From Criminality to Compassion

Reforming Scots Law on Assisted Dying: A Fullerian, Compassion-Based Analysis

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Declaration of Authenticity & Copyright

This thesis is the result of the author's original research. It has been composed by the author and not been previously submitted for examination which has led to the award of a degree.

Signed: 

Date: 23 May 2022.

Acknowledgements

This thesis is dedicated to the late Dr Libby Wilson, a courageous and forthright pioneer of bodily autonomy and an early exponent of assisted dying - a funny, intelligent, and brilliant woman I was lucky to call a dear friend.

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Abstract

This thesis is an internal critique of the Scots Law concerning assisted dying (AD) using Lon Fuller's desiderata as the lens to examine the law.

When measured against Fuller's criteria, it is clear that how Scots legal institutions have approached this issue fails the test for 'good law'. Previous attempts to reform the law (using the principles of autonomy and dignity as their underpinnings) have highlighted the lack of clarity in Scots Law on AD but have failed to pass Stage 1 of the legislative process.

However, the matter is not settled, and issues with the law persist, resulting in severe and far-reaching negative consequences, both for the legal/political landscape but also on a practical societal level, where the needs of those suffering at the end of life who want the choice of AD have not been addressed proportionately.

In a bid to rectify this, a novel approach has been deduced; implicit in the values accepted by Scotland's legal and political order and its wider society is compassion, and this value is used as the basis for law reform recommendations. Compassion incorporated at the *law-making* stage (opposed to *after the fact* in judicial decisions, for example) is little studied, but legal scholars are paying it increased attention; thus, compassion's use in this context becomes convincing as the argument develops.

Therefore, the issue is twofold – an analysis of the Scots Law on AD using Fuller's lens as the tool to critique the law and highlight its failings. After that, to incorporate compassion as the basis of law reform to rectify the negative consequences for society as a whole. This has evolved to become what I term the Fuller + Compassion formula.

Contents

Introduction

1.0 Background

The main focus of this work is to analyse Scots Law's approach to Assisted Dying (AD) using Lon Fuller's criteria for building robust legal frameworks,[1] what I will term 'good law',[2] to make the case that the current legal framework, or lack thereof, is not fit for purpose and to give thereafter recommendations for reform based on compassion.[3] This is what I term the Fuller + Compassion formula.

AD is a debate that has been "done to death"[4] - this thesis promises a novel approach. The novelty, and originality, are twofold.

First, the Fuller + Compassion formula has not before been constructed, let alone crafted and then applied to this debate, or any other socio-legal problem. Secondly, it takes a Scotland-specific approach to the general debate, something that has not been done before at this level of enquiry, with all other major studies having focused on the United Kingdom (UK) as a whole.[5] Although historically some Scots Law scholars have briefly addressed the criminal law of homicide in the context of Scots Law and AD, the present work is distinguished by the depth of enquiry plus its focus on the *other* legal and moral matters associated with Scots Law on AD - not solely the criminal law.[6]

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[1] Lon L. Fuller, *The Morality of Law* (Yale University Press, 1977).
[2] *"If the rule of law is the rule of the good law, then to explain its nature is to propound a complete social philosophy."* Joseph Raz, 'The Rule of Law and its Virtue' in *The authority of law: Essays on law and Morality* (OUP 1979) 211.
[3] 'Reform' is used as an umbrella term meaning to clarify, correct and *create* much needed law.
[4] John Coggan, 'The Wonder of Euthanasia: A Debate that's Being Done to Death' (2013) 33 (2) Oxford Journal of Legal Studies <10.1093/ojls/gqs030> accessed 07 November 2021.
[5] Examples include Isra Black, 'Better off dead? Best interests assisted death' (PhD thesis, King's College London 2015); Sharon Young, 'A Right to Die? Examining Centrality of Human Rights Discourses to End of Life Policy and Debate in the UK' (PhD thesis, Kingston University, 2017); S.A.M McLean & A. Britton, *Sometimes a small victory,* 1996.
[6] James Chalmers, "Assisted dying: jurisdiction and discretion" (2010) 14 Edin LR 295 at 298–299 <http://eprints.gla.ac.uk/70278/1/70278.pdf>; James Chalmers, 'Assisted suicide in Scotland: (not) clarifying the law' (*UofG School of Law Blog*, 10 Febuary 2015) <https://www.uofgschooloflaw.com/blog/2015/02/10/assisted-suicide-in-scotland-not-

AD lies at the intersection of several distinct areas of law, with the topic generally accepted to be primarily a matter of medical/healthcare law. Scotland, a country that is currently part of the UK and was part of the European Union until very recently, has its own distinct devolved legal institutions, meaning several constitutional issues arise, particularly considerations of the European Convention on Human Rights.[7]

In practice, AD in Scotland falls within the criminal law of homicide. This area of Scots criminal law relies heavily on common law and includes offences against the person of murder and culpable homicide. More generally, Scots criminal law can be found both in the Scottish Parliament's statute law, which applies to Scotland only, and the UK Parliament's statutes because provision in some areas of criminal law (such as corporate homicide)[8] applies across both jurisdictions. The Crown Office and Procurator Fiscal Service (COPFS) provides independent public prosecution of criminal offences in Scotland and has extensive responsibilities in the investigation and prosecution of crime. COPFS is headed by the Lord Advocate, in whose name all prosecutions are carried out, and employs Advocates Depute (for the High Court of Justiciary) and Procurators Fiscal (for the Sheriff Courts) as public prosecutors.[9]

In Scotland, procurators fiscal have a dual role – investigating the circumstances of sudden, suspicious, accidental and unexplained deaths and acting as the public prosecutor. By contrast, in England and Wales, a coroner would investigate the death, and the Director of Public Prosecutions (DPP)[10] would deal with any prosecution. Unlike in England and Wales, where the

clarifying-the-law> accessed 12 January 2019; Pamela Ferguson, 'Causing death or allowing to die? Developments in the law' (1997) 23 JME 294; Pamela Ferguson, "Killing 'without getting into trouble'? Assisted dying and Scots criminal law" (1998) 2 Edin LR 289; Sheila McLean, *Assisted Dying: Reflections on the need for law reform* (Routledge-Cavendish 2007).

[7] Scotland, as part of the UK, left the European Union on 31st January 2020 after a UK wide referendum in 2016 decided this.

[8] Corporate Manslaughter and Corporate Homicide Act 2007.

[9] COPFS, 'Who we are' <www.copfs.gov.uk/about-us/who-we-are> accessed 2 May 2022.

[10] Equivalent of the Lord Advocate for Scotland.

DPP is separate from government, in Scotland, the Lord Advocate is a Scottish government minister and the principal legal advisor to the Scottish government.[11] To date, the Scottish government has not adopted AD as an issue and has resisted any attempts at law reform.[12] As will be shown, the Lord Advocate, too, has been vocal about seeing no need for reform.[13]

Against this backdrop of intersecting legal areas, no single perspective can provide a complete overview of the debate's myriad issues. Therefore, this thesis considers medical, criminal, constitutional and human rights law as it applies to AD, drawing in and employing appropriate philosophical literature throughout. Importantly, a key dimension of the argument is that provision for AD should be removed from the criminal law and dealt with instead as a matter of healthcare law. This means that only physician-assisted dying (PAD) (where assisted death is carried out in partnership with healthcare practitioners) would be legal. Removing PAD from the law of homicide to incorporate it into healthcare means that the AD framework proposed applies only to healthcare practitioners (HCPs) who would facilitate the provision for AD in Scotland and that all other forms of assistance to die, for example, between ordinary citizens, should remain subject to the criminal law. The justification for this will be explored throughout this work.

A staggering amount of academic and other literature aims to settle whether AD is moral or not.[14] This work starts from the position that AD is morally and legally acceptable when strictly regulated by clear, predetermined parameters. A key argument that is made in this thesis is that whether AD is

[11] Scottish Government, 'Cabinet and Ministers, Lord Advocate' <www.gov.scot/about/who-runs-government/cabinet-and-ministers/lord-advocate/> accessed 2 May 2022.
[12] *The Scotsman*, 'SNP MSP speaks out about Scottish Government's 'resistance' to assisted suicide' (28 April 2019) <https://www.scotsman.com/news/politics/snp-msp-speaks-out-about-scottish-government-s-resistance-to-assisted-suicide-1-4916585> accessed on 11 November 2021.
[13] Elish Angolini declined to produce guidelines after the *R (Purdy) v DPP* [2009] case and subsequent Lord Advocate's (Frank Mulholland, James Wolffe) have upheld this.
[14] For a sample of the many texts that feature prominently in AD debates see, John Coggon 'Assisted-Dying and the Context of Debate, 'Medical Law' Versus 'End-of-Life Law' [2010] 18(4) MLR 541–563.

moral or not, there should first be substantive laws in place (it will be argued that at present, there are not) to govern either its prohibition or its permissiveness, especially since the subject matter is life or death with the finality of the consequences therein.

1.1 Note of interest

For transparency, it is necessary to note the author's work in this area, both in the charity sector[15] and at the Scottish Parliament.[16] For context, a first full draft of the PhD thesis was submitted to the supervision team in June 2020. During the summer of 2021, the author drafted the proposed *Assisted Dying for Terminally Ill Adults (Scotland) Bill* 2021 consultation for the Office of Liam McArthur MSP, Deputy Presiding Officer of the Scottish Parliament.[17] The author then assumed the role of Research and Legal Advisor to Mr McArthur on the proposed Bill.

Ideally, the author's research and thesis would have been examined before the Bill proposal was launched in September 2021, but this was not possible. The importance of this is that the author's research and knowledge inevitably fed into the construction of the Scottish Bill proposal. Legal, theoretical, and practical recommendations are made throughout this thesis that can be seen and are referenced in the Bill proposal.

For example, this thesis uses Fullerian theory to make the legal argument that the current law lacks clarity and requires reformation; this is reflected in

[15] The author worked for the charity Friends at the End SCIO for nine years, laterally serving as Chief Executive Officer until 2021.
[16] The author briefly served as Margo MacDonald MSPs advisor on the Assisted Suicide (Scotland) Bill 2013. When Ms MacDonald died in 2014, Patrick Harvie MSP adopted the proposal and the author served as advisor to Mr Harvie until 2015. The author created and was Secretary to the Scottish Parliament Cross Party Group on End of Life Choices until 2021. See Scottish Parliament, 'Cross-Party Groups: End Of Life Choices' <https://archive2021.parliament.scot/msps/end-of-life-choices.aspx> accessed 2 May 2022.
[17] Assisted Dying for Terminally Ill Adults (Scotland) Bill Consultation (2021) <https://www.parliament.scot/-/media/files/legislation/proposed-members-bills/assisted-dying-for-terminally-ill-adults-scotland-consultation-2021-final.pdf> accessed 13 April 2022.

the Bill proposal in section 2.1 and throughout.[18] The second theoretical arm of this thesis (the incorporation of compassion) is at the "core" of the proposal and referenced throughout.[19] Practical recommendations, one example being the recommendation in section 10.7 of this thesis that AD should be restricted to the terminally ill only (and to use the Social Security (Scotland) Act 2018 as the terminology definition for this) is the approach taken in the Scottish AD proposal.[20] Primary research for this doctorate ascertained how many Scottish citizens have had an assisted death overseas; this is referenced on page 10 (ref 30) of the Bill proposal.[21] Other practical recommendations that have been incorporated into the Bill proposal will be cross-referenced throughout this thesis. This demonstrates that this thesis is already making an original contribution to knowledge at the heart of Scottish public policy.

Additionally, because of the author's professional work, the cases mentioned in this thesis are not simply abstract legal prose. The author knew many of the claimants and their families personally; a privileged insight but also a deeply difficult dimension to add to any doctoral programme of study. A legal maxim says that hard cases make bad laws; this thesis will show that bad law also creates hard cases.

It has been imperative to maintain critical scholarly distance for the purposes of this work. My adherence to the academic rigour, standards, and review procedures placed upon doctoral candidates by the University means that I have successfully met this challenge.

[18] Ibid 9. Other scholars had previously raised concerns about clarity during earlier Bill proposals. It was decided by the MSP in charge, on the author's advice in her official capacity as Research and Legal Advisor, to readdress this in more depth and use it as a pivotal argument for reform for the 2021 Bill proposal.
[19] Ibid 3.
[20] Ibid 5, reference 9.
[21] Featured in this thesis at 3.0 Scottish Assisted Dying cases unearthed and at 7.5 Suicide Tourism.

1.2 Definition of Assisted Dying

Unsurprisingly, there is debate and disagreement on the definition of AD, as illustrated by Keown:

> It may be optimistic to expect the emergence of common definitions, at least in the near future, not least as the different definitions reflect different underlying moral presuppositions whose resolution is a prerequisite to definitional consensus.[22]

The subject of this thesis is what has become known as 'Assisted Dying'. This is where 'A' aids 'B' deliberately to cause B's death. This scenario is usually in the setting of a terminal illness, where person 'B' is actively dying or on a downward, irremediable trajectory towards death. 'A' aids 'B' by providing the means for 'B' to take their own life – usually medication that will end the person's life. Other commonly cited and interchangeably used terms are Assisted Suicide, Medical Aid in Dying, Voluntary-Assisted Dying and many more.[23] Euthanasia is distinguished from these definitions because it involves direct administration by a third party, not self-administration by the dying person.[24]

Throughout this thesis, the umbrella term Assisted Dying (AD) will be used when discussing the provision of assistance to die to the terminally ill to relieve suffering, specifically mentioning euthanasia where warranted. This thesis recommends that only AD carried out in partnership with HCPs be legalised. This is commonly known as physician-assisted dying (PAD) and involves patients and doctors negotiating the AD process together with other HCPs, such as nurses and physiatrists, contributing where necessary.

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[22] John Keown, *Euthanasia, Ethics and Public Policy An Argument against Legalisation* (Cambridge University Press 2002) 17.
[23] Hamilton Inbadas et al, 'Representations of palliative care, euthanasia and assisted dying within advocacy declarations' [2020] 25(2) Mortality 576 <https://doi.org/10.1080/13576275.2019.1567484> accessed 18 June 2021.
[24] O Dyer et al, 'Assisted dying: law and practice around the world' [2015] 351 BMJ Briefing < https://www.bmj.com/content/351/bmj.h4481> accessed 2 May 2022.

‘Amateur assisted dying’, where ordinary citizens assist one another, should remain within the realms of the criminal law. The justification for this will become apparent throughout the thesis, but in essence, it is a matter of safeguarding. Chapter Nine will consider in more detail why the legalisation of AD should be restricted to PAD only.

1.3 Aims of the thesis

The conceptual framework for this research supports the contention that the legal and political institutions in Scotland – the legislature, prosecution and judicature – have failed to promulgate a coherent policy or approach regarding AD, and that it is now appropriate to legalise a restricted form of AD in Scotland. The central themes of this work are clarity and compassion in the law, with the essential aims of the work being to:

1. Delineate what the law on AD is in Scotland.
2. Demonstrate that the current law (or lack thereof), when judged against Lon Fuller’s desiderata, is not fit for purpose.
3. Outline and analyse the broader legal, medical, and societal consequences of the law not satisfying Fuller’s criteria.
4. Suggest that the law be reformed using clarity and compassion as the guiding principles to better satisfy Fuller’s list and to counter the negative consequence associated with the current ban on AD in Scotland.

1.4 Why is this research necessary?

This research commenced in 2016 following the landmark events of Bills being considered and rejected by both the Scottish and the Westminster parliaments and, in May 2016, the first-ever AD case before the Scottish courts, *Ross v Lord Advocate.*[25] Scotland’s legislators have previously considered the introduction of AD Bills on three occasions but, after careful

[25] [2016] CSIH 12.

consideration, have not proceeded past Stage 1 of the legislative process.[26] Attempts to legislate in Scotland have been criticised as poorly drafted and under-resourced, resulting in more questions than answers.[27] The legislative process shone a light on the poor state of the law in this area, and whilst the purpose of law reform was not served, it revealed a landscape ripe for further research.[28]

The last Scottish parliamentary session (Session Five, 2016-21) did not have a Bill to consider, which allowed time for reflection, but interest persisted. Notably, a cross-party group (CPG) on End of Life Choices was formed in the Scottish Parliament in 2017, whose remit includes consideration of the law on AD.[29] [30] Likewise, in Session Five, when considering its programme for work, the Human Rights Committee of the Scottish Parliament received responses asking the committee to look into AD. They subsequently took evidence that focused on the law being unclear and unjust.[31] AD also featured in political parties' manifestos in the run-up to the May 2021 Scottish elections, with commitments to explore the issue in Session Six of Parliament.[32]

[26] The End of Life Assistance (Scotland) Bill was defeated in December 2010 by 85 votes to 16 with two abstentions; The Assisted Suicide (Scotland) Bill was defeated in May 2015 by 82 votes to 36 with 0 abstentions and 9 members not voting. Jeremy Purvis MSP *Dying with Dignity* 2003 consultation did not receive enough support to form the basis of a Bill.
[27] Isra Black, **'**Assisted suicide bill is laudable, but poorly drafted' (*The Conversation*, 25 March 2014) <https://theconversation.com/assisted-suicide-bill-is-laudable-but-poorly-drafted-24737> accessed 13 Nov 21.
[28] *Herald Scotland*, 'A troubling lack of clarity in Scots law regarding assisted suicide.' (31st March 2015) <www.heraldscotland.com/opinion/13208016.a-troubling-lack-of-clarity-in-scots-law-regarding-assisted-suicide/> accessed 13/11/21.
[29] Scottish Parliament, 'Cross-Party Groups: End Of Life Choices' <https://archive2021.parliament.scot/msps/end-of-life-choices.aspx> accessed 2 May 2022.
[30] The author of this work established and until 2021 was Secretary to this CPG.
[31] Equalities and Human Rights Committee, *Human Rights and the Scottish Parliament* (Session 5, 19th April 2018) Official Report, 21-25 <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11475&mode=pdf> accessed 2 May 2022.
[32] SNP Manifesto (2021), 'Scotland's Future', p.13 <https://issuu.com/hinksbrandwise/docs/04_15_snp_manifesto_2021___a4_document?mode=window>; Scottish Greens Manifesto (2021), 'Our Common Future', p.66 <ScottishGreens_2021Manifesto_Full_web_version.pdf> accessed 2 May 2022.

Historically, attempts to reform the law *across the UK* have happened simultaneously.[33] At present, Baroness Molly Meacher is attempting to reform the law in England and Wales with an Assisted Dying Bill in the House of Lords.[34] These developments and others omitted for reasons of space highlight that AD remains on the legal, societal, and political agenda despite competing interests.[35]

In Scotland, despite high profile and far-reaching public and political discourse, the academic literature on AD specifically has not reflected the debate substantively, and no major study has yet looked at the issue primarily through a Scottish lens, incorporating matters wider than the medical and criminal law considerations.[36] Discussion in Scotland has not been proactive but instead has arisen in reaction to debates on specific Bills, with the result that the literature is primarily confined to policy documents, parliamentary reports, and press commentary. In the absence of contemporary conventional peer-reviewed publications, secondary sources are relied upon to inform the debate.[37] It was my conviction that an issue of this magnitude deserved a higher calibre of analysis and academic rigour and that such research would be imperative to properly inform any future attempts at law reform.

This thesis addresses the remarkably modest academic literature on Scots Law and AD whilst recognising that it is modest because AD is currently embraced by the common law crime of Homicide and is thus grouped under that heading.[38] This Scottish perspective is essential because despite having

[33] For example, Lord Falconers Assisted Dying Bill [HL] 2015 worked its way through the UK parliament whilst the Assisted Suicide (Scotland) Bill 2013 was being considered by the Scottish Parliament. Both attempts fell in 2015.
[34] Assisted Dying Bill HL Bill (2021-22) 13.
[35] Competing interests including recovery from the Coronavirus Pandemic, Brexit, and calls for an independence referendum in Scotland, for example.
[36] As noted at 1.0 Introduction.
[37] For example, Andrew Tickell, 'Justice Committee Fail' (*Llalands Peat Worrier*, 8 Jan 2015) <http://lallandspeatworrier.blogspot.com/2015/01/justice-committee-fail.html> accessed 2 May 2022.
[38] Additionally, because it is considered a matter of healthcare law, much of which is approached from a UK wide perspecitve, focus has been on AD in the UK as a whole.

distinct laws from the rest of the UK and AD being a devolved issue, much of the debate is influenced by messaging from England and Wales, partly because of a lack of Scottish scholarly activity. With reference to the Justice Committee report on the Assisted Suicide (Scotland) Bill 2013 (2013 Bill),[39] Andrew Tickell said that:

> ...the Justice Committee's summary of the *Scottish* legal position amounts to a big shrug about the complexity of the common law, cannot offer any clear guidance on what kinds of assisting behaviour may or may not be criminal under the law as it stands, and focuses almost entirely on *explicitly* irrelevant English material. [40]

It is beyond doubt that Scotland should be able to state with clarity what its laws on AD are[41] - such elucidation must be the first priority before any consideration of reform. Due to important jurisdictional differences in laws on suicide, criminal and constitutional procedure - and the separate devolved Scottish Parliament - this thesis will focus primarily on Scotland to update and fill the necessary research gap. Additionally, it will show that the Scottish courts also appear to pay serious attention to English jurisprudence. This is relatively unusual in Scots criminal law but explains why, at times, this thesis examines the two jurisdictions simultaneously - England and Wales have much more substantive law to draw upon – unlike in Scotland, where the law is in deficit. While my arguments for law reform based on compassion could apply throughout the UK, the main concern is legality and clarity, which is why the recommendations ultimately apply to Scotland only.

As noted in section 1.1, the Scottish Parliament faces a fresh bid to legalise AD in the current parliamentary session (Session Six), with the proposed *Assisted Dying for Terminally Ill Adults (Scotland) Bill* 2021.[42] The research

[39] SP Bill 40 Assisted Suicide (Scotland) Bill [as introduced] Session 4 (2013).
[40] Andrew Tickell, 'Justice Committee Fail' (n 37).
[41] *The Morality of Law* (n 1).
[42] (n 17).

from this thesis will thus bridge a vitally important gap for the academic community and policymakers tasked with considering reformation to the law on AD in Scotland. This is significant because, as will be shown, previous law reform attempts have highlighted disagreement and a lack of clarity in the existing law; this thesis gives a comprehensive overview of what the Scots law on AD actually is, and offers a unique approach to its reformation by incorporating clarity and compassion as the foremost guiding principles, in a shift from previous (unsuccessful) efforts that relied on autonomy and dignity.[43]

It is necessary to situate the arguments made in relation to legal and political considerations throughout because legal concerns, such as a fundamental lack of clarity in this area of law, have previously been raised via the political process of attempting to reform the law. Previous attempts via the legislator provide a rich seam of dialogue on the legality, morality, and politics of AD in Scotland – this narrative will be utilised to help situate the debate historically and topically. Additionally, this thesis proposes that the Scottish Parliament reform the law on PAD to remove it from the realms of homicide and incorporate it into healthcare law via a statutory provision that permits HCPs to assist the terminally ill in ending their lives. It is thus necessary not only to consider the legal reform issues in an abstract academic way but to consider how these would work in practice – using clarity and compassion as the basis of a democratically mandated statute that would allow PAD.

Looking further afield, there is a worldwide momentum around AD, with the movement being increasingly considered by legislatures and enacted by commonwealth countries that are closely linked to Scotland.[44] Whilst writing this thesis, many jurisdictions have introduced permissive laws, including

[43] This move away from autonomy and dignity is laid out in more detail in section 1.6 *Theoretical Frameworks* and in Chapter Ten *Redressing the balance.*
[44] Examples include, Canada (Bill C-14/C-7), States in Australia (Voluntary Assisted Dying Act 2017 (Victoria)), and New Zealand (End of Life Choice Act 2019).

Canada,[45] California,[46] New Zealand,[47] Portugal[48] and Victoria (Australia),[49] with an increasing number of jurisdictions considering making the change.[50] Looking (in this thesis) at what other devolved legislatures have done has been necessary and instructive, although no direct comparison has been undertaken.

Setting aside jurisdictional concerns, this thesis will show not only that the law on AD is unclear but that it also falls short of the standards we ought to require of 'good law'. When we analyse it against Fuller's criteria (described in more detail in Chapter One), it becomes apparent that the haphazard nature of AD law in Scotland is not a matter of clarity alone; this thesis will argue that the law is also clandestine, unjust, and lacking in compassion, and that it most likely breaches the European Convention on Human Rights by failing to promulgate a proscriptive or permissive policy on the issue.[51]

Convention case law has relevance across the full range of Scottish Parliament policy areas,[52] and its relevance to AD in Scotland will be considered. Notably, the proposition that the prohibition on AD in Scotland upholds Article 2 (the right to life) and the protection of the sanctity of life, as

[45] C-7, An Act to amend the Criminal Code (medical assistance in dying). 43rd Parliament, 2nd session. Sept 2020 – Aug 2021.
[46] California's AD law, ABX2-15 (AB-15), the End-of-Life Option Act 2016.
[47] End of Life Choice Act 2019.
[48] Portugal's president subsequently vetoed the Bill in November 2021. Paul Ames, 'Portugal's president vetoes euthanasia bill' (*Politico*, 30 November 2021) <https://www.politico.eu/article/portugal-president-marcelo-rebelo-de-sousavetoes-euthanasia-bill/> accessed 2 May 2022.
[49] Voluntary Assisted Dying Act 2017 which will legalise AD in Victoria from 19 June 2019.
[50] Government of Jersey, Assisted dying in Jersey (*Gov.je* 2022) <https://www.gov.je/Caring/AssistedDying/Pages/AssistedDying.aspx> accessed 2 May 2022.
[51] James Chalmers, 'Assisted Suicide: Why the Lord Advocate is Wrong' (*UofG School of Law Blog*, 7 April 2015) <https://www.uofgschooloflaw.com/blog/2015/04/07/assisted-suicide-why-the-lord-advocate-is-wrong> accessed 11 November 2021.
[52] One recent example is the development of the Land Reform (Scotland) Act 2016 and the Named Person Scheme (2016) courtesy of the Children and Young People Act (2014). It is likely that the UK and Scottish Parliament will remain committed to membership of the European Convention post Brexit, but potential repeal of the Human Rights Act could make European Court of Human Rights decisions less effective, albeit not being bound by EU laws.

weighed against Article 8 (the right to private life, understood in this context as the right to bodily autonomy) inappropriately and disproportionately.

Furthermore, analysis of lived experience has been missing from the commentary on AD, and the profoundly harmful unintended consequences of the current prohibition on PAD in Scotland have been researched and analysed and will be apparent throughout the thesis, specifically in Part III. To date, attempts at law reform to allow AD throughout the UK have focused on equipping individuals with more autonomy and/or dignity at the end of life. Clearly, these are valuable concepts in this context, but they have not proved successful as underpinning principles for law reform. In contrast, while there is a vast philosophical literature on compassion,[53] it is a newly emerging area of *legal* scholarship, and in this thesis, it provides a novel and highly useful lens through which to explore the rectification of the law on AD in Scotland. This aspect is the focus of Part III of the thesis.

In essence, the importance of this work is multifaceted;

1. To highlight, with precision, what the law is, and why it is unclear, unjust and uncompassionate.
2. Repeated failed attempts to reform the law in Scotland have provided space for a change in direction to incorporate new principles around clarity and compassion into the debate.
3. To fill the research gap on this highly important topic that has lacked significant academic analysis.
4. To provide a credible and succinct reference point for stakeholders as to the situation in Scotland without having to glean information from

[53] Examples include; Martha Nussbaum, 'Compassion: The Basic Social Emotion' [1996] 13(1) Social Philosophy and Policy <www.cambridge.org/core/journals/social-philosophy-and-policy/article/abs/compassion-the-basic-social-emotion/A1D501ADE7B92CA7427273FFBB449B03> accessed 2 May 2022; Roger Crisp, 'Compassion and Beyond' [2008] 11(3) Ethic Theory Moral Prac 233-246; Judith Barad, “The Understanding and Experience of Compassion: Aquinas and the Dalai Lama.” [2007] 27 Buddhist-Christian Studies 11–29.

various non-peer-reviewed sources or rely on looking to other jurisdictions.

5. Perhaps most importantly, to add a practical dimension to this highly theoretical debate; to shine a light on the often-ignored negative consequences of the current prohibition – the level of suffering experienced by the terminally ill who would welcome the choice of PAD.

1.5 Methodology

This research is a doctrinal/textual and documentary analysis of the Scots Law on AD. It is grounded in an examination of the available positive and black letter law in Scotland,[54] with a view to gaining a clearer understanding of what the Scots Law on AD is and should be.

There are vast amounts of philosophical theorising about AD, which makes it incredibly difficult to make an original and substantive contribution to those debates. Thankfully, this is a thesis in law and legal ethics, not pure philosophy, and here the original and substantive contribution is in providing the internal critique of Scots Law via the application of the Fuller + Compassion formula. Of course, I draw on the philosophical literature, borrowing jurisprudential standards from Fuller and the ethics/political philosophy on AD within which I contextualise conclusions; however, I am not fully entering into those debates, simply using them to provide context or justification for the internal critique of Scots Law.

Before law reform is mooted, it is first imperative to understand what the law actually is. One of the main reasons for the ambiguity in this debate, and a subsequent lack of Scottish scholarly activity, is that there is no specific offence in statute and no permissive legislation on AD in Scotland.[55] Subsequently, there is little case law and no specific formal guidance for or

[54] Statues, case law, prosecutorial guidelines etc.
[55] As will be outlined in detail in Part II.

from prosecutors. So, in attempting to understand the law on AD, information must be excavated from alternative sources – relevant parallel statutes, broadly related case law, general prosecutorial statements, parliamentary documents, *inter alia*.

Therefore, the data for this study includes multiple sources, beginning with primary resources, including academic journals, legal, political, medical, theoretical, and other textbooks. As noted, there is a dearth of Scottish academic literature on AD; thus, it has been necessary also to consult secondary sources, such as blog posts by Scottish academics, in the absence of conventional peer-reviewed publications.[56]

Parliamentary data, newspaper press reports, opinion pieces and campaigning websites of lobby groups were also consulted. Public opinion polls helped ascertain how attitudes toward AD have developed. Opinion polls are open to interpretation, but it is a matter of historical fact that the development of legal systems has been influenced by moral opinion, and conversely, moral standards are influenced by the law;[57] thus, their (limited) use is warranted.

Freedom of Information (FOI) requests were submitted to various stakeholders to glean how prevalent AD may be in Scotland and to show that accurate records are not currently capable of being kept. The absence of a specific legal framework, and the subsequent lack of accompanying reporting and monitoring requirements, make it difficult to establish how prevalent AD is in Scotland.

There have been many recent national and transnational developments on AD, which complicates the exercise of relating Scots Law to the contextual UK and EU systems in which it has operated during the writing of this thesis.

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[56] (n 37).
[57] HLA Hart, 'Positivism and the Separation of Law and Morals' [1958] 71(4) HLR 593-629.

Thus, it has been necessary to contextualise Scotland's place in the UK (and formerly, the EU) and reference, where appropriate, the UK and other relevant jurisdictions, although a direct comparative analysis is not the objective of this thesis.

1.6 Theoretical Frameworks

Chapter One of this thesis, *Theoretical Frameworks*, will outline in detail the theoretical lenses used in this work, but it is necessary to summarise them here to substantiate their use in this context.

The analysis is carried out *primarily* through the lens of Lon Fuller's theory on the morality of law which provides a criterion for judging the present Scots Law.[58] In this context, 'Morality' refers to moral values such as justice, equality, rights, liberty, dignity and advancement of the common good – values that we use in the substantive evaluation of systems of rules.[59] The framework takes a twofold approach, primarily grounded in Fuller's principles of legality but combines this with a deeper theoretical understanding of Compassion – the Fuller + Compassion formula. The two theoretical arms do separate and distinguishable jobs. Fuller (who does not consider compassion in his work or focus on the substantive 'ends' of law)[60] analyses and ultimately determines the *legality* aspect - the state of Scots Law; the principle of compassion then deals with the practicalities of law reform recommendations.

In relation to the 'legality' aspect, my strong impression was that the law concerning AD was not clear and indeed was ambiguous and, at times, cruel. On the issue of clarity, Fuller speaks specifically to these issues in a way that others do not. Fuller directly addresses issues with the law being transparent procedurally and pragmatically. Critics of this procedural type of law believe

[58] *The Morality of Law* (n 1).
[59] Jeremy Waldron, 'Positivism and Legality: Hart's Equivocal Response to Fuller' [2008] 83(4) NYU Law Review 1142.
[60] See Chapter One, section 1.1 for more detail.

that observance of the principles of legality tends to make matters worse. Horwitz, for example, remarked that a procedural approach to the law, based on principles of legality, "enables the shrewd, the calculating, and the wealthy to manipulate its forms to their own advantage. And it ratifies and legitimates an adversarial, competitive, and atomistic conception of human relations."[61] Hart argued that principles of legality were "compatible with very great iniquity".[62] This may be true in other areas of law, such as private law, but where the issue at stake is a matter of life and death, liberty or deprivation, I am convinced that a formal, procedural, legislative route to guide behaviour is best, and that is what is argued in this thesis.

Fuller provided a useful prism through which to work, as his criteria and specific focus on clarity in the law addressed the driving concerns behind this research in a better frame than had other philosophers. In particular, his procedural law approach was a clear and persuasive lens through which to analyse the law because it allowed me to break down this multifaceted area of law in a manageable and measurable way and gave a formal means of comparing it against a robust, well-established (Fullerian) template.

Whilst Fuller does not directly address AD, he does consider issues at the core of this debate around autonomy, self-determination and the law's protective function. Fuller's legality approach allowed me to examine the Scots Law on AD in a less polarised way than traditional analyses. For example, Dworkin's work *does* examine AD but does not address clarity in the law in that way, and his writing as a proponent of AD proved problematic in avoiding presupposing any outcomes and taking a diagnostic approach. Fuller gave a critical framework to assess a polarised and dogmatic area of

[61] Morton J. Horwitz, 'The Rule of Law: An Unqualified Human Good?' [1977] 86 Yale L.J. 561, 566 (reviewing Douglas Hay et al., 'Albion's Fatal Tree: Crime and Society in Eighteenth Century England (1975), and E.P. Thompson, 'Whigs and Hunters: The Origin of the Black Act', (1975).
[62] HLA Hart, *The Concept of Law* (2nd edn, OUP 1994) 206.

law in a more measured way. Indeed, Fuller was explicit that his criteria were 'neutral over a wide range of ethical issues'.[63]

Autonomy and dignity will always play a prominent role in this debate, but they have been exhaustively examined in the academic literature.[64] On the other hand, *compassion* provides a significant new option and is used in this thesis to solve the problems identified through the Fullerian analysis. Where autonomy and dignity have perhaps not taken the debate forward due to their amenability to differing interpretations,[65] compassion shines clearer light on why the law needs to change - to counter the negative consequences of the current prohibition. In this respect, compassion is a less egocentric argument regarding the inner workings of these concepts, as it cannot be weighed against itself in the way that *autonomy v autonomy* and *dignity v dignity* interpretations can. One of the rare commonalities on both sides of this debate is that compassion should be shown toward those suffering at the end of life. This will be explored in greater depth in Section 10.4.

Thus, the thesis utilises a balanced theoretical framework. On the one hand, there is a very purposeful Fullerian legality analysis that is well-aligned with precisely the kind of problems that Scots Law has in relation to AD. On the other hand, there is a much broader, more abstract and conceptual exploration of the role of compassion in AD law. Fuller operates as the primary theoretical lens, serving a particular purpose - as a framework to critique the law. The complementary theoretical arm of this research is the consideration of compassion, which permeates the analysis and comes into its own as the basis of law reform in Chapter Ten. Both aspects of the framework are explored in-depth in Chapter One. For now, however, it is

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[63] *The Morality of Law* 162.
[64] Examples include; Tom L. Beauchamp, 'The Right to Die as the Triumph of Autonomy' [2006] 31(6) Journal of Medicine and Philosophy 643; Peter Allmark, 'Death with dignity' [2002] 28 JME 255.
[65] On Dignity: Oliver Sensen, 'Human dignity in historical perspective: The contemporary and traditional paradigms' [2011] 10(1) European Journal of Political Theory 71. On Autonomy; Ben Colburn, *Autonomy and Liberalism* (Routledge 2010) 4-20.

helpful to conceptualise Fuller as diagnosing the problem, with compassion acting as the prescription.

1.7 Thesis Structure

This thesis is split into three distinct parts. **Part I** comprises **Chapter One**, which outlines this work's theoretical frameworks. First, I explain the philosophy of the natural law scholar Lon Fuller. It will outline how a specific part of Fuller's work will be emphasised and utilised – his desiderata for good law. Second, the emerging concept of compassion in law will be explored, particularly its feminist roots and relevance in UK jurisprudence. This chapter will point to how these frameworks allow us to analyse the current Scots Law on AD, pinpoint its faults, and offer a framework for revision to produce good law on AD in later chapters.

Part II consists of chapters two to five, inclusive. **Chapter Two**, *Scots Law on AD: Finding the signal amongst the noise*, examines the current law on AD in Scotland and the rest of the UK and illustrates the lack of clarity. It details how the law of homicide presently governs this area, investigates criminal law concepts such as *mens rea, actus reus,* causation, and considers relevant case law before assessing the use of defences in this setting.

Chapter Three, *Case Law on AD,* explores original primary research in the form of unreported AD cases and considers the court as an instrument for reform, illustrating why a *legislative* reform approach is adopted. The English case of *Purdy v DPP* [2009] shows that the lack of Scottish prosecutorial guidelines on AD is problematic; this then sets up the discussion in **Chapter Four**, *Scotland's Test Case: Ross v Lord Advocate* [2016], which built on the ruling in *Purdy*. This chapter outlines how the lack of a specific statute on AD coupled with there being no prosecutorial guidelines and minimal and conflicting case law contributes to the lack of clarity, and an overall failure of the legal and political institutions to address this matter appropriately.

Chapter Five draws together the main concerns raised in Part II and comprehensively analyses them, ultimately deriving a protective principle: contrary to the view that permissive AD laws foster harm to the vulnerable, a permissive law acts as a protective measure by introducing a framework that promotes accountability and prior screening where one is presently absent.[66] It summarises why the law of homicide is not working and sets up the basis of the case for moving the regime into healthcare law.

Part III, *Consequences of the ban on AD,* consists of Chapters six to nine, inclusive. Moving from the criminal law analysis to the medical law examination, **Chapter Six**, *Avoidable suffering, disempowerment and traumatic deaths without dignity*, introduces lived experience to this theoretical and abstract debate. It illuminates the realities of modern-day dying, the suffering that is too frequently present, and demonstrates how increased care does not negate the need for PAD. It weighs the protective function of the law against the potential for harm and promotes a balance that leans towards allowing PAD for terminally ill people.

Chapter Seven, *Suicide,* outlines the phenomenon of rational agents who take their own lives in the setting of a terminal illness. It bluntly shows the status quo for what it is – a situation where compassionate assisters are criminalised, failed suicide attempts occur, premature deaths happen, and suicide tourism takes place, perpetuating an unsustainable and immoral climate. It turns the perception of vulnerability and harm in this debate on its head and demonstrates a lack of compassion towards some of the most vulnerable and overlooked people in this debate – the terminally ill who want the choice of PAD.

Chapter Eight, *Contradictory and Confusing Medical Practice,* researches the inconsistent approach that the law takes to assisting death in a medical setting. It covers the practices of withdrawing/withholding treatment, double

[66] See *Assisted Dying for Terminally Ill Adults (Scotland) Bill* proposal at p. 5, 16, 17, 23.

effect, palliative sedation and euthanasia. It highlights how explicitly introducing bespoke law on PAD will not be inconsistent or much removed from the principles which underpin current end-of-life practices, namely compassion and best interests. It explores the central argument that the legality of AD should be regulated via healthcare law and restricted to HCP assistance.

Chapter Nine analyses Part III and argues that we must, and can, do better as a society in relation to the regulation of AD. It outlines that the *potential* harm that a PAD law could produce has been disproven by jurisdictions with permissive laws and that the balance is now tipped in favour of allowing the choice of PAD for the terminally ill in Scotland who are, by virtue of the prohibition, subject to harm and suffering at present.

Part IV comprises **Chapter Ten,** *Redressing the balance.* This final chapter brings the work full circle and reintroduces the compassion aspect of law reform, showing its emerging but contemporary relevance in law and especially how fitting it is for end of life considerations. It outlines how a shift from *dignity and autonomy* towards *clarity and compassion* as a dual framework for reform is the most appropriate method to counter the current prohibition's negative consequences. The principles analysed throughout are considered together, namely clarity, compassion, the law as a protective measure, and an instrument for justice and equality. It does not attempt to draft a PAD Bill but considers what the conversation around legislative proposals should be. The approach and its limitations are considered, and specific practical recommendations for reform are offered.

Finally, the work concludes with a summary of the research, its original contributions to knowledge, and the gap it has filled in the academic literature.

Part I

Chapter One: Theoretical Frameworks

1.0 Diagnosing the problem - Fuller's Desiderata

Lon L Fuller is principally associated with his secular natural law position – that there is no separation between law and morals and that law has an 'inner morality'.[67] Fuller is influenced by 17th-century writers such as Vaughan[68] and Lilburne[69] and their commitment to conforming conduct via a coherent body of rules. The overarching inquiry of Fuller's scholarship for over three decades was his effort to uncover how, and in what ways, the human interactions constitutive to different forms of social order generate distinctly moral demands on their agents. The seeds of this inquiry are seen in Fuller's earliest writings in their attempt to illuminate the 'natural laws' or 'compulsions necessarily contained in certain ways of organising men's relations with one another' [70] and the inherently normative conduct of those responsible for creating and maintaining these forms of social order.[71]

One of the key distinctions between positivist and natural law scholars (such as Fuller) is disagreement about whether there is any connection between law and morality. A core tenant of legal positivism is that there is no necessary connection between law and morality.[72] Instead of postulating a substantive natural law approach, which proclaims a higher law than that

[67] Lon L. Fuller, 'American Legal Realism' [1934] 82(5) University of Pennsylvania Law Review and American Law Register <https://doi.org/10.2307/3308406.> accessed 2 May 2022.; Lon L. Fuller, The Law in Quest of Itself (The Foundation Press, Inc, Chicago 1940).; Lon L. Fuller, The Problems of Jurisprudence (Brooklyn: Foundation Press, 1949).; Lon L. Fuller, 'American Legal Philosophy at Mid-Century' [1954] 6 (4) Journal of Legal Education 457-85.; Lon L. Fuller, 'Human Purpose and Natural Law' [1958] 28 Natural Law Forum.; Lon L. Fuller, 'Positivism and Fidelity to Law: A Reply to Professor Hart' [1958] 71(4) Harvard Law Review 630-672.
[68] Fuller quotes Vaughan, C.J. in *Thomas v Sorrell* [1677] in *The Morality of Law* 33.
[69] Fuller quotes Lilburne, *England's Birth-Right Justified,* 1645 in *The Morality of Law* 33.
[70] Lon L. Fuller, 'American Legal Philosophy at Mid-Century' [1954] 6(4) Journal of Legal Education 476.
[71] Lon L. Fuller, 'Reason and Fiat in Case Law' [1946] 59(3) HLR 378 <https://doi.org/10.2307/1335588> accessed 2 May 2022.
[72] Kristen Rundle, 'Fuller's Internal Morality of Law' [2016] 11(9) Philosophy Compass 499.

enacted by the state[73], Fuller adopts a secular *pragmatic procedural* natural law approach.[74] Fuller distinguishes between the *internal* morality of law and the *external* morality of law to articulate his stance. The 'internal morality of law' is essentially concerned with the procedure of making law. The 'external morality of law' refers to the content of the substantive rules of law as they are actually applied. Complete comprehension of both moralities is not necessary for this work, and Tucker has said:

> Just as at times it is difficult to clearly distinguish between adjective and substantive law, so too one may find Fuller's distinction between "external morality" and "internal morality" lacking the kind of specificity which might be desirable. Fuller admits the absence of such precision, finding it to be unavoidable due to the structure of our legal system.[75]

Of particular relevance for this thesis is Fuller's *internal morality* of law, which is how Fuller describes the eight criteria that need to be systematically present for law to be extant in the first place. The demands that law be general, publicly promulgated, clear, non-contradictory, possible to comply with, relatively constant through time, non-retroactive and that there be congruence between official action and declared rule – it is these eight criteria, Fuller argues, that together compromise the 'internal morality of law'.

Fuller's internal morality of law is his 'desiderata': 'eight kinds of legal excellence toward which a system of rules may strive'.[76] Thus the desiderata form the *criteria* for the morality of law, capturing morality based on an understanding of what is valuable about social order and the relationships between legal institutions and those who are subject to them.[77]

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[73] As adumbrated, for example, by the German legal positivist, Gustav Radbruch.
[74] Fuller draws this contrast between what he calls procedural natural law (that's him) and substantive natural law (that's not him).
[75] Edwin W. Tucker, 'The Morality of Law, by Lon L Fuller ' [1965] 40(2) Indiana Law Journal <https://www.repository.law.indiana.edu/ilj/vol40/iss2/5> accessed 2 May 2022.
[76] *The Morality of Law* 41.
[77] Raymond Wacks, *Understanding Jurisprudence: An Introduction to Legal Theory* (5 edn, OUP 2017) 33.

Fuller motivates his desiderata by asking us to reflect on an imagined story, the tale of King Rex and the eight ways in which he fails to make law. These are:

1. A failure to achieve rules at all so that every issue must be decided on an ad hoc basis.[78]
2. Promulgation - a failure to publicise, or at least to make available to the affected party, the rules expected to be observed.[79]
3. Retroactive laws,[80] which cannot itself guide action, but undercuts the integrity of rules prospective in effect, since it puts them under the threat of retrospective change.
4. The Clarity of Laws - a failure to make rules understandable.[81]
5. Contradictions in the Laws.[82]
6. Laws requiring the impossible - rules that require conduct beyond the powers of the affected party.[83]
7. The constancy of the Law through time - introducing such frequent changes in the rules that the subject cannot orient their action according to them;[84] and, finally,
8. Failure to achieve congruence between Official Action and Declared Rule.[85]

These failures *motivate* the eight criteria that make up Fuller's 'desiderata' or eight kinds of legal excellence toward which a system of rules should strive.[86] They are 1. Generality. 2. Promulgation. 3. Non-retroactivity. 4. Clarity. 5. Non-contradiction. 6. Possibility of compliance. 7. Constancy. 8. Congruence between declared rule and official action – which Fuller describes as the

[78] "The first desideratum of a system for subjecting human conduct to the governance of rules is an obvious one: there must be rules. This may be stated as the requirement of generality" *The Morality of Law* 46.
[79] Ibid 49.
[80] Ibid 51.
[81] Ibid 63.
[82] Ibid 65.
[83] Ibid 70.
[84] Ibid 79.
[85] Ibid 81.
[86] Ibid 41.

most complex of all the desiderata.[87] Thus from the failures, eight criteria for good law (often described as principles of legality) are borne, which together form the desiderata. Throughout *The Morality of Law,* Fuller refers to his list as principles, directions, criteria and desideratum. For clarity, the term 'criteria' is used throughout this work.

1.1 The Morality of Law

Fuller does not precisely clarify how his eight criteria are 'moral'. He believed that the satisfaction of his eight criteria of legality generally served moral ends. These criteria were 'neutral' regarding the substantive purposes of law (its 'external morality'), but observing them made it less likely that bad laws would be adopted. In any case, the morality of law does not claim to accomplish any substantive ends, apart from the excellence of the law itself. This aim of legal excellence, with no substantive ends to measure achievement or otherwise, has, however, been a point of criticism of Fuller's work, most notably by HLA Hart.[88] One example is apartheid laws in South Africa; the state's law arguably met all of Fuller's criteria, but it was still 'bad law' given its prejudiced and discriminatory nature.[89] Likewise, Fuller refuses to regard the 'law' of the Third Reich as law, a view rejected by Hart, who prefers the simple utilitarian position that 'laws may be law but too evil to be obeyed'.[90]

Legal positivists such as Hart firmly believed in the separability thesis; the idea that there is a fundamental distinction between law and morality. On the other hand, natural law theorists believe that law has a moral character by its very nature.[91] Rundle describes how Hart attempted to neutralise the moral

[87] Ibid 81.
[88] Early lectures started an ongoing dialogue and years of debate between Professors Hart and Fuller, known as the Hart-Fuller debate. Fullers book, *The Morality of Law,* was an assault on legal positivism.
[89] Colleen Murphy, 'Lon Fuller and the Moral Value of the Rule of Law' [2005] 24(3) Law and Philosophy <https://www.jstor.org/stable/30040345> accessed 2 May 2022.
[90] H.L.A. Hart, 'Positivism and the Separation of Law and Morals' (n 57).
[91] Martin Van hees, 'Legal Positivism and the Separability Thesis.' in Manuela Schwietzer (ed), *Law and Philosophy Library* (Springer, Dordrecht 2000).

dimensions of Fuller's criteria to defend the separability thesis. Rundle articulates how Hart's argument was founded on Fuller's work being nothing more than 'neutral aids', i.e., Fuller's criteria make the end product of law more effective in pursuit of its ends. Importantly, this aid to efficacy, Hart argued in his review of *The Morality of Law*, was just as likely to assist with the realisation of morally evil laws as it was good laws;[92] thus, there was nothing 'moral' about Fuller's criteria; they were instead only "principles of good legal craftmanship",[93] articulated by Waldron as "instrumental principles for effective legislation".[94]

Fuller himself accepts that compliance with his 'internal morality' is no guarantee of a just order (they are necessary but not sufficient conditions) but whilst his principles are open to criticism; they are still a solid foundational point from which to start:

> We can, for example, know what is plainly unjust without committing ourselves to declare with finality what perfect justice would be like.[95]

Thus, Fuller is willing to sacrifice analytic clarity and specificity to provide helpful resources for understanding social reality and the subsequent navigation of the law. He was unequivocal, however, that systems of rules that observe the principles of legality are much less likely to be wicked, unjust or tyrannical, maintaining that "coherence and goodness have more affinity than coherence and evil," and that "when men are compelled to explain and justify their decisions, [by promulgation] the effect will generally be to pull those decisions toward goodness." [96]

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[92] i.e. the argument that following Fuller's criteria can result in excellently drafted 'bad' (immoral) laws, as well as good.
[93] H.L.A. Hart, 'Book Review: *The Morality of Law* by Lon L. Fuller' [1965] 78 Harv. L. Rev. 1286.
[94] Jeremy Waldron, 'The Rule of Law', *Stanford Encyclopaedia of Philosophy* (Summer2020) < https://plato.stanford.edu/entries/rule-of-law/#Aca> accessed 14 May 2022.
[95] *The Morality of Law* 12.
[96] Ibid 63.

1.2 The Morality of Aspiration and of Duty

Throughout his work, Fuller further develops the idea of morality by breaking it into two components - the morality of aspiration and the morality of duty. The morality of aspiration starts at the top of human achievement, while the morality of duty starts at the bottom. The morality of duty is designed to capture the basic rules or standards that we need to follow for social life to be possible - capturing the basic rules without which ordered community is not possible. There is a duty to meet the moral minimum, but things become much more complex as we ascend above this threshold, and the perspective of the morality of aspiration is the one to adopt.[97] Here, Fuller considers what it means to have the good life and legal excellence, with the two being interdependent. According to Fuller, if you do not achieve the laws of aspiration, you have not failed in the same way as if you fail the morality of duty - you are not guilty of wrongdoing; instead, the failure is one of shortcoming, falling short of the target set for oneself or society.[98] Thus whilst Fuller has been criticised for not articulating precisely how his criteria results in good ends or moral law, the duty of aspiration somewhat does this work for us with the high standards it imposes.

As noted,[99] we can trace eight kinds of legal excellence to which a system of rules might aspire. What appears at the lowest level as indispensable conditions for the existence of law at all become (as we ascend the scale of aspiration) increasingly demanding challenges to meet these criteria in an excellent way. Fullers' notion of excellence is demanding because it is not simply a matter of the straightforward satisfaction of all eight criteria; the criteria can conflict and may be met to a lesser or greater extent depending on the circumstances.

[97] Ibid 5-9.
[98] Ibid 3-30.
[99] p.30.

The road from what Fuller calls 'the abyss of total failure to the heights of human excellence' is a journey,[100] one that can perhaps be seen in the various human rights/civil liberties issues we have witnessed where centuries of social and political change are necessary before things like equal marriage are realised.[101] These journeys and issues tell us that moral neutrality and legal excellence are never fully achieved – evidenced by the ongoing campaigns to revoke, reframe and reform the laws that have passed.[102] These processes – the polarisation and scrutiny afforded - do, however, have the potential to make 'good law'. The internal and external criticism and procedures of deliberation, confrontation and consultation allow the rules to be thoroughly tested. Many related issues can be resolved in similar terms without reaching an agreement on the substantive moral issues involved.[103]

As stated in the introduction,[104] it is of lesser importance to this thesis whether AD is moral or not; the primary significance lies with legality - that there should first be *specific* laws in place to govern either its prohibition or its permissiveness (Fuller's first two criteria of generality and promulgation) given the significance of the life/death decisions therein. In Scotland, there are baseline laws on AD – the criminal law of homicide - which means that our obligations to duty are being satisfied. However, it will be shown that as a result of classifying AD as homicide, we are failing to become the society we aspire to – in this case, one with clear laws that show compassion for human suffering.

While Fuller's notion of law's inner morality is an imaginative attempt to capture the idea of a well-ordered legal system and the Rule of Law, it does have its limitations, both of which lie in recognising whether something is 'law' at all. Firstly, I consider a legal framework inherent with failures

[100] *The Morality of Law* 46.
[101] Marriage (Same Sex Couples) Act 2013.
[102] *R (on the application of Steinfeld and Keidan)* v *Secretary of State for International Development (in substitution for the Home Secretary and the Education Secretary)* Trinity Term [2018] UKSC 32 On appeal from: [2017] EWCA Civ 81.
[103] *The Morality of Law* 133.
[104] p.9.

identified by Fuller as *bad law;* thus, on my interpretation, the 'internal morality of law' is essentially a morality of 'aspiration' to produce good moral law.

However, Fuller argues that where a system does not conform with any one of his criteria (or fails substantially in respect of several, as will be argued Scots Law on AD does), it cannot properly be called 'law' at all.[105] This lies in the natural law maxim '*lex iniusta non est lex*' (an unjust law is not law) - normally attributed to Aquinas and adopted by Fuller, who said that "legal morality cannot live when it is severed from a striving toward justice and decency".[106]

Fuller's limitation, therefore, lies in the fact that whilst this thesis argues that the laws on AD are unclear and uncompassionate, it does not deny that they are 'law'.[107] It is accepted, in line with positivist thinking,[108] that Scotland *does* have law on AD - the common law offence of Homicide – which it is submitted, meets the minimum moral threshold (duty) for law by Fuller's standards but does not ascend above that minimum towards the morality of aspiration, or excellence ('good law').

As the positivist, John Austin said, "The existence of law is one thing; its merit or demerit is another. Whether it be or be not is one enquiry; whether it be or be not comfortable to an assumed standard, is a different enquiry".[109] Thus, whilst this thesis is critical of the law on AD in Scotland, it is accepted that there is, in theory, already a legal procedure for dealing with it.

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[105] "A total failure in any one of these eight directions does not simply result in a bad system of law; it results in something that is not properly called a legal system at all". *The Morality of Law* 39.
[106] Fuller himself mentions this, his is not a theologically grounded conception. Lon L. Fuller, 'Positivism and Fidelity to Law: A Reply to Professor Hart' [1958] 71(4) Harvard Law Review 661.
[107] Which is why Article 7 'no punishment without law' ("no-one shall be guilty of any criminal offence…which did not constitute a criminal offence") has not been considered in any detail in this thesis.
[108] That the existance of law is one thing; its merit or demerit another.
[109] John Austin, *The Province of Jurisprudence Determined* [London 1832] I84-85.

Compliant with Fuller's first criteria, the *generality* of Scots Law on AD (falling within the broad category of 'homicide') is a characteristic shared with other laws, and in some cases, generality in law may even be preferred.

However, laws that regulate matters of life and death should strive for a higher level of clarity than, for example, traffic offences because the associated risks therein are the most severe - for the individual assisted to die; concerns of potential coercion and abuse, and for the assister; potential prosecution for homicide and subsequent deprivation of liberty. Fuller references an illustration drawn from Hoebel's chapter, 'The Eskimo: Rudimentary Law in a Primitive Anarchy'[110] and describes what happens to a society when there is no clear demarcation between what is and is not allowed and what the rules are:

> The result is that what one man views as a fair contest for the lady's favours, the other may see as an adulterous invasion of his home. Plainly the remedy here is not to be found in preaching, but in some explicit legislative measure that will define and set visible boundaries...the consequent non-existence of needed law may be said to impoverish seriously the quality of their lives.[111]

While repudiating the 'fair contest' example above for its patriarchal undertones, it is a good example of how specific statutory laws help regulate behaviour. Thus, whilst there is debate about what the Scots Law on AD ought to be, the primary function of law is to provide a sound and stable framework for citizens' interactions with one another. To that end, Fuller's criteria are used as a valuable lens to highlight that the current law on AD in Scotland is not fit for purpose, not that it is not law at all.

[110] in E. Adamson Hoebel, *The law of primitive man: a study in comparative legal dynamics* (Harvard University Press 1954) 83-85.
[111] *The Morality of Law* 206.

In that respect, I take a looser approach than Fuller, who would withhold the term ‘law’ from the resulting system of rules that did not meet his criteria unequivocally.[112] Although labels are important, whether we call something a law, an approximation of law (Scots AD law) or no law at all is second to the moral guidance it carries for its citizens.

The requirement for clarity and access to the law is of fundamental importance. Law should be epistemically accessible; it should be a body of norms promulgated as public knowledge so that people can study it, internalise it, understand what it requires of them, and use it as a framework for their plans and expectations.[113] Conformity with Fuller’s criteria would have the advantage of citizens knowing in advance how their liberty will be restricted in the various situations in which they may find themselves, a knowledge that is needed if they are to plan their lives and deaths. This fits with Fuller’s philosophy that legislators have a moral duty to be clear, to make the law known and available, a demand that lends itself with ‘unusual readiness to formalization’.[114] Fuller goes on to say:

> A formalized standard of promulgation not only tells the lawmaker where to publish his laws; it also lets the subject – or a lawyer representing his interests – know where to go to learn what the law is.[115]

‘Law’ itself comprises many things: for some, the common law is the epitome of legality; for this thesis, the Rule of Law connotes the impartial application of a drafted statute. Sometimes matters can be governed by informal norms rather than by positive law, but others (AD) are so fraught with complexities that they cannot, or should not, be handled by indirect, ad hoc, or general

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[112] (n 105).
[113] Jeremy Waldron, 'The Rule of Law: The Contentedness of the Rule of Law', *Stanford Encyclopaedia of Philosophy* (22 June 2016) <https://plato.stanford.edu/entries/rule-of-law/> accessed 11 May 2022.
[114] *The Morality of Law* 43.
[115] Ibid 44.

rules – we know that general rules, no matter what they are, invariably "throw up bad results" in this context.[116]

This thesis takes the view that with matters as important as life/death and the potential deprivation of liberty, Scotland should adopt Fuller's formulation and produce a published AD statute that is prospective, coherent, clear, stable and practicable to guide behaviours, inform citizens and clear up much of the confusion, iniquity and injustice that the current prohibition produces. The justification for reform via the legislator will be shown in Part II, where the harmful consequences of relying on a common law approach in this context will be highlighted.[117]

1.3 Fuller in relation to other philosophers

Whilst Fuller believes that legal systems are derived from the norms of justice, which have a moral aspect, Fuller's most prominent dissenter, Hart, does not believe there is a close relationship between law and morality. The crux of the disagreement between Hart and Fuller was that positivists believe in the separation of laws and morals, the law as it is and ought to be, whereas natural law theorists primarily believe there is no separation.[118]

Hart refused even to use the term 'principles of legality' save but on one occasion,[119] and when discussing procedural criteria, such as the importance of generality, clarity, public promulgation etc., in his Encyclopaedia essay, Hart does not give explicit reference to Fuller.[120] The "principles of legality"[121] that Hart describes are roughly what Fuller referred to as the "inner morality

[116] Stephen Smith, 'Nicklinson and the ethics of the legal system.' in Smith and others (eds), *Ethical Judgments: Re-Writing Medical Law* (Hart publishing 2017) 221.
[117] "the democratic process is liable to be subverted if, on a question of moral and political judgement, opponents of the Act achieve through the courts what they could not achieve in Parliament". Lord Sumption [231] in *R (on the application of Nicklinson and Another) v MOJ* (2014) UKSC 38. quoting *R (Countryside Alliance) v Attorney-General* [45].
[118] H.L.A., Hart, 'The Separation of Law and Morals' (n 57).
[119] H.L.A., Hart, *Law, Liberty and Morality* [SUP 1963] 12.
[120] H.L.A. Hart, 'Problems of Philosophy of Law', *The Encyclopaedia of Philosophy* [1983] 274.
[121] Ibid.

of law."[122] Jeremy Waldron has written that Hart's comments in the Encyclopaedia essay are about as close as Hart ever came to acknowledging the importance of Fuller's contribution[123] and that whilst Hart tried to create the impression that Fuller's work was hopelessly confused, "Hart himself – when he thought no one was looking – toyed with many of the positions that Fuller held".[124]

Waldron asked the question, "What exactly is the relation between principles of legality and norms like justice, rights, and the advancement of the common good that we use to evaluate systems of rule?".[125] Waldron highlights that Hart was dismissive of such questions and sought to shut them down quickly with little elaboration.[126] Since this thesis is concerned with reforming the law on AD to introduce clarity, promote compassion and instil justice, fairness and equality to a system that is, at present, suffering from significant and pervasive failures, Hart's reluctance to engage in such moral considerations impeded understanding and promotion of the arguments that I aimed to make.

In his response to Hart's 1958 Holmes Lecture and elsewhere, Fuller argued that principles of legality—formal principles requiring, for example, that laws be clear, general, and prospective—constitute the "internal morality of law." Waldron contends that Hart never offered a clear response to Fuller, as in different writings, Hart seems variously to affirm and deny that legality is a necessary criterion for the existence of law;

> Likewise, he sometimes suggests and elsewhere scorns the idea that legality has moral significance. Hart's apparent inconsistency might actually reflect the complexity of the terms. Some degree of legality might be a prerequisite of law, while some failures of legality might not

[122] *The Morality of Law* 42.
[123] Waldron, 'Positivism and Legality: Hart's Equivocal Response to Fuller' (n 59).
[124] Ibid 1167.
[125] Ibid 1137.
[126] Ibid 1138.

> condemn it. Principles of legality might have contingent rather than inherent moral value, might have moral value that is severable from their legal value, or might have both positive and negative moral effect. [127]

Waldron goes on to argue that the conclusion Hart seeks to avoid - that legality inevitably links morality and law - is compatible with Hart's positivism and opens a promising field for positivist jurisprudence.[128] Whilst this context is useful to gain a better understanding of where Fuller and his work sit in historic and modern day jurisprudence, the complex foundational arguments between these philosophers (whether law has an inherent morality; the criteria, principles, and virtues that must be present for a functioning legal system to exist; the law as an instrument for basic efficacy or to promote 'good' ends; forms and procedures rather than ends and purposes*, inter alia*) are not the main concern of this work's theoretical framework. That foundational structure emerges from Fuller's criteria, which will be used as a template against which to evaluate the current Scots Law on AD. Thus, whilst there are exciting Hart v Fuller philosophical points I *could* engage in here, they would act as a distraction from my point, which is to focus on the practical legal question, not the philosophical theory.

The dominant response to the 'internal morality of law' in contemporary legal philosophy can be traced not to Hart but Joseph Raz (1979). In Fuller's favour, Raz's germinal essay, 'The Rule of Law and its Virtue', strengthened the association between Fuller's principles of the 'internal morality of law' and the idea of the rule of law.[129] However, according to Rundle, the 'Virtue' aspect of Raz's work is problematic as it consolidated the position advanced by Hart that Fuller's claims failed to disturb the positivist separability thesis. Raz does, however, pick up on the basic principles that form the rule of law, which mirrors the procedural framework offered by Fuller, only Raz offers

[127] Ibid 1135.
[128] Ibid 1135.
[129] Raz, 'The Rule of Law and its Virtue' (n 2).

eight criteria that focus more on the judiciary as an instrument for the rule of law[130] whilst Fuller is concerned primarily with law-making *prior to* its implementation, scrutiny, and oversight. Raz's focus on the judiciary is the main reason that his framework is not adopted in this thesis. Fuller's framework better aligns with the legislative solutions I seek to promote in response to Scots Law's failings on AD.

While Fuller and Raz's similarities are seen in the non-retroactivity, stability, and clarity criteria,[131] Raz states that Fuller's attempt to establish the connection between law and morality fails. The rule of law, Raz argues, is ultimately a 'negative' virtue. It merely offsets or corrects evils that only law itself could ascertain. Several scholars sympathetic to Fuller's jurisprudence have strongly questioned whether these arguments constitute the kind of 'knockdown' response to Fuller that is claimed for them. This has especially been the case with respect to the 'negative virtue' claim that compliance with the rule of law principles merely corrects evils that 'only law' could create.[132] Fuller, and the arguments in this thesis, subscribe more to the law as an instrument for good and eventually moral societies – a feature of moral societies being that they include clear laws that incorporate compassion. Law-making as a measure for good – to prevent suffering, reduce inequality and promote justice are not aspects of the rule of law that Raz subscribes to. Instead, he points out that legal institutions have reinforced negative aspects such as racism and discrimination throughout time.[133] This negative aspect – that the law reinforces bad things happening – is true with the current approach to AD in Scotland.

Cohen writes that Fuller's 'canons' (i.e., his desiderata) are a "tolerable start at producing a set of conditions necessary for the presence of a (modern)

[130] Raz's principles fall into two groups. Principles 1 to 3 require that the law should conform to standards designed to enable it effectively to guide action. Principles 4 to 8 are concerned with the legal machinery of enforcing the law. Raz's principles 4, 5, 6 and 7 are solely concerned with the judiciary.
[131] Raz, 'The Rule of Law and its Virtue' (n 2).
[132] Ibid 224.
[133] Ibid 216.

legal system...there can be no doubt that some list of this sort is correct".[134] Dworkin also accepts "Fuller's conclusion that some degree of compliance with his eight canons of law is necessary...".[135] Thus, as a starting point, Fuller's criteria offer a valuable and practical framework against which to judge the law on AD.

Applying Fuller's criteria to the Scots Law on AD, we can identify five key failings.[136] These are:

(1) Failure to achieve **rules**, so that every issue must be **decided on an ad hoc** basis.

(2) A **failure to publicise**, or at least to promulgate and make available to the affected parties, the rules expected to be observed.

(3) A failure to make rules **understandable** – a lack of clarity.

(4) The enactment of **contradictory rules** – law should be consistent.

(5) A failure to achieve **congruence** between the rules as announced and official action.

Certain aspects of the law relating to AD in Scotland exemplify these failings. Throughout this thesis, I will identify and explain the aspects of Scots Law which fall foul of Fuller's criteria, making the legal issues, rather than the theory, the focus. Considering each issue, I will discuss which of Fuller's criteria for good law are relevant and why this relationship poses a problem.

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[134] Marshall Cohen, 'Law, Morality and Purpose' [1965] 10(4) Villanova Law Review 648.
[135] Ronald Dworkin, 'Philosophy, Morality and Law – Observations Prompted by Professor Fuller's Novel Claim' [1965] 113 (5) University of Pennsylvania Law Review 669.
[136] The three omitted are: Rule 3 - retroactive legislation, which cannot itself guide action, but undercuts the integrity of rules prospective in effect, since it puts them under the threat of retrospective change; Rule 6 - rules that require conduct beyond the powers of the affected party and Rule 7 - introducing such frequent changes in the rules that the subject cannot orient his action by them.

This is the most straightforward way to highlight the discrepancies and failings in the current law, although it will become apparent that there is some overlap between the issues and Fuller's criteria.

As noted in the introduction,[137] the most substantive part of the theoretical framework uses Fuller's principles of legality to diagnose the issues with legality, after that, and to a lesser extent, the theory of compassion as the basis of law reform acts as the prescription to fix the status quo. Together, Fuller's criteria help us diagnose the problem, and compassion helps to point a way forward with law reform. I now turn to what is meant by compassion in legal and political theory.

1.4 Compassion

For the purposes of this work, compassion is considered a *concept* and *principle* when we use it as the basis for policy decisions. It is considered a *virtue* or *competency* in the context of practical application, expected, for example, of medical or legal practitioners. Compassion is increasingly incorporated explicitly or implicitly into legislation and case law on AD.[138] Numerous scholars, policymakers and legislators approve of compassion in law, whether as an overarching political principle, as a basis for adjudication, or as a competency for legal professionals.[139]

The literature on compassion stems from virtue or care ethics.[140] Ranked a great virtue in many philosophies, compassion is considered among the

[137] n section 1.6.
[138] Hazel Biggs, 'Legitimate Compassion or Compassionate Legitimation? Reflections on the Policy for Prosecutors in Respect of Cases of Encouraging or Assisting Suicide' [2011] 19 (1) Feminist Legal Studies 83.; Andrew Grubb, 'Euthanasia in England: A Law Lacking Compassion?' [2001] 8 European Journal of Health Law 89; H. Keating and J. Bridgeman, 'Compassionate Killings: The Case for a Partial Defence' [2012] 75 (5) Modern Law Review 697; A. Mullock, 'Overlooking the Criminally Compassionate: What Are the Implications of Prosecutorial Policy on Encouraging or Assisting Suicide?' [2010] 18 MLR 442.
[139] D. Feenan, 'Law and Compassion' [2017] 13 (2) Int Journal of Law in Context 137.
[140] E. Porter, 'Can politics practice compassion?' [2006] 21 (4) Hypatia 97; M. Slote, *The Ethics of Care and Empathy* (London: Routledge 2007).

greatest of virtues in almost all major religious traditions.[141] It is often regarded as carrying an emotional aspect, though when based on cerebral notions such as equality, justice and interdependence, it is considered rational, and its application is understood as an activity based on sound judgment.[142] Moreover, the law currently accommodates 'irrationality' by way of defences such as provocation and diminished responsibility; thus, even dissenters of compassions rationality have to accept its scope for relevance in law.

1.5 Definitions

The etymology of "compassion" is Latin, meaning "co-suffering." More involved than simple empathy, compassion commonly gives rise to an active desire to alleviate another's suffering.[143] Compassion has multiple meanings and lacks a clear and unified definition.[144] [145] It is said to be one of the most politically charged emotions,[146] having featured in the writings of political and moral philosophers throughout history, such as Rousseau (1755),[147] Smith (1759),[148] Schopenhauer (1840),[149] Nietzsche (1887)[150] and Arendt (1963)[151] – with implications for political and legal institutions. More recently, compassion has been rehabilitated by Nussbaum[152] and Whitebrook[153] as a political virtue.

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[141] Leah Curtin, 'Compassion: A nurse's primary virtue' (*American Nurse*, 24 July 2018) <https://www.myamericannurse.com/compassion-nurse-virtue/> accessed 16 January 2022.
[142] 'Compassion' (*Pallipedia*, 2 May 2018) <https://pallipedia.org/compassion/> accessed 16 January 2022.
[143] 'Compassion… The greatest of virtues' (*HMA*, 12 April 2017) <https://www.hma.co.nz/2017/04/12/compassion-the-greatest-of-virtues/> accessed 12 November 2021.
[144] D., Feenan, ' Law and Compassion' [2017] (n 139).
[145] A characteristic shared with the subject matter of this thesis, which also has no agreed universal definition.
[146] M. Ure & M. Frost., *The Politics of Compassion*, (1st edn, Routledge 2014).
[147] J.J Rousseau, *A Discourse on Inequality* (originally published as Discours sur l'origine et les fondements de l'inégalité parmi les hommes 1755/Penguin 1984).
[148] A. Smith, *The Theory of Moral Sentiments* (London, 1759/1853).
[149] A. Schopenhauer, *On The Basis of Morality* (Berghahn Books, 1840/1995).
[150] F. Nietzsche, *On the Genealogy of Morals: A Polemic* (originally published as Zur Genealogie der Moral: Eine Streitschrift 1887/ Penguin 2013).
[151] H. Arendt, *On Revolution* (New York : Viking,1963).
[152] M C. Nussbaum, *Political Emotions* (Belknap Press, 2015).
[153] M. Whitebrook, 'Compassion as a Political Virtue' [2002] 50 (3) Political Studies 529 <https://doi.org/10.1111/1467-9248.00383> accessed 14 May 2022.

However, calls for compassion as a basis for political action may, it is countered, be 'at least as likely to foster despair and rage as it is to foster benevolence.'[154] For Bandes, compassion's importance lies in its ability to aid decision-makers in understanding what is at stake for the litigant, and it is thus closely tied to humility. Bandes recognises the overlap between compassion and empathy but distinguishes between them:

> Compassion is 'the feeling that arises in witnessing another's suffering and that motivates a subsequent desire to help. The compassionate person must not only perceive suffering; she must also 'care about that suffering and desire its alleviation'. Thus, compassion includes a call to action that is not an inherent component of empathy. This command to act on the sufferer's behalf suggests another important difference between empathy and compassion.[155]

Aristotle utilises compassion in tragic plots concerning death, old age, illness and disfigurement, and its appropriateness for AD for the terminally ill is apparent by extension.[156] In the Aristotelian account, an essential element of compassion is its implicit judgment that the sufferer does not deserve their suffering. However, compassion is not merely a passive sense of pity; it is also about engagement: seeking to assist those whose suffering may be ameliorated by our actions,[157] in this case, equipping them with the choice of AD.

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[154] Jonathan Marks, 'Rousseau's Discriminating Defense of Compassion' [2007] 101(4) The American Political Science Review 739.
[155] Susan Bandes, 'Compassion and the rule of law.' [2017] 13(2) IJLC 184. <10.1017/S1744552317000118> accessed 11 Nov 2021.
[156] Britannica, Theory of tragedy: Classical theories, 'Aristotle's *Poetics* < https://www.britannica.com/art/tragedy-literature/Theory-of-tragedy> accessed 11 March 2022.
[157] Shahaduz Zaman et al., 'A moment for compassion: emerging rhetorics in end-of-life care' [2018] 44(2) BMJ 140.

Compassion, therefore, has emotional, social, legal, political and practical dimensions. Nussbaum observes that pity constructs an emotional analogue of the 'original position' in John Rawls' *A Theory of Justice*,[158] in which rational agents are asked to select the principles that will shape their society, knowing all the relevant general facts but not knowing where in the resulting society they will end up,[159] what Rawls calls a veil of ignorance. Rawls' theory focuses on equality and an awareness that any one of us could become poor, sick, or discriminated against. There is no certainty that any given individual will develop a terminal illness with unbearable and incurable suffering in their lifetime, but many of us will. With the knowledge that (despite excellent palliative care) many people will suffer,[160] we must either accept this as a circumstance that we are willing to bear (for the sake of potential negative repercussions) or give the terminally ill (who want the choice of PAD) recognition and compassionately support them by empowering them with choices on how they wish their end of life to be.[161]

The original position is a device that shows us how to design political institutions, and especially systems of fair and just distribution of opportunities and access.[162] When we are enjoying good health and have not yet experienced or witnessed bad deaths, a terminally ill person's suffering is abstract, but if we accept its validity, we see that compassion is intimately related to justice and provides a powerful vision for social justice. Biggs outlines how in the AD case of *Pretty*, Mrs Pretty's husband was acting out of compassion by agreeing to help her end her life:

> Neither of them wanted to break the law, as Mrs Pretty made clear: 'I want my family to remember me as someone who respected the law, and asked in turn that the law respected my rights'. Instead, the courts

[158] John Rawls, '*A Theory of Justice'* (Cambridge: Harvard University Press, 1971).
[159] Nussbaum, '*Political Emotions'*, 36 (n 152).
[160] Part III of this thesis.
[161] Dignity in Dying, *The Inescapable Truth about dying in Scotland* (2019) < https://features.dignityindying.org.uk/inescapable-truth-scotland/> accessed 14 May 2022.
[162] Samuel Freeman, 'Original Position', *Stanford Encyclopedia of Philosophy* (27 Feb 1996) <https://plato.stanford.edu/entries/original-position/> accessed 16 January 2022.

> conducted a dispassionate application of the law and Diane Pretty suffered the kind of death she sought to avoid: one that lacked dignity and was contrary to her autonomous wishes and the values by which she had lived her life. A more compassionate outcome would have surely avoided this suffering and respected the autonomy and values of Mrs Pretty.[163]

Biggs is concerned about the lack of compassion in a law that prohibits autonomous persons from being assisted to die at home and yet regularly fails to prosecute those who assist them to travel overseas to access AD.[164] The significance of *Pretty* is that it was the first UK AD case to be presented to the European Court of Human Rights (ECtHR); the case signalled a shift in the narrative around AD from criminality to compassion and laid the foundations for later attempts to reform the law;[165] thus it is worth summarizing the case now.

1.5.1 *Diane Pretty v The United Kingdom* [2002] [166]

In the English case of *Pretty v United Kingdom* (2002), Ms Pretty brought a claim against the United Kingdom before the EctHR. She submitted that the refusal of the Director of Public Prosecutions (DPP) to grant her husband immunity from prosecution if he assisted her in ending her life, and the prohibition in domestic law on assisting suicide, infringed her rights under Articles 2, 3, 8, 9 and 14 of the European Convention on Human Rights.[167]

After considering Article 2, the right to life, it was held that 'no right to die, whether at the hands of a third person or with the assistance of a public authority, [could] be derived from Article 2 of the Convention'[168] thus there

[163] H. Biggs, 'From dispassionate law to compassionate outcomes in health-care law, or not.' [2017] 13 (2) IJLC 180.
[164] Ibid 181. Covered in more detail in this thesis at 7.5 Suicide Tourism.
[165] Such as that by Debbie Purdy, discussed at 3.1.1.
[166] *Pretty v United Kingdom* 2346/02 [2002] ECHR 427.
[167] ECHR, Reports of Judgments and Decisions, 2002 – III, 161 <https://www.echr.coe.int/Documents/Reports_Recueil_2002-III.pdf> accessed 13 Nov 21.
[168] *Pretty* [40].

had been no violation of Ms Pretty's Article 2 rights. Article 3 was also not engaged because it was not the government inflicting ill-treatment[169] but the disease Ms Pretty was living with.[170] However, the ECtHR differed from the House of Lords in holding that Ms Pretty's Article 8(1) rights were engaged. Regarding Article 8, the court said, 'to pass the closing moments of her life was part of the act of living, and she had a right to ask that this too must be respected'.[171] The ECtHR said:

> The applicant in this case is prevented by law from exercising her choice to avoid what she considers will be an undignified and distressing end to her life. The Court is not prepared to exclude that this constitutes an interference with her right to respect for private life as guaranteed under Article 8(1) of the Convention.[172]

And that without 'negating the principle of the sanctity of life protected under the Convention', it was necessary under Article 8 to consider 'notions of quality of life'.[173] The court had to decide whether the interference with the applicant's right to respect for private life was 'necessary in a democratic society', it not being contested that Section 2 of the Suicide Act 1961 was 'in accordance with the law' and in pursuit of a legitimate aim.[174]

Under the court's jurisprudence, necessity had two facets: first, correspondence of the interference to a pressing social need; second, the proportionality of the interference to the legitimate aim pursued. Section 2 of the Suicide Act 1961 was not found to be disproportionate.[175] The social need justification was protection for vulnerable people at risk of abuse.[176] The apparent flexibility in the regime for suicide assistance – the requirement for

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[169] *Pretty* [53].
[170] n Section 7.6 of this thesis.
[171] *Pretty* [64].
[172] *Pretty* [67].
[173] *Pretty* [65].
[174] *Pretty* [70].
[175] *Pretty* [69-70].
[176] *Pretty* [88].

the DPP's consent to prosecution under Section 2(4) of the Suicide Act 1961 and the possibility for discretion in sentencing – contributed to the finding that the blanket ban was proportionate.[177]

The court accordingly concluded that "the interference in this case may be justified as 'necessary in a democratic society' for the protection of the rights of others" and, consequently, found no violation of Article 8 ECHR.[178] Article 9 was dismissed as a 'restatement of the complaint raised under Article 8 of the Convention'[179] , and Article 14 was also dismissed.[180] The finding that the right to life could not be interpreted as conferring the diametrically opposite right, namely a right to die, was not helpful for Ms Pretty, and she died two weeks after the court case. Ms Pretty died in a hospice after experiencing breathing difficulties and eventually entering a coma. The manner of her death was described as one which "she always feared".[181]

This case established, *inter alia*, that Article 2 is "unconcerned with issues to do with the quality of living"[182] and that the emphasis is to protect life generally. While this is the attitude of the ECtHR, other bodies, including the Indian Supreme Court and the Inter-American Court of Human Rights, have interpreted the right to life to include the requirement to live with dignity,[183] something that Ms Pretty was "frightened and distressed" at the thought of losing as her disease ran its course.[184]

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[177] *Pretty* [76].
[178] *Pretty* [78].
[179] *Pretty* [82].
[180] *Pretty* [89].
[181] Sandra Laville, 'Diane Pretty dies in the way she always feared', (*The Telegraph* 13 May 2002) <https://www.telegraph.co.uk/news/uknews/1394038/Diane-Pretty-dies-in-the-way-she-always-feared.html> accessed 13 Nov 21.
[182] *Pretty* [39].
[183] Scottish Human Rights Commission, 'Assisted Suicide (Scotland) Bill: Written Evidence to the Justice Committee', (October 2014) <https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Fwww.scottishhumanrights.com%2Fmedia%2F1357%2Fassistedsuicide-scotland-bill2014shrc.doc&wdOrigin=BROWSELINK > accessed on 13 Nov 21.
[184] *Pretty* [8].

It has been endorsed repeatedly in later case law of the ECtHR that such matters engage Article 8(1), for example, in *Haas v Switzerland* (2011),[185] *Koch v Germany* (2012),[186] *Gross v Switzerland* (2013)[187] and *Nicklinson v United Kingdom* (2015).[188] Additionally, in *Hass,* the court observed that "the right to life guaranteed by Article 2 … obliges states to establish a procedure capable of ensuring that a decision to end one's life does indeed correspond to the free wish of the individual concerned."[189] Essentially, Ms Pretty's final legal appeal (to the ECtHR) failed due to the 'potential harm to others' argument, which features heavily in this debate, arguably to the detriment of showing compassion to those suffering at the end of life.

1.6 Feminist Roots

Much of the early literature on compassion and law emanated from feminist legal scholars and judges, mainly in the US, who reacted during second-wave feminism in the 1980s and 1990s against the prevailing gendered orthodoxies of Western law.[190] From the 1960s onwards, feminist scholars in particular, began to develop the concept of care ethics, with this work now featured throughout medical law, by nature of the healing/caring healthcare encounter. It is this ethic of care that Jonathan Herring believes opens the door for consideration of compassion within the legal sphere which he terms "compassionate relational care".[191]

Perplexingly, compassion has been seen as an emotion negatively associated with women, contrasted with dispassion: positively associated

[185] *Haas v Switzerland* [2011] 53 EHRR 33.
[186] *Koch v Germany* [2012] 56 EHRR 6.
[187] *Gross v Switzerland* [2013] 58 EHRR 197.
[188] *Nicklinson v United Kingdom* [2015] 61 EHRR SE7.
[189] *Hass* [58].
[190] D. Feenan, 'Law and Compassion' [2017] 2.2 (n 139).
[191] J. Herring, 'Compassion, ethics of care and legal rights.' [2017] 13 (2) International Journal of Law in Context 158-171.

with men.[192] Feenan compounds this, articulating that compassion is perhaps absent from professional codes and legal education and training because of:

> law's historical elitism and protection of class privilege (Abel, 1988), traditional separation of reason and emotion (Abrams and Keren, 2010; Bandes and Blumenthal, 2012) and valorisation of competencies that are typically associated with the masculine rather than the feminine.[193]

In economics, politics, and especially, perhaps, in the law, we find a recurrent contrast between "emotion" and "reason", especially where appeals to compassion are at issue. Both compassion's defenders and its opponents in legal theory seem to grant that this emotion is irrational. Some would exclude it from legal reasoning on that account; some, by contrast, wish to admit it as irrational and yet valuable in addition to reason.[194] Feminist legal scholars have led the defence, holding that "irrational" factors make a valuable public contribution. [195]

Martha Nussbaum attempts to reframe compassion in 'Compassion: The Basic Social Emotion'.[196] Nussbaum defends compassion aligning her views with Rousseau, Adam Smith and others, as opposed to those who see no place for it – Stoics, Kant and others. Nussbaum gives three reasons why compassion is an important factor in relationships between individuals and the community and reframes its use and appropriateness. First, compassion acts as a bridge or hook between individuals and the community. Second,

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[192] D. Feenan, 'Law and Compassion' [2017] (n 139).
[193] Ibid 136.
[194] M. Nussbaum, 'Compassion: The Basic Social Emotion.' [1996] 13 (1) Social Philosophy and Policy 30.
[195] For two examples, see Lynne N. Henderson, 'Legality and Empathy' [1987] 85 Michigan Law Review 1574-1653; Toni M. Massaro, 'Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds,' [1989] 87 Michigan Law Review 2099-2127; Martha Minow and Elizabeth V. Spelman, 'Passion for Justice,' [1988] 10 Cardozo Law Review 37-76; Paul Gewirtz, 'Aeschylus' Law' [1988] 101 Harvard Law Review 1043-55. Among these authors, only Minow and Spelman criticize the emotion-reason dichotomy. None presents any analysis of emotion that would clarify the role of cognition in emotion.
[196] M. Nussbaum, 'Compassion: The Basic Social Emotion.' (n 194).

she challenges liberal and individualist moral theories which treat compassion as “an irrational force in human affairs, one that is likely to mislead or distract us when we are trying to think about social policy” and illustrates why this dismissal is warranted – because it is actually based on careful thought and evaluation. Lastly, outlining the opposition between emotion and reason invoked by “communitarian critics of liberalism” who suggest that if we make room for compassion, then political judgement will be based on a “force that is affective rather than cognitive, instinctual rather than concerned with judgment and thought”. [197]
Nussbaum disagrees, arguing that:

> Compassion is, above all, a certain sort of thought about the well-being of others. The upshot of this will be to show that a certain type of objection to the project of the Enlightenment fails, and that Enlightenment thinkers (such as Kant and John Rawls) who do not give this emotion a central place could do so without altering very much in the substance of their moral theories. If we want a compassionate community, we can have one without sacrificing the Enlightenment's commitment to reason and reflection—because compassion is a certain sort of reasoning.[198]

Emotion remains in the minds of many legal scholars and judges as irredeemably at odds with reason – as evidenced in Ronald Dworkin’s statement that legal rights are a matter of principle and should not be affected by ‘mere emotional reaction’.[199] However, Dworkin recognised that the law should give effect to the patient’s own preferences and attitudes to suffering since they reflect her will.[200] Using legality and compassion together allows the building of a strong case for AD in Scotland.

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[197] Ibid 28.
[198] Ibid 27.
[199] R. Dworkin, *Taking Rights Seriously* (Harvard University Press, 1977) 250.
[200] R. Dworkin and others, ‘Assisted suicide: the philosophers' brief.’ [1997] 27 New York Rev Books 41-7.

1.7 Compassion and the Law

Herring summarises the traditional view of compassion and the law:

> At first, I thought that was a very strange topic...the best I thought the law could do to promote compassion was to 'keep out'...the idea of using the law to create compassion seems so peculiar to lawyers. [201]

However, this thesis argues that compassion is used to create the law (rather than "using the law to create compassion"), something that has not been proposed before in this context. Nonetheless, compassion does not have a natural place in historical legal reasoning, with the thought being that law should be rational, objective and dispassionate so that outcomes are consistent and certain.[202] This thesis will show, however, that outcomes in the current context of Scots law on AD are not, in fact, consistent or certain.

There are risks in using compassion as the basis of a law, especially when purported by a woman, given the archaic but still prevalent association between emotion, women, and unfitness to perform key tasks and embody fundamental values of rationality and impartiality in law. For example, the judiciary and legal profession more generally are male-dominated, but this is not because:

> [W]omen are not capable of being judges. Women don't get elevated because it is considered by the men who make the decisions that they will be too emotional, and they will be incapable of being impartial.[203]

This is an antiquated view at best, but a lack of compassion in AD law (and society more generally) arguably causes more harm than good, especially

[201] J. Herring, 'Compassion, ethics of care and legal rights.' (n 191).
[202] T.A. Maroney, 'The Persistent Cultural Script of Judicial Dispassion' [2011] 99 California Law Review 629.
[203] R. Boland, 'The Delhi Bus Rape: A Mother Speaks' (*Irish Times* Weekend Review, 31 October 2015) 1.

when applied to people at the end of life. Litigants in AD cases have shared harrowing examples of their experiences of distress because of the fear and suffering they must endure,[204] making a persuasive space for the use of compassion in the law on AD.

Recognition by judges of the importance of compassion as a judicial attribute tends to emanate from judges in the USA and Canada. Feminist scholars approved of compassion in jurisprudence[205] and as an attribute of the judge.[206] Carol Gilligan's *In a Different Voice* (1982) argued for an ethic of care in place of the model of justice and rights and included compassion within her ethic of care.[207] Maureen Whitebrook outlines that Hume and Adam Smith viewed compassion as intrinsic to, or at least instrumental for, justice rather than distinct from it.[208]

UK District Judge Anselm Eldergill, in his article *Compassion and the law: a judicial perspective* states that compassion is an instrument of justice.[209] This is illustrated with reference to mental health law, including whether decisions about a person are in their 'best interests'. Judge Eldergill connects the decision to the 'qualities required of a judge'. The judge must, he argues, through experience, understanding, courage, empathy and compassion, 'emotionally evaluate' the evidence and try 'to feel and understand what the case and possible outcomes mean for the [person]'.[210] Judge Eldergill rejects the view that compassion is incompatible with law's objectivity when he observes: 'The notion that judicial objectivity requires being dispassionate

[204] See later chapters, specifically testimony by Gordon Ross at 4.0, Mr Conway at 8.3 and generally the examples in section 6.1 of this thesis.
[205] R. Colker, 'Feminism, Theology, and Abortion: Toward Love, Compassion and Wisdom' [1989] 77 California Law Review 1011.
[206] J. Resnik, 'On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges' [1988] 61 Southern California Law Review 1877.
[207] C. Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Harvard University Press 1982).
[208] Whitebrook, (n 153).
[209] [2015] Eld LJ 268.
[210] D. Feenan, D. Bedford & J.Herring, 'Judicial compassion - commentary on 'Compassion and the law: a judicial perspective'' [2015] 5 (4) *Elder Law Journal* 392-398.

and that objective decision-making is contaminated by empathy, sympathy and compassion is impossible to support'.[211]

Part of the unique contribution of this thesis lies in the fact that it proposes compassion being used *proactively* as the basis for legislative reform, whereas most scholars interpret it in a judicial context only.[212] Feenan et al. consider the dearth of compassion in legislation as reflecting the will of parliament and that:

> The paucity of such reference reflects something of the prevailing values in our society. Perhaps the trend in modern times in recognising individualism and of protecting negative rights, such as liberty, rather than promoting social duties may account for this situation.[213]

Leaving aside this as a general observation, it is worth observing that the value of compassion is emphasised repeatedly within the Scottish context, suggesting that a policy based on it would respond to something central in Scotland's self-understanding. Scotland has been described as a "land of compassion."[214] Compassionate Communities initiatives are engrained in the Hospice and Social Care sector,[215] and conversations have been taking place within policy and research circles in Scotland in recent years that are focused on kindness and compassion. This has been further stimulated by the development of values such as kindness and compassion being included at the heart of the National Performance Framework for Scotland.[216] Thus,

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[211] ibid 276.
[212] ibid; see also, S Bandes and J A Blumenthal, 'Emotions and the Law' [2012] 8 Annu Rev Law Soc Sci 161; B Zipursky, 'Deshaney and the Jurisprudence of Compassion' [1990] 65 NYU Law Rev 1101 "that compassion - whether defined, for instance, as an attribute, emotion, or trait - has a legitimate role to play in adjudication".
[213] (n 210) 393.
[214] Sarah Clark, 'Spotlight: Kindness' (*Scotland.org* 14 Nov 2019) <https://www.scotland.org/features/spotlight-kindness-the-scottish-tourist-hotspots-with-kindness-at-their-core> accessed 13 Nov 2021.
[215] *Scottish Community Alliance*, 'Compassionate Communities' <https://scottishcommunityalliance.org.uk/2019/07/03/compassionate-communities/> accessed 13 Nov 2021.
[216] Scottish Government, 'National Performance Framework, Values' <https://nationalperformance.gov.scot/what-it> accessed 13 Nov 21.

scaling up these values is one way Scotland as a compassionate nation might be constituted. As this St Andrew's Day message by Scotland's First Minister illustrates:

> The values of compassion and solidarity are central to the story of St Andrew. They are also a big part of Scotland's national identity.[217]

Using compassion as the basis of legislation on AD would fit well with the culture of Scotland; it permeates the people and communities throughout. The Scottish Parliament prioritised compassion by engraving it on the head of the mace of the Scottish Parliament as a reference to the aspirational ideals of the people of Scotland.[218] As it stands, the question arises as to whether the legislative body lives up to this as regards AD. The point is that compassion is clearly one of Scotland's fundamental values, which is useful for this thesis' purposes, which argues that the law should speak to our aspirations and should help us even when we fall short of them.

1.8 Conclusion

This research was initially driven by concerns that the law on AD was not clear, something of concern to me as a legal scholar. Upon further investigation, it became clear that the lack of a permissive law means that avoidable suffering is taking place for those who want the choice of AD; this called into question the morality of the current legal framework, which led me to Fuller and his internal morality and eventually to compassion as a route to rectify the situation.

Again, perhaps against the grain of natural law theory, the argument is not that the status quo position is immoral; clearly, it is striving to serve the values of protecting human life and the deterrence of abuse to vulnerable

[217] Scottish Government, 'St Andrew's Day Message:speech (30 Nov 17)' <https://www.gov.scot/publications/st-andrews-day-message/> accessed 13 Nov 21.
[218] Scottish Parliament, 'Art Collection - Michael Lloyd The Mace' <https://archive2021.parliament.scot/visitandlearn/24496.aspx> accessed 13 Nov 21.

people as demanded by Article 2 of the ECHR. Thus, at first sight, the motivation for maintaining the ban on AD is commendable. However, introducing compassion to the Fullerian analysis (to create the Fuller + Compassion formula) meant that cognisance, equal respect, and consideration were given to the 'other' set of vulnerable people – those who are terminally ill and want the choice of AD. In light of evidence from permissive jurisdictions that AD can become an accepted part of end-of-life care, which can be managed sensibly and safely[219] (and thus refuting the argument that the status quo acts as a bulwark), the balance tips in favour of permitting AD. Adopting a compassionate narrative to both sides of the debate (and the concerns therein) proved that the steadfast protection of one set of people's rights no longer serves as a justifiable reason to limit the rights of all others.

Linked to Fuller's concerns around procedural formulation is an apparent sense of compassion in law. He describes how entrenched positions are not conducive to moral law and that:

> One hopes that the future will bring a further bridging of extremes, for the capacity to devise institutions and procedures adequate to its problems is perhaps the chief mark of a civilized society. That capacity is in any event the chief instrument by which civilization can hope to survive in a radically changing world. [220]

and in order to move away from the abstract theoretical considerations, that:

> Those who interpret the law...must, if they are to do their job well, put themselves in the position in which the accused found himself and ask what can reasonably be expected of a human being so placed. A

[219] B. Colburn, 'Disability-based arguments against assisted dying laws' [2022] Bioethics 1-7 < https://doi.org/10.1111/bioe.13036> accessed 21 May 2022; M. Battin et al., 'Legal physician assisted dying in Oregon and the Netherlands: evidence concerning the impact of patients in "vulnerable" groups' [2007] 33 (10) JME 591.
[220] *The Morality of Law* 181.

> knowledge of life, a capacity for empathy, and a sense of what kind of rule will provide a workable guide to action, are all essential for a proper decision."[221]

Whilst well established in academia more generally, specifically in the social sciences, compassion is only starting to emerge as the focus of legal scholarship. Thus, whilst there is theoretical and practical literature on compassion to draw upon, this thesis is the first to apply the concept of compassion to Scots Law and AD. The Fuller + Compassion formula leads to the conclusion that if a specific permissive law on PAD is introduced in Scotland, it will make for a clearer, more compassionate and moral law.

The practical application of Fuller's criteria to diagnose the problems with (and consequences of) Scots Law on AD will now be implemented in the following chapters, forming Parts II and III of the thesis. Compassion will consistently permeate the analysis throughout, with in-depth consideration of it as the basis of law reform in Part IV. Having set out the theoretical frameworks that will guide this work, I will now analyse the current Scots Law on AD.

[221] Ibid 229-230.

Part II

Chapter Two: Scots Law on Assisted Dying: Finding the signal amongst the noise

2.0 Lack of Clarity

Clarity is an essential aspect of Fuller's formulation; arguably, it is the overarching concern representing one of “the most essential” ingredients of legality.[222] The official parliamentary reports from the two previous substantive attempts to reform the law in Scotland[223] - the End of Life Assistance (Scotland) Bill 2010 (2010 Bill) and Assisted Suicide (Scotland) Bill 2013 (2013 Bill) have as their first address, the fact that the current law is not clear.[224] [225] Likewise, whilst the current official Bill has not yet been drafted at the time of writing because the unprecedented consultation response is still being processed, a central theme of the proposed *Assisted Dying for Terminally Ill Adults (Scotland) Bill* 2021 consultation is that the law lacks clarity.[226]

Whilst there is some disagreement about this, this thesis will argue that the current law is not clear and is instead ambiguous, confusing, inaccessible,

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[222] *The Morality of Law* 63.
[223] Section 1.3 of this thesis stated “Scotland’s legislators have previously considered the introduction of AD Bills on three occasions…” Jeremy Purvis MSP *Dying with Dignity* [2003] consultation did not receive enough support to form the basis of a bill, hence why “two previous *substantive* attempts” is noted in Section 2.0.
[224] SP Paper 523, *Stage 1 Report on the End of Life Assistance (Scotland) Bill* [2010] ‘Calls for ‘clarity’ in Scots law’. 1st Report, Session 3, para 13 <http://archive.scottish.parliament.uk/s3/committees/endLifeAsstBill/reports-10/ela10-01-vol1.htm> accessed 21 May 2022.
[225] SP Paper 712, *Stage 1 Report on Assisted Suicide (Scotland) Bil* [2013] ‘Lack of clarity’. 6th report, Session 4, p.18. <https://archive2021.parliament.scot/S4_HealthandSportCommittee/Reports/her15-06w.pdf> accessed 11 March 2020.
[226] Section 2.1, ‘The Law’. As regards the “unprecedented response” see: Jack Norquoy, “Unprecedented response" to public consultation on Assisted Dying for Terminally Ill Adults Bill proposals” (*Liam McArthur MSP*, 23 Dec 2021) <https://www.liammcarthur.org.uk/_unprecedented_response_to_public_consultation_on_assisted_dying_for_terminally_ill_adults_bill_proposals> accessed 14 May 2022.

and could be much improved by reform. For instance, during the 2013 Bill consideration, the Health and Sport Committee of the Scottish Parliament was prompted to ask for legal advice on the current situation from academics in Scotland. This is not unprecedented, but it tells us that a consensus on the law could not be reached within the Scottish Parliament, which has access to numerous experienced legal professionals. The response from legal academics was telling, with Professors James Chalmers and Pamela Ferguson highlighting a lack of clarity in the current law. [227]

Furthermore, there is disagreement between senior academics and the legal institutions,[228] one example being the public disagreement between Professor Chalmers, Regius Professor of Criminal Law at the University of Glasgow, and the Lord Advocate;[229] testimony from organisations such as the Scottish Human Rights Commission;[230] numerous press reports from 2009 to the present day denouncing the ambiguity;[231] and obscure legal reasoning by the courts in the *Ross* judicial review.[232] All of these are

[227] Scottish Parliament, 'Assisted Suicide (Scotland) Bill Response to Question Paper: The Position under Existing Scots Criminal Law Written Submissions HS/S4/15/5/1 James Chalmers; Written Submissions HS/S4/15/5/1 Professor Ferguson' <https://archive2021.parliament.scot/S4_HealthandSportCommittee/Assisted%20Suicide%20Bill%20submissions/Papers_for_meeting_-_17_February_2015_(Web).pdf> accessed 13 Nov 2021.
[228] Of course their roles are such that we might not always expect their views to align.
[229] Prof Chalmers and the Lord Advocate have publicly disagreed, the timeline of which is outlined in: J.Chalmers, 'Assisted Suicide: Why the Lord Advocate is Wrong' (n 51).
[230] The Committees scrutinising the bill received evidence which criticised the lack of certainty in the existing law relating to AD in Scotland. The Justice Committee noted that Alan Miller of the Scottish Human Rights Commission perceived a problem with: "the lack of foreseeability on, and of accessibility to knowledge of, whether any informal action that individuals and families might take to assist suicide would lead to criminal sanctions being taken against them." and that "families and legal professionals need much more certainty". See: Scottish Parliament, *Stage 1 Report on Assisted Suicide (Scotland) Bil* [2013] para 19-20 (n 225).
[231] *Scotsman,* 'We'll consider suicide law guidance' (Sept 2009) <https://www.scotsman.com/news/uk-news/we-ll-consider-suicide-law-guidance-1-776235> Which notes the uncertainty given there is no specific offence and that sentencing is 'unpredictable'; *Scotsman*, 'Victory in bid to legalise assisted suicides.' (July 2009) <https://www.scotsman.com/news/victory-bid-legalise-assisted-suicides-2480413> where Jeremy Purvis MSP wrote to the Lord Advocate seeking 'urgent clarification' of the law in Scotland, following the Purdy ruling; *Herald Scotland*, 'A troubling lack of clarity in Scots law regarding assisted suicide.' (31st March 2015) <https://www.heraldscotland.com/opinion/13208016.a-troubling-lack-of-clarity-in-scots-law-regarding-assisted-suicide/> accessed 14 May 2021.
[232] See chapter four.

covered in this thesis, but a useful starting point is an example from the 2010 Bill consideration when the End of Life Assistance committee of the Scottish Parliament said:

> There is no ambiguity in current Scots law in this area…Any call for clarity is, therefore, spurious.[233]

Whilst during consideration of the 2013 Bill, 21 senior legal academics from Scottish Universities stated that there was a "troubling lack of clarity in Scots Law regarding Assisted Suicide", that the current situation presented a "shameful state of affairs (which) should embarrass any legal system" [234], and that "the criminal law in this field is an unpredictable mess."[235] Such remarks were made between 2010-2015 without the substantive law changing at all. Chalmers was critical of the existing law (in his written submission to the Health and Sport Committee) and stated: "I do not believe that the legal position can be clarified other than by legislation."[236]

A recurrent theme in the evidence from the 2010 Bill was a perception that reform would "clarify" the existing law in Scotland.[237] For example, Paul Philip from the General Medical Council (GMC) stated that it would be "useful if the legal position on assisted suicide were clarified",[238] and Dr Tony Calland from British Medical Association (BMA) Scotland stated that there had "always been a lack of clarity around issues at the end of life."[239] Similarly, Social Work and Health Services hoped that the law reform process would "lead to

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[233] (n 225) 256.
[234] *Herald Scotland*, 'A troubling lack of clarity in Scots law regarding assisted suicide.' (31st March 2015.) <https://www.heraldscotland.com/opinion/13208016.a-troubling-lack-of-clarity-in-scots-law-regarding-assisted-suicide/> accessed 13 Nov 21.
[235] Andrew Tickell, 'Is the current law in Scotland clear? Nope…' (*Llalands Peat Worrier*, 18 Jan 2015) <http://lallandspeatworrier.blogspot.com/2015/01/is-current-law-in-scotland-clear-nope.html> accessed 11 November 2021.
[236] Written Submissions HS/S4/15/5/1 James Chalmers, Para 35 (n 227).
[237] SPICE Briefing, End of Life Assistance (Scotland) Bill, (2 Sept 2010), 10–12. <https://archive2021.parliament.scot/SPICeResources/Research%20briefings%20and%20fact%20sheets/SB10-51.pdf > accessed 13 June 2020.
[238] (n 224) para 13.
[239] Ibid.

greater clarity in the law and in public policy on end of life choices".[240] The 2010 Bill was defeated in December 2010 by 85 votes to 16 with two abstentions.[241]

Whilst the 2010 Bill introduced the concept of a lack of clarity in the law, the next attempt, the 2013 Bill, firmly solidified it. Central themes of the 2013 Bill were that the law needed clarification and codification, that AD should uphold the person's autonomy and dignity, and that robust safeguards should be put in place to deter abuse of vulnerable people.[242] Autonomy is most prominently used as the basis for justifying law reform on AD, and Fuller himself recognised the importance of self-determination in modern law:

> To judge his actions by unpublished or retrospective laws, or to order him to do an act that is impossible, is to convey to him your indifference to his powers of self-determination...Today a whole complex of attitudes, practices, and theories seems to drive us toward a view which denies that man is, or can meaningfully strive to become, a responsible, self-determining centre of actions. [243]

A governing principle in medical ethics is respect for patient autonomy. Thus, autonomy will always play a central role in this debate (and thus, this thesis), but it is not the primary underlying theoretical principle used to support the arguments and recommendations made; those are supported via the Fuller (clarity) and Compassion framework. Bullock believes that the lesser dominance of autonomy fits well with contemporary models of medical-decision making that downplay the importance of patient self-determination

[240] Ibid West Dunbartonshire Council written submission.
[241] SP Bill 38, SPICE Briefing, Stage 1 Summary Report, p.3 < https://archive2021.parliament.scot/S3_Bills/End%20of%20Life%20Assistance%20(Scotland)%20Bill/EndofLifeAssistanceBillsummary.pdf > accessed 13 Jan 2022.
[242] (n 225).
[243] *The Morality of Law,* 162-163.

but do not entirely rule out the importance of patient autonomy.[244] Autonomy still plays an important role for two reasons.

Firstly it satisfies the consent requirement. The appeal to patient autonomy in relation to PAD can be traced to the doctrine of informed consent.[245] The consent requirement determines the permissibility or otherwise of any action to assist a patient in ending their life since, in the context of medical treatment, the general rule is that HCPs are not permitted to give treatment to a patient unless that patient has 'consented' to receive the treatment and has the capacity to give consent. Failure to respect a patient's autonomous wishes and treating that person in the absence of consent can leave health professionals open to criminal charges, civil actions and allegations of professional misconduct.[246]

Second, autonomy remains central because having the autonomy to exercise free choice over one's end-of-life decisions contributes to greater control for the patient and ultimately towards the relief of suffering. This aligns neatly with patient-centred care and the compassion aspect that aims to address bad deaths where suffering and a lack of choice (to control that suffering) are present.[247] That is, using clarity and compassion as the basis of a permissive PAD law gives people more autonomy as their end-of-life choices are increased. Thus while autonomy is not the theoretical basis of the argument for law reform in this thesis, it would be an additional benefit to greater clarity and compassion.

The lack of clarity in the existing law being presented as evidence of the 'need' to legislate for AD was the most prominent theme in the 2013 Bill's

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[244] Emma C. Bullock, 'Assisted Dying and the Proper Role of Patient Autonomy' in M. Cholbi and J. Varelius (eds), *New Directions in the Ethics of Assisted Suicide and Euthanasia* (International Library of Ethics, Law and the New Medicine 64, 2015).
[245] Tom Beauchamp, 'The right to die as the triumph of autonomy' [2006] 3 643 Journal of Medicine and Philsophy.
[246] Scottish Executive, *A Good Practice Guide on Consent for Health Professionals in NHS Scotland,* (June 2006) < https://www.sehd.scot.nhs.uk/mels/HDL2006_34.pdf> accessed 30 July 2022.
[247] Colburn, 'Autonomy, voluntariness and assisted dying' (2020) 46 JME 316.

deliberation - whilst the lack of clarity had been raised previously in 2010 [248] - this time, it stood out as a significant concern.[249] This concern has persisted with the proposed *Assisted Dying for Terminally Ill Adults (Scotland) Bill* consultation 2021, highlighting it as a grave concern.[250]

2.1 Examination of the current law

In considering the lack of legal clarity in this area, it is necessary to begin, not with AD, but with the act of suicide itself.[251] Identifying this allows us to start to unpack the origin of some of the confusion in the current law.

Suicide was historically a criminal offence in many jurisdictions, and continues to be so in some.[252] Suicide was a criminal offence in England and Wales[253] until it was decriminalised by Section 1 of the Suicide Act 1961.[254] By contrast, Scotland has never had legislation prohibiting suicide, and it has been claimed that suicide is not, and never has been, a crime in Scotland.[255] However, there is evidence that Scottish legal authorities *did* regard suicide as a crime.[256] Anderson, for example, said that suicide "is a crime, but it is one as to which it is impossible to visit the principal with punishment."[257]

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[248] Stage 1 Report on the End of Life Assistance (Scotland) Bill para 13 (n 224); Also earlier by Jeremy Purvis MSP, *Dying with Dignity consultation*, (2003) < https://archive2021.parliament.scot/S2_MembersBills/Draft%20proposals/Dying%20with%20Dignity%20Consultation%20paper.pdf> accessed 2 Feb 2019.
[249] Stage 1 Report, p.3 (n 225).
[250] p 9-10.
[251] Suicide is the act of ending ones life intentionally. Cambridge Dictionary (2022).
[252] For example, Cyprus: *Criminal Code, Government of Cyprus, Article* 219; Pakistan: Criminal Code, Government of Pakistan. Sec. 325.
[253] "Self-murder" became a crime under common law in England in the mid-13th Century. *BBC*, 'When suicide was illegal' (2011) <https://www.bbc.co.uk/news/magazine-14374296> accessed 13 Nov 2019.
[254] S1 reads: Suicide to cease to be a crime. The rule of law whereby it is a crime for a person to commit suicide is hereby abrogated.
[255] R. A. A. McCall Smith and D. Sheldon, *Scots Criminal Law* (2nd ed, Bloomsbury 1997) 171; S. A. M. McLean, C. Connelly & J. K. Mason, "Purdy in Scotland: We Hear, but Should We Listen?" (2009) JR 265 at 276.
[256] G. Mackenzie, *The Laws and Customs of Scotland, in Matters Criminal* (1678) 1.13; Erskine, Inst 4.4.46 ("as truly criminal the murder of one's neighbour") Hume, Commentaries I, 300.
[257] A. M. Anderson, *The Criminal Law of Scotland*, 2nd ed (Edinburgh 1904) 148.

Chalmers states, “We don’t actually know whether suicide is a criminal offence in Scotland. It’s commonly asserted that it isn’t - but there’s no real basis for it.”[258] He suggests that because suicide was a common law offence in England before the Suicide Act of 1961 and Scotland has never had such legislative or common law provisions, it might be thought that suicide has never been a crime in Scotland. Chalmers goes on to say:

> But that misunderstands how English law made the point clear: archaic rules about the forfeiture of a suicide’s goods and chattels, along with the system of coroners’ courts, meant that the issue was a real, practical one there in a way that it never could be in Scotland … scrutiny of the older writers on criminal law reveals that they consistently thought suicide was criminal, just practically impossible to punish.[259]

Other commentators state with certainty that suicide is not a crime in Scotland.[260] According to McLean *et al.:,* “Suicide has never been a crime in Scotland. There is no Suicide Act or equivalent …”.[261] Ferguson and McDiarmid indicate that “[it] is no longer a crime to commit suicide. The crime seems to have fallen into desuetude.”[262] [263]

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[258] James Chalmers, ‘Assisted suicide in Scotland: (not) clarifying the law’ (*UofG School of Law Blog*, 10 Febuary 2015) <https://www.uofgschooloflaw.com/blog/2015/02/10/assisted-suicide-in-scotland-not-clarifying-the-law> accessed 12 January 2019.
[259] Ibid.
[260] G. Maher, ‘'The Most Heinous of all Crimes': Reflections on the Structure of Homicide in Scots Law.’ in J Chalmers & F Leverick (eds) *Essays in Criminal Law in Honour of Sir Gerald Gordon* (Edinburgh University Press 2010) 218-40.
[261] SAM McLean, C Connelly and JK Mason, “Purdy in Scotland: we hear, but should we listen?” 2009 JR 265 at 276; See also P. R. Ferguson, “Killing ‘without getting into trouble’? Assisted dying and Scots criminal law” (1998) 2 Edin LR 289 at 290.
[262] P. R. Ferguson & C. McDiarmid, *Scots Criminal Law, A Critical Analysis* (2nd edn Edinburgh University Press 2014) 248 para 9.3.2.
[263] Desuetude is a doctrine that has the effect of rendering inoperative legal principles which have not been enforced for a considerable period. The Latin phrase *cessante ratione legis, cesssat ipsa lex* means that, once the public policy objective or rationale for a law has ceased to apply, the law itself ceases to apply.

The fact that Scotland has not seen prosecutions for attempted suicide supports the view that it is not a crime. However, Chalmers countered this in 2010 when he wrote:

> The absence of such prosecutions, however, seems to have had more to do with the lack of any general theory of attempts in Scots law prior to 1887. Although there is now a general rule that any attempt to commit a crime is itself criminal, it seems that attempted suicide has not in practice been treated as a crime per se in Scots law, no doubt because if a prosecution were felt necessary resort might be made to the offence of breach of the peace.[264]

A recent investigation has shown that suicidal people are not infrequently arrested for breach of the peace (BOP). Because of a lack of mental health services, this is the only option for the police to address the situation.[265]

The law around BOP has developed over the years such that, where BOP could have been used in the past to cover almost any kind of criminal-type activity, its role now is much more circumscribed.[266] Following *Smith v Donnelly* 2002,[267] breach of the peace is conduct that is "genuinely alarming and disturbing" and capable of threatening "serious disturbance to the community".[268] Additionally, BOP constitutes a public element requiring a "realistic risk" of the conduct being discovered.[269] Traditional suicide may satisfy these requirements – jumping from a building, for example, will be alarming and disturbing for the public to witness and cause a serious

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[264] J. Chalmers, "Assisted dying: jurisdiction and discretion" (n 6). See also J.Chalmers (2015) Assisted suicide in Scotland: (not) clarifying the law (n 258).
[265] Fiona Walker, 'Banged-up for being suicidal' (*BBC Scotland* 19 July 2012) <https://www.bbc.co.uk/news/uk-scotland-18882728> accessed 13 Nov 2020.
[266] The Scottish law definition of a breach of the peace is conduct "severe enough to cause alarm to ordinary people and threaten serious disturbance in the community", which presents as "genuinely alarming and disturbing, in its context, to any reasonable person". *Smith v Donnelly* 2002 J.C. 65 or 2001 S.L.T. 1007 or 2001 S.C.C.R. 800 (Confirmed with full bench decision in *Jones v Carnegie* 2004 S.L.T. 609 or 2004 S.C.C.R. 361)
[267] Ibid.
[268] Ibid [17].
[269] *Jones v Carnegie* 2004 SLT 609.

disturbance. If the suicide is complete, there would be no conviction. In contrast to traditional suicide attempts, a prearranged voluntary assisted death carried out in a private setting would struggle to satisfy BOP criteria. Here, any conviction levied would be for the person who assists, not the person who dies.

The legal status of suicide in Scotland is an area that could benefit from clarification, particularly from a public policy position, to aid resource allocation considerations both for the police and mental health services. Although the question of whether suicide is, or was, itself criminal in Scotland remains debatable, it is not fundamentally important to further analysis of AD. Therefore, the majority view and general societal acceptance that suicide is not illegal in Scotland is taken as the baseline for this work.

Having concluded this, consideration now moves to consider *assistance* in suicide by third parties, with an analysis of Scots criminal law more generally first required to aid understanding.[270]

2.1.1 Laws on Assisted Dying in Scotland and the UK

The Deputy Minister for Health made the following statement to the Scottish Parliament in 2004:

> Under Scots law, an act of euthanasia by a third party, including physician-assisted suicide, is regarded as the deliberate killing of another and would be dealt with under the criminal law relating to homicide. The consent of the victim would not be a defence and no degree of compassion on the part of the person who carried out the

[270] Suicide meaning the act of intentionally ending one's life. Recommendations made in chapter 10 – that PAD should only be available to the terminally ill – mean that the terminology of 'suicide' is, arguably, not appropriate i.e., the choice to live has already been taken away by the infliction of an illness that will cause death, the choice of an assisted death only allows the inevitable dying process to be expediated and less traumatic. In this chapter however, consideration is given specifically to assisting suicide, because of the unregulated nature of the status quo, we cannot be sure that each situation was voluntary and intentional.

> act would amount to a legal justification. There might be cases in which the circumstances of the offence would make a charge of culpable homicide more appropriate than one of murder, and a court would take all the circumstances of the case into account before sentence was pronounced. However, if the accused was convicted of murder, a sentence of [life] imprisonment would be mandatory.[271]

The statement summarises how AD is dealt with in Scotland:

- It is considered a matter for the criminal law of homicide.
- Consent on the part of the victim is not a defence.
- Compassion on the accused's part does not *legally* justify the act(s).
- In some circumstances, the charge may be reduced to culpable homicide.[272]
- Cases are very fact-specific, and sentencing is left to the court's discretion, except that murder always carries a compulsory life sentence.[273]

Scotland has no statute on AD, but euthanasia is very briefly mentioned under secondary legislation, namely the revised Code of Practice relating to the Adults with Incapacity (Scotland) Act 2000,[274] which states that the "AWIA does not affect the existing criminal law and an act of euthanasia is open to prosecution under the criminal law".[275] The above summary applies to ordinary citizens and healthcare practitioners alike.

[271] Deputy Minister for Health and Community Care, Scottish Parliament, Official Report, 11 November 2004, Col. 11891.
[272] Where diminished responsibility is present for example.
[273] Criminal Procedure (Scotland) Act 1995 s205.
[274] part 5 (Medical Treatment).
[275] Sections 2.65 and 2.66.

In contrast, in England and Wales, anyone who "aids, abets, counsels or procures" another person's suicide (or attempted suicide) commits a statutory offence under Section 2 of the Suicide Act 1961. The Director of Public Prosecutions (DPP) approach to prosecuting this statutory offence is set out in a published policy, *'Suicide: Policy for Prosecutors in Respect of Cases of Encouraging or Assisting Suicide'.*[276] Cases of assisted suicide, of which there have been many, are dealt with in the Special Crime Division.[277]

In Northern Ireland, a person commits an offence under Section 13 of the Criminal Justice Act (Northern Ireland) 1966 if they perform an act capable of encouraging or assisting the suicide or attempted suicide of another person. Northern Ireland also has a published prosecution policy.[278] In Ireland, Under Section 2 of the Criminal Law (Suicide) Act 1993, anyone who "aids, abets, counsels or procures the suicide of another [person]" can be convicted and imprisoned for up to 14 years.

Thus, the rest of the UK has firmly settled laws on AD and has made them accessible to the professions, the public, and policymakers. The statutes, published prosecution policies and case law[279] collectively provide a strong legal steer for how the other UK jurisdictions will deal with AD. Approaching AD more robustly in Scotland (by promulgating specific laws) would not only allow institutions to better satisfy Fuller's test for 'good law'[280] (i.e. what the law ought to be) but would also bring Scotland onto a parallel legal footing with the rest of the UK in terms of *clarity*, if not the *content* of the law.

[276] Crown Prosecution Service, 'Suicide: Policy for Prosecutors in Respect of Cases of Encouraging or Assisting Suicide'. February 2010 (Updated October 2014) <https://www.cps.gov.uk/legal-guidance/suicide-policy-prosecutors-respect-cases-encouraging-or-assisting-suicide> accessed 13 Nov 21.
[277] Ibid para 49.
[278] Public Prosecution Service for Northern Ireland, 'Policy on Prosecuting the Offence of Assisted Suicide.' (Feb 2010) <https://www.ppsni.gov.uk/publications/policy-prosecuting-offence-assisted-suicide> accessed 13 Nov 21.
[279] See chapter three.
[280] In particular the requirement for promulgation.

2.1.2 Scotland's Law on Homicide

In the absence of specific provision by statute, prosecutorial guidance (covered at 3.2) or specific case law (see Chapter Three), AD is dealt with under the common law crime of homicide in Scotland. Homicide is the destruction of human life[281] and, in Scotland, is divided into two categories: murder and culpable homicide.[282]

An individual who, *with wicked intent or wicked recklessness,* causes the death of another, without lawful excuse, commits murder.[283] Macdonald's formulation of murder as "the destruction of life"[284] was modified by the decision in *Drury v HM Advocate* (2001) to place more emphasis on the 'wicked' intention required:

> Murder is constituted by any wilful act causing the destruction of life, whether (wickedly) intended to kill, or displaying such wicked recklessness as to imply a disposition depraved enough to be regardless of the consequences.[285]

Whilst the focus here is on the wickedness of the *intention*, subsequent case law has further defined what 'wickedness' means in relation to the other state of mind relevant to murder: *recklessness*. Following *Purcell v HMA*[286] an intention to cause physical injury is a prerequisite of wicked recklessness in Scotland. While 'intention' describes doing something deliberately, and recklessness means having an utter indifference or wicked disregard towards the fatal consequences, the term 'motive' usually describes the reason for committing an act. Importantly, however, the Scots criminal law does not ask

[281] JHA Macdonald, *A Practical Treatise on the Criminal Law of Scotland* (5th edn, by J Walker and DJ Stevenson,1948) 89.
[282] Other categories are recognised and treated seperatley in Scots Law, such as corporate homicide and driving offences.
[283] *Drury v HM Advocate* (2001) SLT 1013.
[284] Ibid.
[285] *Drury* [89].
[286] *Purcell v HMA* [2007] HCJ 13.

why the accused committed a crime[287] - one might believe that it is one thing to kill a person out of greed or hate, but quite another to end life on compassionate grounds[288] - in other words, motive in Scots criminal law is irrelevant.[289] Despite this, the discussion of motive has permeated this debate at the Scottish Parliament.[290]

Culpable homicide tends to be described rather than defined.[291] In *Drury*, it was stated that "the crime of culpable homicide covers the killing of human beings in all circumstances, short of murder, where the criminal law attaches a relevant measure of blame to the person who kills".[292] Claire McDiarmid's description is helpful:

> Culpable homicide occupies potentially more difficult, and certainly rather broader, terrain than murder, extending from killing which is so serious as to sit on the borderline with it to that which, for any of a wide variety of reasons, renders the agent of the death so unblameworthy that the question may be whether to prosecute for a homicide offence at all.[293]

For academic distinction, culpable homicide is divided into voluntary and involuntary culpable homicide, with the latter being subdivided into lawful acts and unlawful acts. While these divisions have existed for centuries,[294]

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[287] *Quinn v Lees* [1994] SCCR 159.
[288] See Chapter Ten.
[289] *Gordon v HMA* 2018 JC 139.
[290] For example, "…notwithstanding that motive currently makes the difference between murder and culpable homicide in Scotland." Stage 1 Report on AS (Scot) Bill 2013 Para 40.
[291] The Culpable Homicide (Scotland) Bill 2020 attempted to reform the law of culpable homicide in Scotland but fell at Stage 1 on 21 Jan 2021.
[292] *Drury v HM Advocate* 2001 SLT 1013 [13] (LJ-G Rodger). This dictum has been cited with approval in subsequent cases including *Transco plc v HM Advocate* No 1 2004 JC 29 [4] (Lord Osborne); and *Lilburn v HM Advocate* [2011] HCJAC 41, 2012 JC 150 [4] (LJ-G Hamilton).
[293] C.McDiarmid, 'Killing Short of Murder: Examining Culpable Homicide in Scots Law.' in A. Read et al. (eds) *Homicide in Criminal Law. Substantive Issues in Criminal Law* (Routledge 2018) 21-36.
[294] Hume identified 'Culpable homicide by doing a lawful act without due caution' 233, 'Culpable homicide where death ensues on a purpose to do some slight injury' 235 and 'Culpable homicide where there is a mortal purpose, but taken up on gross provocation' 239.

convictions are always for the generic offence of culpable homicide in practice.

Voluntary culpable homicide arises where the accused has killed in a way that would, in principle, satisfy the definition of murder, but a partial defence (of provocation or diminished responsibility) operates to 'reduce' the crime to the lesser form.[295] **Involuntary culpable homicide** generally arises where the death of the deceased was not within the accused's actual or deemed contemplation, but the accused is nonetheless considered to be sufficiently blameworthy for it that criminal liability is entailed.[296] For example, the accused is involved in committing another crime (almost invariably the crime of assault), and death ensues. Macdonald explains this category as "the doing of any unlawful act … from which death results though not foreseen or probable".[297] As I will examine on p.74, the *mens rea* (state of mind) is that for the underlying crime. It can also arise from a lawful act,[298] by contrast, but nonetheless causes the victim's death. Here, the *mens rea* is recklessness.[299] Given the fact that diminished responsibility is not infrequently used as a partial defence in AD cases,[300] it could be argued that AD should fall into the category of voluntary culpable homicide.[301]

[295] *MacAngus v HM Advocate* [2009] HCJAC 8, 2009 SLT 137 [27]. The terminology of 'reducing' is not accepted in *Drury* where LJ-G Rodger described it as 'essentially misleading' [17] however it has continued to be used. See J.Chalmers and F.Leverick, *Criminal Defences and Pleas in Bar of Trial* (W Green 2006) para 1.02.
[296] C.McDiarmid, 'Killing Short of Murder: Examining Culpable Homicide in Scots Law' (n 293).
[297] Macdonald, *A Practical Treatise on the Criminal Law of Scotland* (4th edn, Roger McGregor Mitchell 1929) 89 at 150.
[298] See *Transco* [35]– [38] (Lord Hamilton) (n 292).
[299] Ibid.
[300] See cases discussed at 2.4 and 3.0 (Mr Webb, Ian Gordon, Susanne Wilson).
[301] Involuntary culpable homicide is unlikely to be relevant, given that the accused will have been aware that the consequence of their actions will be the person's death. The unlawful act concept could be relevant because of another crime being committed, for example in a situation where the accused obtains and supply's drugs to the person wishing to die. Again though, the death is foreseeable as per McDonalds definition, so the definition would not be satisfied. Recklessness as the *mens rea* is also not appropriate, as the assister knows what they intend to do.

An important practical result of the distinction between murder and culpable homicide is that a murder conviction attracts a compulsory sentence of life imprisonment.[302] In contrast, the sentence for culpable homicide is more flexible,[303] allowing access to the full range of sentencing options, including admonishment,[304] community service[305] and a custodial sentence up to a life sentence.[306] McDiarmid believes that the stigma attached to a murder conviction is also significant in that there is less stigma in relation to a charge of culpable homicide.[307] Still, the practical impact of a culpable homicide conviction is not just the risk of imprisonment but also employment implications, especially for healthcare practitioners.

Looking at distinctions and possible charges more thoroughly, it is helpful to consider in more detail the behavioural and mental elements as they might apply in AD, known as *Actus Reus* (behavioural) and *Mens Reus* (mental).

The forbidden behavioural element - the *actus reus*[308] - of both murder and culpable homicide is the destruction of life; in each case, the accused has caused the death of another person. The *actus reus* is typically an act involving "some willed bodily or muscular movement" causing death,[309] although an *omission* causing death may also constitute the *actus reus*.[310] Where a person assists in the death of another, the *actus reus* could be

[302] Criminal Procedure (Scotland) Act 1995 s205.
[303] The process of determining the appropriate sentence in a case of culpable homicide is much less structured than murder. There are currently no Scottish guidelines to follow but the Scottish sentencing council is working on this.
[304] See *Brady* at 3.1.
[305] *Docherty v HM Advocate* 2000 SCCR 106 (300 hours community service).
[306] *K (A Child) v HM Advocate* 1993 SLT 237 (detention without limit of time for a child-accused aged 12); *Kirkwood v HM Advocate* 1939 JC 36 (penal servitude for life).
[307] C.McDiarmid, 'Killing Short of Murder: Examining Culpable Homicide in Scots Law' 6 (n 293); See also Criminal Procedure (Scotland) Act 1995, s 205. See also: J.Chalmers and F.Leverick, 'Fair Labelling in Criminal Law' (2008) 71 (2) MLR 217.
[308] The external element or the objective element of a crime, the Latin term for the 'guilty act' which, when proved beyond a reasonable doubt in combination with mens rea, 'guilty mind', produces criminal liability.
[309] Jim Stephens, *Criminal Law*, *Current Legal Problems* (Sweet and Maxwell 1995). 73–111, Part 1.73.
[310] Gerald Gordon, The Criminal Law of Scotland, Vol.1, (1st ed, 1967) at 3.30 p 81. For further discussion on the Duty Theory see J.D.Robertson, 'Criminal liability for omissions in Scots law' (LL.M(R) thesis, University of Glasgow 2012).

constituted by a range of actions, including directly administering[311] drugs that will end a person's life.

In addition to the *actus reus*, the accused must possess the relevant mental state – the *mens rea.*[312] Indeed, the principle of *actus non facit reum nisi mens sit rea*, (meaning the act cannot be reprehensible unless the mind is also guilty) is generally applied in Scots Law.[313] The two categories of murder and culpable homicide are distinguished by the *mens rea* and hence the accused's blameworthiness. Proof of the mental element usually has to be by inference from the surrounding circumstances since it is impossible to read another person's mind.[314] Both *mens rea* and *actus reus* must be present for the prosecution of murder or culpable homicide, but culpable homicide would be the charge if the *mens rea* of wicked recklessness or wicked intent (needed for a charge of murder) could not be proved.[315] [316]

At present, the law in Scotland makes the distinction only between murder and culpable homicide. In England and Wales, assisting suicide is distinguished from murder and manslaughter.[317] In reality, however, cases of compassionate assistance to die cover a broad spectrum of ethically different acts, ranging from direct euthanasia to giving moral support. This thesis does not explore every probable case of assisted death and how it might occur, as the number of potential scenarios is infinite. However, Ferguson provided a

[311] Injecting or pouring drugs into a person's feeding tube for example.
[312] The intention or knowledge of wrongdoing that constitutes part of the crime - mental state. The "classic" definition is that provided by JHA Macdonald, *Practical Treatise on the Criminal Law of Scotland* (5th edn by James Walker and D J Stevenson, W Green, 1948) 89.
[313] C.McDiarmid, 'Killing Short of Murder: Examining Culpable Homicide in Scots Law' 22 (n 293).
[314] C. McDiarmid, *Scots Criminal Law Essentials* (Edinburgh University Press 2018) p.11.
[315] See *Drury.*
[316] In *Petto v HM Advocate* 2012 J.C. 105 the view was that "the mental element in murder and culpable homicide in contemporary Scots law … is in need of a thorough re-examination" and is "…burdened by legal principles … that are inconsistent and confusing" but that reform should not be "… done by ad hoc decisions of this court in fact specific appeals" but by "the normal processes of law reform". (Lord Justice-Clerk Gill at 22) ([2011] HCJAC 80, 2012 JC 105 [20] (LJ-C Gill)). Following Lord Gill's remarks the Scottish Law Commission is working towards developing a discussion paper on the mental element. This is despite the SLC removing the law of homicide from its programme of work in 2015.
[317] The English equivalent of the Scottish crime of culpable homicide.

helpful typology in her written evidence to the Health and Sport Committee of the Scottish Parliament, which distinguished types of assistance:[318]

(1) positive, direct acts, immediately connected with the subsequent death

(2) the provision of the means of committing suicide

(3) the provision of information and advice

(4) an omission to act: failure by one person to prevent another person from committing (or attempting to commit) suicide.[319]

The problem with AD being labelled homicide (the general nature of the prohibition via the criminal law) is what Hart terms 'problems of the penumbra'.[320] These problems arise from the law's generality, which leaves gaps outside the standard instances or settled meaning of things. Lord Drummond Young addressed this penumbra in the Scottish AD case of *Ross v Lord Advocate,* articulating how certainty in law is unattainable by its very nature.[321] This is, of course, accurate, but the objective here is not certainty. The concerns centre on the fact that if we cannot logically deduce what AD conduct is and is not legal, and what the consequences of a breach may be with any degree of certainty, it puts the most severe crime (homicide) in the same realm as general laws such as, for example, rules forbidding vehicles in public parks.[322] Settled meaning in law is rare, but it is centrally important with AD that borderlines are first distinguished if borders must not be crossed. Clearly outlining the legality or otherwise of such acts would better help Scots Law meet Fuller's criteria and provide greater clarity for citizens.

Following *Drury*, there arose a question as to whether there could be a defence of 'lack of wickedness' – where the accused deliberately intended to

[318] Stage 1 Report on AS (Scot) Bill, 6th Report, Session 4 (2015) p. 5.
[319] James Chalmers added *Suicide Tourism* to this which will be covered at 8.5.
[320] H.L.A., Hart, 'The Separation of Law and Morals' (n 57).
[321] [71] [72].
[322] Ibid.

kill the victim but that intention was found not to be wicked. The cases of *Elsherkisi v HMA* (2011)[323] and *Meikle v HMA* (2014)[324] have now removed this possibility. In *Elsherkisi*, Lord Hardie stated on appeal that "all intentional killings were not wicked, and wickedness was not a necessary inference that could be drawn from an intention to kill", but

> ... where intention to kill is either admitted or proved ... in the absence of any legally relevant factor capable of justifying or mitigating the accused's actions, the jury should be directed that they must convict of murder.[325]

McDiarmid believes that, concerning murder, a common-sense view has prevailed[326] and that the *mens rea* of wicked intention to kill is established where the accused intended to kill, and no recognised defence applies.[327] However, with AD, although the intention is to end the person's life, this is for compassionate altruistic reasons, so it could be argued that the intention falls well short of being wicked and that this could be inferred from those altruistic motivations. At present, though, no recognised defence would apply in Scots criminal law, and whilst case law shows that AD typically involves the accused admitting their actions and often phoning the police themselves,[328] compassion is not a *legally* justifiable excuse. Lord Hardie's direction in *Elsherkisi* would therefore mean that a jury would be directed to convict for murder, even if the assister's actions were not considered to be wicked.

However, the line between euthanasia, where the accused actions directly cause death, and AD, where only assistance is provided, is not clear. How far

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[323] *Elsherkisi v HMA* [2011] SCCR 735.
[324] *Meikle v HMA* [2014] SLT 1062.
[325] *Elsherkisi v HMA* [2011] SCCR 735 at [12] (noted in Gordon (4th edit) vol II para 30.13).
[326] C.McDiarmid, 'How Do They Do That? Automatism, Coercion, Necessity and Mens Rea in Scots Criminal Law' in A. Reed et al. (eds) *General Defences in Criminal Law* (1st edn Routledge 2014) p.3 <https://pureportal.strath.ac.uk/files-asset/46064327/McDiarmid_Ashgate_2014_How_do_they_do_that_automatism_coercion_necessity_and_mens_rea.pdf> accessed 13 Dec 2019.
[327] *Elsherkisi v HM Advocate* [2011] HCJAC 100, 2011 SCCR 735; 2012 SCL 181 [11]-[13].
[328] *HMA v Ian Gordon* at 2.2 and chapter three at Section 3.1 generally.

an individual would have to assist before such assistance crossed the line from murder to culpable homicide is debatable. In genuine cases of AD, where the person acts to relieve the other's suffering, a wicked intention is, arguably, not present, but, under the current law, compassionate motives are in themselves not capable of providing the basis for a complete defence or even a partial excuse.[329] This means that the law gives more recognition to emotions such as anger (provocation)[330] and fear (self-defence)[331] than to compassionate, altruistic emotions.[332]

This approach may nevertheless be justified: recognising a partial excuse of 'acting compassionately' could be dangerous, as the concept of 'compassion' – which is difficult to define, not least because people often act out of mixed motives[333] – could be used to mask selfish reasons for killing. A defence of compassionate killing, such as that proposed by Huxtable,[334] is problematic as the investigation occurs *after the fact*. Chapter Ten will explore this in greater detail and will argue that compassion can serve as the appropriate basis of a well-drafted law that includes *upfront* procedural safeguards (to avoid abuse and ensure competency/consent) *before* any death takes place, therefore acting as a protective measure where one is currently absent.

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[329] C.McDiarmid, SLC Homicide Seminar (5 Oct 2018) <https://www.scotlawcom.gov.uk/files/3015/4055/0080/Homicide_seminar_-_Dr_Claire_McDiarmid_-_mens_rea_of_culpable_homicide.pdf> accessed 13 Jan 2020.

[330] Macdonald, *Criminal Law* 93 "Being agitated and excited and alarmed by violence, I lost control over myself, and took life when my presence of mind had left me, and without thought of what I was doing." 'Scots law requires a loss (though not a complete loss) of self-control. This must be brought about, immediately, by one of the two accepted provoking acts: either an initial act of violence towards the accused by the ultimate deceased or the discovery of sexual infidelity.' See: Claire McDiarmid, *Don't Look Back in Anger: The Partial Defence of Provocation in Scots Criminal Law* in Chalmers and Leverick *Essays in Criminal Law in Honour of Sir Gerald Gordon* (EUP, 2010). See also: *Drury v HM Advocate* 2001 SLT 1013.

[331] The basic principles of self-defence are set out in *Palmer v R, [1971] AC 814*; approved in *R v McInnes*, 55 Cr App R 551:"It is both good law and good sense that a man who is attacked may defend himself. It is both good law and good sense that he may do, but only do, what is reasonably necessary.".

[332] Heather Keating and Jo Bridgeman, 'Compassionate Killings: The Case for a Partial Defence' (2012) 75 (5) MLR 679.

[333] Ibid.

[334] Richard Huxtable, 'Splitting the difference? Principled Compromise and Assisted Dying' (2014) 28 (9) Bioethics 473.

So, although assistance could potentially legally amount to murder in Scots criminal law, it would more often be prosecuted in practice as the lesser offence of culpable homicide.[335] However, the Lord Advocate has not ruled out prosecution for murder, depending on the facts and circumstances.[336] Cases are very fact-specific, so a decision cannot be guaranteed or even predicted either way. Indeed, as recently as 2018, there have been prosecutions for murder in AD cases in Scotland, and it is worth scrutinising the case law for further insight.[337] The following cases address ordinary citizens who have assisted loved ones to die (and not healthcare practitioners); they have been examined and included here to illustrate the lack of clarity in the law and the inappropriateness of leaving this issue within the realms of homicide. They help to illustrate that if PAD is legalised, there will be no, or less of a need for citizen assistance as those assisted would be able to avail themselves as part of their end-of-life healthcare options. Further, they illustrate the pain and distress experienced by dying people and their loved ones due to the current illegality of PAD.

2.2 *HMA v Ian Gordon* [2018] [338]

HMA v Ian Gordon is a 2018 judgement of the High Court of Glasgow. Mr Gordon was initially charged with murdering his wife after admitting to smothering her with a pillow. Later the Crown accepted his plea of guilty to

[335] GH Gordon, and MGA Christie, *Criminal Law* (3rd edn. W Green 2000) para 25.03; McCall Smith and Sheldon *Scots Criminal Law* (Butterworths 1997) p.173; Ferguson, "Killing 'without getting into trouble'? Assisted dying and Scots criminal law" (1998) p.294.
[336] The Lord Advocate has made it clear that, when there is a sufficiency of evidence that an individual had caused the death of another, it would be difficult to conceive of a situation in which it would not be in the public interest to prosecute, but each case would be considered on its own facts and circumstances. Frank Mulholland QC (Lord Advocate), SP Justice Committee, Assisted Suicide (Scotland) Bill Written submission from the COPFS <https://external.parliament.scot/S4_JusticeCommittee/Inquiries/AS1._COPFS.pdf> accessed 17 Nov 2018.
[337] *HMA v Ian Gordon* [2018] where Mr Gordon was initially charged with murder before it was reduced to the lesser offence. In England, in October 2019 Mavis Eccleston, was acquitted by a jury after being charged with murder for helping her husband of 60 years, to end his own life rather than suffer from advanced bowel cancer.
[338] *HMA v Ian Gordon* [2018] HCJAC 21.

culpable homicide on the basis of diminished responsibility. Section 51 (B) (1) of the Criminal Procedure (Scotland) Act states that:

> A person who would otherwise be convicted of murder is instead to be convicted of culpable homicide on grounds of diminished responsibility if the person's ability to determine or control conduct for which the person would otherwise be convicted of murder was, at the time of the conduct, substantially impaired by reason of abnormality of the mind.

The reference in subsection (1) to abnormality of mind includes mental disorder.[339]

Mr Gordon was sentenced to 40 months' imprisonment in October 2017. The sentencing judge, Lord Arthurson, determined that given the nature of the crime: "… in the exercise of my public duty and in the public interest only a custodial sentence is appropriate".[340] However, on appeal in January 2018, Lord Brodie, sitting with Lord Turnbull, overturned the sentencing decision and admonished Mr Gordon for the culpable homicide of his wife.

Mrs Gordon was suffering from lung cancer, for which she was not receiving treatment because of her extreme anxiety about hospitals.[341] On occasion, she had visited the hospital with the appellant accompanying her but was scared of a diagnosis, and the two agreed that the accused would help her die peacefully.[342] The accused accepted that he had caused the death of his wife by putting a pillow over her face after she had taken an overdose of drugs, which he helped her to concoct.[343] The pathologist expressed the opinion that it was possible that the drugs alone could have accounted for the death.[344] It is difficult to determine whether this should be labelled as a case

[339] Criminal Procedure (S) Act 1995 Part VI s51(B)(2).
[340] *Ian Gordon* (n 338) para 31.
[341] Ibid 14.
[342] Ibid 19.
[343] Ibid 25.
[344] Ibid 22.

of euthanasia or what we would term AD; Mr Gordon gave his wife assistance to die, but it could not be proven that his actions indeed ended her life, given the actions that Mrs Gordon had already taken towards ending her own life.

The accused fully and consistently admitted to the police what he had done; thus, the issue at trial was whether he was guilty of murder or culpable homicide. At this time (2016), there was no evidence to suggest diminished responsibility, and thus Mr Gordon was indicted for murder.[345] The initial report of the Crown psychiatrist who had examined Mr Gordon in April 2016 did not disclose a basis for a plea of diminished responsibility.[346] The trial was set for June 2017, by which time psychiatric evidence concluded that he was suffering from an abnormality of the mind at the time, namely a depressive illness.[347]

There remained a question as to whether the appellant's depressive illness (being an abnormality of mind), albeit undiagnosed and not apparent even to the accused himself, was sufficient to have substantially impaired his ability compared with an ordinary person to determine and control his acts.[348] Following evidence from the accused's daughter on her parents' relationship dynamics, including how Mr Gordon had given up work to care for his wife, the Crown changed their view. Rather than leave it to the jury to decide whether diminished responsibility had been established, the Crown accepted the previously tendered plea to culpable homicide.[349]

At the sentencing diet, the court referred to the many testimonials tendered on behalf of the appellant prior to the sentence. One, from a Dr Russell, described what the appellant had done as a "final act of love" and

[345] Ibid 25.
[346] Ibid 26.
[347] Ibid 24.
[348] Ibid 27.
[349] Ibid 28.

compassion, without malice and with kindness.[350] On appeal, Mr Gordon's defence submitted no public or private interest in imposing a custodial sentence. There was agreement that diminished responsibility alone would not point away from custody, but:

> What was more important was the state of health of the appellant's wife and her fear of medical intervention … It was noteworthy that had the appellant not told the police what he had done it is unlikely that there would ever have been a prosecution.[351]

Further, there had been instances in the past where a custodial sentence had not been imposed in circumstances that were broadly similar to those in the present case – the cases of Paul Brady and Susanne Wilson described later in this chapter, for example.[352] In a brief second address, defence counsel acknowledged that, in the case of Paul Brady, while there had been "no peg on which to hang it, everyone thought it was the right thing to do".[353]

Lord Brodie, delivering the appeal judgement in *Gordon*, said:

> There are circumstances in which intentional killing is justifiable and therefore not criminal but such circumstances are far removed from those in the present case… Neither the attitude of the victim of a homicide nor the fact that he was suffering from a terminal disease nor the compassionate motives of the perpetrator in killing him, are of any relevance to the question of criminal responsibility.[354]

When the murder charge was levied, it was unknown that the accused had been suffering from diminished responsibility, so under *Elsherkisi,*[355] the

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[350] Ibid 30.
[351] Ibid 32.
[352] 3.0 Scottish 'assisted dying' cases unearthed.
[353] *Ian Gordon* [34].
[354] Ibid 35.
[355] *Elsherkisi v HMA* 2011 SCCR 735 at [12] (noted in Gordon (4th edit) vol II para 30.13): "...where intention to kill is either admitted or proved ... in the absence of any legally relevant

court of appeal confirmed that the original charge of murder was correct, as was the trial advocate depute's understanding of the law.[356] Once diminished responsibility was established, however, this rightly reduced the charge to culpable homicide.[357] Notably, though, the court partially recognised[358] that there was no 'wicked' element to Mr Gordon's actions, and so arguably, murder should *not* have been the charge in the first instance. Mr Gordon was not remorseful for his actions and, when initially charged with murder, said, "I did it because she wanted me to. I loved her and still love her, and that's all; she is free now".[359]

The court of appeal discussed how the circumstances in which the appellant came to "kill his wife" could be seen as "exceptional".[360] Lady Rae also used this adjective in January 2018 in the case of Susanne Wilson. While such cases may be infrequent, they are not exceptional in that they are not unprecedented. The problem is that in these cases, there is a lack of judicial precedent in Scots Law to draw on. For these and the other reasons set out in this thesis, such cases need to be guided by clear and appropriate legislation and not left to the courts to decide as and when the cases arise. This would have the benefit of complying with Fuller's criteria on promulgation, clarity, constancy through time, and congruence between official action and declared rules, helping everyone involved in these difficult situations to be better directed and informed.

As noted earlier, Scots Law frequently looks to England and Wales to help inform decision making in AD cases.[361] When considering the sentence in *Gordon*, Lord Brodie drew comparisons with the English case of *R v Webb*

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factor capable of justifying or mitigating the accused's actions, the jury should be directed that they must convict of murder."

[356] *Ian Gordon* 37.

[357] Ibid 37-39.

[358] para 30 of the appeal, the trial judge acknowledges the medically qualified character reference which describes Mr Gordon's actions as a 'final act of love' and states 'that may very well be so'.

[359] para 20.

[360] para 42.

[361] Introduction, Section 1.4.

[2011], and so it is worth explaining this case to contextualise the *Gordon* decision.

In *R v Webb* [2011],[362] Mr Webb was initially charged with the murder of his wife before being found guilty of manslaughter on the grounds of diminished responsibility.[363] He was sentenced to two years in prison, but this was reduced to a suspended 12-month sentence on appeal. The court described the circumstances of this case as "unusual"[364] and "tragic".[365] Mr Webb's wife had several actual and imagined ailments and had considered ending her life for years.[366] Mrs Webb had begged her husband for help to die and, in May 2010, took 34 tablets washed down with brandy and fizzy orange. When Mr Webb feared this was unsuccessful, he smothered his sleeping wife with a plastic bag and a towel.[367] Mr Webb reported his wife's death and admitted his actions, fully assisting the police with their inquiries.

The jury concluded that Mr Webb's mental responsibility for his actions had been substantially impaired. He had developed a psychiatric condition, described as a significant adjustment disorder, and one of its prominent features was depression.[368] He was thus acquitted of murder. The sentencing judge took the view that it was nevertheless an unlawful killing and not an assisted suicide, that Webb's responsibility was diminished but not extinguished, and that the imposition of a non-custodial sentence would give the erroneous indication that such killings did not warrant punishment.[369] He, therefore, imposed a two-year prison sentence. The appeal court

[362] *R v Webb* [2011] EWCA Crim 152.
[363] In England, 'diminished responsibility' is prescribed by section 2 Homicide Act 1957 as amended by section 52 Coroners and Justice Act 2009. In order to prove diminished responsibility a defendant must show: 1. He was suffering from an abnormality of mental functioning; 2. From a recognised medical condition; 3. Which substantially impaired his ability to understand his conduct, form a rational judgment or exercise self-control; 4. Which provides an explanation for being party to the killing.
[364] *Webb* para 26.
[365] Ibid 1.
[366] Ibid 4.
[367] Ibid 11.
[368] Ibid 16.
[369] Ibid 17.

decided that the principle of the sanctity of human life would not be undermined by the reduction of the sentence to one of 12 months imprisonment, suspended for 12 months with a supervision requirement.[370]

R v Webb is almost factually identical to the Scottish case of *Ian Gordon*.[371] Unlike in Scotland, the prosecution in *Webb* had the option to charge for murder, manslaughter or assisted suicide and had access to full prosecutorial and sentencing guidelines[372] for the charge decided on (manslaughter by reason of diminished responsibility). Nonetheless, the sentencing exercise was described as "exceptionally difficult".[373]

In *Ian Gordon*, Lord Brodie said:

> The deliberate taking of a human life is a matter of the utmost seriousness. As we have already stressed, in almost every case and certainly in the sort of case of which *Webb* and the present appeal are examples, it is criminal. One of the functions of criminal sentencing is denunciation, in other words the clear and public expression of society's disapproval of certain acts. As we have already acknowledged, there are different views about the acceptability of what can be described as mercy killing, *but until Parliament intervenes to change the law* it is the duty of the court to make clear that it is unlawful.[374]

Among the ways of expressing this message is to impose a custodial sentence. However, in allowing a place for denunciation, it should be kept in mind that denunciation is merely one among several objectives in

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[370] Ibid 26-27.
[371] Both appellants, were older men who had been married for decades; cared for their spouse who had various mental and physical illnesses; abnormality of the mind was present and they fully assisted the police.
[372] *Sentencing Council*, 'Manslaughter by reason of diminished responsibility' (1 Nov 2018) <https://www.sentencingcouncil.org.uk/offences/crown-court/item/manslaughter-by-reason-of-diminished-responsibility/> accessed 13 Nov 2020.
[373] *Webb* [24].
[374] [48] (emphasis added).

sentencing. Moreover, it is an objective that can be achieved without necessarily imposing a custodial sentence.[375] There will always be a certain discretion with sentencing, but predictability is often cited as a Rule of Law virtue and is certainly a prominent feature in Fuller's criteria. Having robust laws in place in the first instance might still mean that cases present to the court, but they would likely be fewer in number and would be guided by substantive law upon which to base judgements.

In *Gordon*, Lord Brodie took issue with the approach of the trial judge, regarding the weight he gave to the elements of denunciation and retribution when determining the appropriate sentence, noting that it led to an undue concentration on the nature of the act as the measure of culpability or blameworthiness, at the expense of appropriate regard to the abnormal state of mind of Mr Gordon at the relevant time. He contrasted this with the approach of the Chief Justice in *Webb* and decided it amounted to an error on the trial judge's part. The appeal court gave consideration to the initial trial judge and concluded that "there is nothing to suggest that the trial judge has really given thought to the relevance of the appellant's mental condition at the time he killed his wife".[376]

In *Gordon*, the trial judge determined it to be in the public interest to impose a custodial sentence. The appeal court did not agree. The defence invited the appeal judge to ask, "what is the good reason for this man to stay in jail?". The appeal court saw no good reason and decided that the objectives of rehabilitation and individual deterrence had no application. Similarly, given the very particular circumstances of the case, they saw no requirement for general deterrence and concluded that the appellant was not a risk to the public.[377]

[375] Lord Brodie in *Ian Gordon* [48].
[376] para 53.
[377] para 59.

The appeal court was keen to stress that this did not mean that Mr Gordon was not guilty of a crime or should not have been prosecuted:

> It is in the public interest that all cases of homicide should be carefully investigated and, where there is sufficient available evidence, prosecuted at the appropriate level. However, that has been done. There is also a public interest in making clear what must be regarded as society's disapproval of criminal conduct. That is what we have referred to as denunciation. However, we see that as having been achieved by this prosecution and the public recording of a guilty verdict.[378]

Thus, a publicly announced guilty verdict alone was enough. This reinforces the work of McDiarmid and others on fair labelling and the stigma attached to crimes such as murder and culpable homicide.[379] Commentators have argued that the principle of fair labelling applies to defences as well as offences.[380]

2.3 Causation

In Scotland, besides *mens rea* and *actus reus*, there is a further requirement for a conviction of homicide, namely causation. Causation further confuses the issue of AD as the burden of proof is on the Crown to show that it is beyond reasonable doubt that the accused caused the deceased's death.[381] Issues of causation have proved to be complex in cases of murder or culpable homicide; thus, AD is again not unique in this regard.

[378] para 59.
[379] C.McDiarmid, 'Killing Short of Murder: Examining Culpable Homicide in Scots Law' 6 (n 293); See also Criminal Procedure (Scotland) Act 1995, s 205. See also: J.Chalmers and F.Leverick, 'Fair Labelling in Criminal Law' (2008) 71 (2) MLR 217.
[380] Ibid.
[381] This must be someone other than the accused themselves, as noted, it is not homicide to take one's own life. Lord Advocate's Reference (No 1 of 1994) 1996 JC 76; 1995 SLT 248.

Causation has been the subject of much discussion, but an understanding can be taken from *MacDonald v HM Advocate* 2007,[382] where the court set out a twofold test: factual causation – that 'but for'[383] the accused's conduct, the individual would not have died; followed by proximity - if 'too remote', then a causal link cannot be established. The establishment of the causal link is assessed based on foreseeability, which helps the court assess culpability.[384] It is then the responsibility of the jury to decide whether the accused's conduct is the cause of death.

Smith v HMA 2016[385] considered principles of causation. Here, the trial judge made it clear that there had to be a "direct and compelling link between the assault … and the death"[386] and that that link required to be "an operating … and a substantial cause of the death, even if some other cause or causes were operative".[387] This is all relatively straightforward and apposite for cases of wickedly intended murder. However, in AD cases, the concept of *novus actus interveniens* complicates matters further.

A *novus actus interveniens* or 'new intervening act' is an act that breaks the chain of causation so that the accused ceases to be responsible for the outcomes which occur after their behaviour. Therefore, a scenario where a person voluntarily ingests life-ending drugs (assisted dying) raises the question of whether the chain of causation has been broken – the assister is

[382] McDonald v HM Advocate, 2007 S.C.C.R. 10. the trial judge instructed the jury that they required, first, to be satisfied that "but for" the assault on him the victim would not have died. However, the "but for" test was only the initial test and the jury then had to consider whether the unlawful act was a direct or indirect cause. Some acts may pass the "but for" test but be considered too remote in time or other circumstances to be direct causes and would thus fail to satisfy the causal link. If there were a direct causal link, it would not matter that the assailant might not reasonably have foreseen that death would result or how it would occur; but if the victim of the assault reacted in a wholly unforeseeable or unreasonable way that would mean that the attack would cease to be a direct cause of the death and thus the requisite causal link would not be established. From para 11 of appeal judgement [2006] HCJAC 89 Appeal No: XC88/06.
[383] In the Healthcare context, see *HM Advocate v Rutherford* (1947) and the Scottish case of *Finlayson v HMA* (1978) SLT (Notes) 60.
[384] *Sharp* v *HM Advocate* (2003) S.C.C.R. 573.
[385] *Smith v HMA* (2016) SCL 773.
[386] Trial judge charge to jury in *Smith v HMA* [2016] reported at para 20 of the appeal.
[387] [36] per Lord Justice-General Carloway quoting the trial judge.

offering the afflicted person the *potential* to take their own life; in the end, it is the afflicted who takes the drug. However, the question is usually whether the outcome was a foreseeable result of the action taken by the accused – in which case they are responsible for it[388] – or whether it was unpredictable – in which case *novus actus interveniens* operates. In AD, death *is* foreseeable; in fact, it is the object of the assister's actions.[389] Thus, it would appear at first blush that the criteria for *novus actus interveniens* is not satisfied due to the foreseeability issue.

The closeness of the two forms of homicide (murder and culpable homicide) can be seen in this description from *Ross v Lord Advocate*,[390] where Lord Justice-Clerk Carloway stated:

> …if a person does something which he knows will cause the death of another person, he will be guilty of homicide if his act is the immediate and direct cause of the person's death[391] ... Depending upon the nature of the act, the crime may be murder or culpable homicide. Exactly where the line of causation falls to be drawn is a matter of fact and circumstance for determination in each individual case. [392]

Thus, whilst causation's characteristics are a problem for Scots criminal law generally, in the context of AD, the matter is even less clear because the person voluntarily wishes to end their life and typically performs the final act which ends it. Take, for example, the first two categories of Ferguson's typology[393]: (1) positive, direct acts, immediately connected with the subsequent death and (2) the provision of the means of committing suicide. In a situation where A obtains drugs for B, who wishes to end their life, and

[388] *Khaliq v HMA* [1984] JC 23 and *Ulhaq v HMA* [1991] SLT 614.
[389] See section 4.1 for discussion of *MacAngus* and *Kane*.
[390] [2016] CSIH 12, 2016 SC 502.
[391] (referencing *MacAngus v HM Advocate* [2009] HCJAC 8, 2009 SLT 137 [42] (LJ-G Hamilton)).
[392] *Ross* [29] (LJ-C Carloway).
[393] At Section 2.1.2.

then mixes the drugs into the lethal substance that would end B's life, how far would A have to go before the chain of causation was broken? Prosecutions for the supply of drugs and other harmful substances (e.g. glue) have succeeded in Scotland, with the blame for the effect on the recipient of the substance being levied at the supplier.[394] It is difficult to see how this would not be applied in AD cases, given that the recipients are aware of what they are being given and why.[395] In any case, A would be likely to be prosecuted under the Misuse of Drugs Act 1971 for possession of a controlled substance.[396]

McDiarmid outlines that English law has taken a different course and has determined that the voluntary act of the deceased, certainly in freely administering controlled drugs supplied by the defendant, negates any criminal liability on that defendant's part.[397] In the UKSC case of *Nicklinson,*[398] Lord Neuberger said that if the act which immediately causes the death is that of a third party, that act "may be"[399] on the wrong side of the line, i.e. constitute euthanasia. Whereas if the person performs the final act, carried out pursuant to a voluntary, clear, settled and informed decision, that act is on the permissible side of the line. He said: "In the latter case, the person concerned has not been 'killed' by anyone but has autonomously exercised his right to end his life."[400]

Stauch and Wheat consider a doctor in England who puts lethal drugs into a patient's mouth. Provided the patient knows what is in the drugs, their voluntary and informed action (swallowing the drugs, for example, as opposed to spitting them out) will constitute a *novus actus interveniens* and break the causal chain, making the doctor guilty of assisting a suicide, but not

[394] *Khaliq v HM Advocate* [1984] J.C.; *Ulhaq v HMA* [1991] SLT 614.
[395] *Khaliq, Ulhaq* and in AD cases.
[396] Misuse of Drugs Act 1971 ss 5 (3).
[397] C.McDiarmid, 'Killing Short of Murder: Examining Culpable Homicide in Scots Law' 25 (n 293).
[398] *R (on the application of Nicklinson and another) v MOJ* [2014] UKSC 38.
[399] Ibid [95].
[400] Ibid.

guilty of murder.[401] Although genuine AD cases involve the person voluntarily and competently deciding to end their life, a person cannot consent to be killed in Scotland.[402] The victim's consent and the fact that death may be in their best interests[403] are irrelevant to the determination of criminal responsibility for the offence,[404] as is the accused's motive, i.e., if they were acting compassionately.[405] In Scotland then, the only charge open to the prosecution would be one of homicide or nothing at all. Here, again then, is an example of the liminal quality of Scotland's crime of culpable homicide, occupying as it does a space in relation to the destruction of the life of another, which, in another jurisdiction, has not been regarded as criminal.[406] Arguably, many cases of AD would be prosecutable in Scotland but not in England and Wales, which might encourage people to travel to England to do this if our laws are significantly different.

Separate from the issue of AD, additionally, in Scotland, it is unknown what offence a person could be charged with for encouraging or inciting the suicide of another person who *did not* act upon their encouragement. It could reasonably be culpable and reckless conduct, attempted murder on an art and part basis, incitement to commit murder (even if the person does not try to end their life), or perhaps conspiracy. This behaviour should be categorised as criminal, but it would likely not be prosecutable with no specific offence[407] in operation. Suicide itself is not a crime, and it is difficult to label the encouragement of a non-crime as criminal. Material assistance[408]

[401] M. Stauch, & K.Wheat, *Text, Cases and Materials on Medical Law and Ethics* (6th ed Routledge 2018) 606.
[402] *HMA v Rutherford* [1947] JC 1; *Smart v HMA* [1975] JC 30; *Scott v HMA* [2010] HCJAC 110).
[403] As determined by the victim themselves.
[404] *HM Advocate v Rutherford* [1947] JC 1 at 5; *Smart v HMA* [1975] JC 30.
[405] McDiarmid (2018) SLC Homicide Seminar (n 329).
[406] McDiarmid, 'Killing Short of Murder: Examining Culpable Homicide in Scots Law' 25 (n 293).
[407] Of 'encouraging or assisting suicide' as is available via statute to all other parts of the UK. See section 2.1.1 of this thesis.
[408] Hands on assistance such as providing drugs and encouraging the person to ingest.

could potentially lead to a prosecution for attempted murder, but the situation with verbal/psychological encouragement/assistance is unclear.

Thus, in this scenario, the consequences in England seem less severe than in Scotland. This has also held true in drug-supply cases, with Scottish law taking a punitive approach towards suppliers[409] compared with the equivalents in English cases.[410] Although, if no prosecution for murder or culpable homicide was brought, the Scots would avoid conviction, whilst those in England and Wales could still face 14 years imprisonment for breaching Section 2 of the Suicide Act. It is not inconceivable that those who are *au fait* with this situation and considering assisting a loved one to die would arrange such activity south of the border in an attempt to reduce the risk of a homicide prosecution.

It is impossible to give a definitive conclusion here, and the development of the common law in an attempt to clarify (or force reform) in this area of law is not desirable, as it would involve numerous deaths which take place out with any legal framework, with the associated risks therein for the individual assisted to die (potential coercion, abuse) and the assister (prosecution, subsequent deprivation of liberty).

Prosecutions for murder (or attempted murder)[411] relating to AD are infrequent, and it is more likely that prosecutions for culpable homicide would be brought, but causation poses a real issue in this setting, with the current law not drawing a clear distinction between acts of assistance and acts which cause death. It was hoped that the process of attempting to reform the law in Scotland through new legislation would shed light on what type of assistance is and is not acceptable. This did not happen; instead, the most recent Bill only reinforced the lack of clarity. Andrew Tickell said:

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[409] *Khaliq & Ulhaq.*
[410] *R v Kennedy (No.2)* (2007) UKHL 38.
[411] Attempted murder is the same as the offence of murder in Scots Law with the only difference being that the victim has not died *Cawthorne v HMA* [1968] JC 32, 36 per LJ-G Clyde.

> …we have been left none the wiser about how the Crown Office understands and analyses these scenarios. As have the families and friends of people for whom these are not abstract questions of legal principle, but real, flesh and bone decisions to be taken in the midst of great suffering and trauma. That can't be right.[412]

Whilst common law is intrinsically fact-sensitive, the fact-specific nature of AD cases – and thus the ad hoc nature of prosecutions/sentencing – is an argument that Fuller's criteria are not being met. Citizens have no clearly established rules to guide behaviour in the first place, so they cannot understand and comprehend the consequences of any breach.[413] Thus common law approaches can work well in some instances, but where the consequences are arguably the most severe (the person's death and the assister's deprivation of liberty), specific promulgation of statutory laws is required.

As Raz has said, "Just as we need government both by laws and by men, so we need both general and particular laws to carry out the jobs for which we need the law".[414] Fuller considers the policy of "wait and see" and the emergence of "case-by-case treatment of controversies as they arise" as fundamentally flawed and as a policy it has little to recommend it.[415] Raz continues that:

> The doctrine of the rule of law does not deny that every legal system should consist of both general, open, and stable rules (the popular conception of law) and particular laws (legal orders), an essential tool in the hands of the executive and the judiciary alike. As we shall see,

[412] Andrew Tickell, 'Assisted Suicide (Scotland) Bill RIP' (*Llalands Peat Worrier* , 25 May 2015) <http://lallandspeatworrier.blogspot.com/2015/05/assisted-suicide-scotland-bill-rip.html?m=0> accessed 11 November 2021.
[413] (1) failure to establish clear rules so issues are decided on an ad hoc basis and (3) understanding and comprehension of these rules for citizens.
[414] Raz, 'The Rule of Law and its Virtue' p.213 (n 2).
[415] *The Morality of Law* 65.

> what the doctrine requires is the subjection of particular laws to general, open, and stable ones. It is one of the important principles in the doctrine that *the making of particular laws should be guided by open and relatively stable general rules.*[416]

This idea of governance by law and not by man, i.e., ad hoc prosecutorial and judicial decisions, illuminates the important aspect of what the rule of law means, primarily for this thesis. Which is that the law should be such that people can be guided by it and use it to realise certain societal values. Citizens can only obey the law if they first have knowledge of it. Therefore, if the law is to be obeyed, it must be capable of guiding the behaviour of its subjects. It must be such that the population can find out what it is and act on it. Fuller was especially concerned with the relation between the legal subject's obligation to obey the law and the fulfilment of his criteria, [417] most evident in his beliefs that laws must be promulgated appropriately[418] and not require the impossible.[419]

To summarise, assistance in death can come in many forms, from simply providing emotional support to physically administering/providing the person with life-ending medication. Whilst acknowledging that many crimes are fact-sensitive and a definitive answer to each scenario can never be given when a blanket approach is taken, the analysis above reinforces Fuller's concerns with the law failing to provide comprehensive rules, and the subsequent ad hoc nature of decisions taken, the negative consequences of which will be outlined in Part III of this work.

2.4 Defences

As noted earlier in the discussion of *Ian Gordon* and *Webb,* where the accused had strong emotional ties to the deceased person, a court may be

[416] Raz, 'The Rule of Law and its Virtue' p.213 (n 2).
[417] Lon L. Fuller, 'Positivism and Fidelity to Law: A Reply to Professor Hart' [1958] 71 (4) Harvard Law Review 646.
[418] *The Morality of Law* 49.
[419] Ibid 70.

persuaded that the accused was suffering from diminished responsibility[420] and could avail themselves of this partial defence.[421] Diminished responsibility is now a statutory defence in Scotland,[422] which codified the common law.[423] Its legislative form reads:

> A person who would otherwise be convicted of murder is instead to be convicted of culpable homicide on the grounds of diminished responsibility if the person's ability to determine or control conduct for which the person would otherwise be convicted of murder was, at the time of the conduct, substantially impaired by reason of abnormality of mind.[424]

The substantial impairment by reason of an abnormality of the mind specifically includes 'mental disorder' and in practice is fairly narrowly and strictly defined.[425] A jury may be prepared to accept that the grief of watching a close relative suffer the pain and indignity of a terminal illness had tipped the balance of the defendant's mind, hence diminishing their responsibility. However, the exhaustion and often-present depression arising from the stress of caring for people at the end of life is thus not enough to avoid a conviction at present, and these important aspects are lost in formal verdicts.

Later in the thesis, it will be shown that medical professionals frequently provide assistance to die to patients at the end of life.[426] It would be difficult to afford this same defence to members of the medical profession, who also may be emotionally distraught by the patient's suffering, but who are professionally trained and are dealing with non-relatives, thus not ordinarily

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[420] P.Ferguson, 'Causing death or allowing to die? Developments in the law' (1997) 23 JME 294.
[421] Criminal Procedure (Scotland) Act 1995 s 51 B.
[422] 51B of the Criminal Procedure (Scotland) Act 1995. "if the person's ability to determine or control conduct [which includes acts and omissions (s 51B(5)] for which the person would otherwise be convicted of murder was, at the time of the conduct, substantially impaired by reason of abnormality of mind [which includes mental disorder (s 51B(2))]" as inserted by Section 168 of the Criminal Justice and Licensing (Scotland) Act 2010.
[423] *Galbraith v HMA* [2001] SCCR 551.
[424] CPSA s.51B(1).
[425] CPSA s.51B(2).
[426] See Chapter Eight.

having the same emotional ties as loved ones.[427] For healthcare professionals (HCPs), it would be difficult to establish an 'abnormality of the mind' in accordance with G*albraith* or the legislative definition of diminished responsibility. We would not want to establish this either, as it suggests that something is wrong with the accused when what they are doing is acting compassionately to relieve suffering. In such cases, the use of diminished responsibility would only arise through the lack of formal alternatives.

Here, it is also helpful to consider how diminished responsibility is treated elsewhere in the UK. The Law Commission of England and Wales, in its report *Murder, Manslaughter and Infanticide*, gives an example of diminished responsibility in AD cases:

> [A] depressed man who has been caring for many years for a terminally ill spouse kills her, at her request. He says that he had found it progressively more difficult to stop her repeated requests dominating his thoughts to the exclusion of all else, so that "I felt I would never think straight again until I had given her what she wanted".[428]

In this context, it is not clear whether diminished responsibility could be a potential defence, given that the mercy killer is being worn down by repeated requests to end life. Relatives and medical professionals who provide compassionate assistance to die but whose conduct does not arise from a medical condition that impairs their ability to form a rational judgment and thus prove abnormality of the mind will be unable to avail themselves of the diminished responsibility defence in Scotland or England and Wales. The Law Commission of England and Wales has said that "the defence of diminished responsibility should not be stretched so far that it becomes a

[427] P.Ferguson, 'Causing death or allowing to die? Developments in the law' p.369 (n 413).
[428] *Law Commission,* 'Murder, Manslaughter and Infanticide', No 304, Project 6 of the Ninth Programme of Law Reform: Homicide, Section 2 (c) p.105.

backdoor route to partial excuse for caring but rational 'mercy' killers".[429] The Commission also commented that the defence provides:

> A practically convenient method for the prosecution, defence and the court, by agreement, to dispose of cases where nobody would wish to see the imposition of a mandatory life sentence. This has been achieved by a sometimes strained and sympathetic approach to the medical evidence and the language of the statute.[430]

In the absence of a permissive law on AD, this is a compassionate response from the legal institutions, and case law has shown us that diminished responsibility is sometimes used in this way.[431] However, it does not fit with Fuller's criteria of what makes good law, and it highlights an incongruence between the rules as announced and official action.[432] Cases illustrate that the courts are willing to treat the defence of diminished responsibility with a certain degree of flexibility to encompass situations where a spouse or relative faces tremendous pressure and assists their loved one to relieve suffering.[433] The partial defence of diminished responsibility, while appropriate for some cases, fails to acknowledge compassionate and relational acts and is forced to label cases in the context of homicide. This fails to recognise the complexity and moral difference between these and other killings.[434]

Furthermore, the use of psychiatric assessment to support pleas of diminished responsibility[435] is useful but arguably not altogether reliable. For

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[429] Ibid, 7.37.
[430] *Law Commission,* Consultation Paper No 173, Partial Defences to Murder p.20.
[431] *R v Webb* [2011] EWCA Crim 152 and arguably also in *Ian Gordon* where no initial abnormality of the mind was detected by HCPs or Mr Gordon until later in the case when decisions on charges, sentencing and appeals were being made.
[432] *The Morality of Law* p. 81.
[433] S. Ost, 'Euthanasia and the Defence of Necessity: Advocating a more appropriate legal response' [2005] Crim LR 355, 360. p.706.
[434] H. Keating and J. Bridgeman, 'Compassionate Killings: The Case for a Partial Defence.' (n 332).
[435] Usually required to satisfy the burden of proof placed upon the accused.

example, in *Ian Gordon* it was not initially recognised that Mr Gordon was suffering from a condition that impaired his judgment. Mr Gordon himself was not aware of it. This was recognised only after initial charges had been proceeded with. It is difficult to prove that cases have relied on enlisting the defence of diminished responsibility to reduce the charge. If this is happening, it is a convoluted way of avoiding prosecuting well-meaning relatives who arguably should not be subject to the law of homicide. Therefore, it is another example of the law failing Fuller's criterion, specifically congruence between official action and declared rule;[436] clarity;[437] and contradiction.[438]

Tadros believes that there is a strong case for treating AD cases as fundamentally distinct from killing with diminished responsibility.[439] This is because, by assisting the person to die, the assister acts out of "a genuine and plausible, if ultimately faulty, conception of respect for the victim's life".[440] Homicide is among the worst crimes, and the conviction carries an indelible moral stigma. In jurisdictions where the penalty for murder is mandatory, that indelible stigma is reinforced by the severity of the sentence.

Keating and Bridgeman have argued that the law requires reform to reflect society's moral judgement about family members who kill out of compassion.[441] This will be explored in greater detail in chapter 10, but they suggest that the use of the defence of diminished responsibility fails to respond to the emotive yet reasoned, responsive and relational nature of the act and results in a travesty of labelling. In England and Wales, the letter of the law is clear, but the *practical application* creates a lack of clarity; thus, in that jurisdiction, the issue is one of fair labelling, whilst in Scotland, it is

[436] *The Morality of Law* 81.
[437] Ibid 63.
[438] Ibid 65.
[439] V. Tadros, 'The Limits of Manslaughter' in C. M.V Clarkson and S. Cunningham (eds), Criminal Liability for Nonaggressive Death (Farnham: Ashgate, 2008) 35, 59.
[440] Ibid.
[441] Keating and Bridgeman, 'Compassionate Killings: The Case for a Partial Defence' (n 332).

affirmatively one of a lack of clarity in the law *and* its application. Britton, who was advisor to the committee considering the End of Life Assistance (Scotland) Bill 2010, has argued that these cases may be "yet another example of the courts operating in a vacuum created by the possibilities of modern medicine and a lack of clarity in the law".[442]

2.5 Conclusion

This chapter has, for the first time, collated precisely what the law on AD is in Scotland in unparalleled detail. It has highlighted the various legal issues we have because of the deficit of black letter law on AD and considered the more general problems with the criminal law in this area which collectively contribute to a failure of Fuller's criteria. It has contextualised Scotland's place within the UK legal framework and shown that throughout the UK, but most severely in Scotland, issues persist around clarity and the practical application of the law.

It has been shown (and will be further detailed in chapter three) that some AD cases have the potential to result in a prosecution for murder and a life sentence, but the courts chose to show leniency, possibly out of compassion for the circumstances in which the accused found themselves. Instead, the prosecution reduce the charge, often via the partial defence plea of 'diminished responsibility'.[443] Arguably, perpetrators of AD were not experiencing 'abnormality of the mind'[444] but were acting rationally and compassionately in distressing circumstances. Using diminished responsibility pathologises relatives who assist, and requires questionable employment of expert evidence.[445] It seems that an uncomfortable skirting around the charge by legal and medical professionals is occurring in the absence of legislation that allows them to affirmatively say that the accused

[442] *Herald Scotland*, 'Husband walks free after killing wife in 'final act of love' (26 Jan 2018) <http://www.heraldscotland.com/news/15899084.Husband_walks_free_after_killing_wife_in__final_act_of_love_/ > accessed 13 Nov 21.
[443] See for example *Ian Gordon*.
[444] Criminal Procedure (Scot) Act 1995 51B Section 1 Diminished responsibility.
[445] Fiona Raitt and Suzanne Zeedyk, The implicit relation of psychology and law: Women and syndrome evidence, ch. 2 esp (Routledge 2000) for a discussion on expert evidence.

assisted out of compassion, not wickedness. There must be a partial defence for a reduced plea to be accepted, and if charge bargaining around diminished responsibility is happening, this approach is ambiguous at best.

It is not uncommon in cases of AD for the family[446] to wish clemency for the accused.[447] The existence of a charge of culpable homicide allows the Crown leeway to balance competing public interests in respecting the wishes and interests of the deceased's family, who wish compassion to be shown despite knowing that the taking of life was entirely deliberate.[448] Carving out a permissive form of AD, where HCPs can assist the terminally ill to end their life, would remove such deaths from the realms of criminal law into healthcare and would allow people who are suffering to end their lives peacefully without having to rely on the assistance of well-meaning but amateur helpers, as seen in the *Ian Gordon* and *Webb* cases. It would avoid lengthy court proceedings and the associated public exposure, emotional turmoil and expense these entail. Additionally, there is some evidence that the amateur assistance approach perpetuates death in this context, with as many as 30% of amateur assisters going on to die by suicide themselves.[449]

Fuller and others have indicated that one of the most important things people need from the law that governs them is predictability in the conduct of their lives.[450] If people know how the law will operate in advance, they can act (or

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[446] Who are the family of both the deceased and the accused.
[447] As was the case in *Ian Gordon* and *Paul Brady*. *The Herald,* 'Family Declare Support for Brother's Mercy Killing' (Glasgow 1 October 1996) <http://www.heraldscotland.com/news/12024044.Family_declare_support_for_brother_apos_s_mercy_killer /> accessed 13 Nov 2018.
[448] *Boyle v HM Advocate* [1976] JC 32, 37 (Lord Cameron).
[449] Anne Johnstone, 'I know what I did was wrong and I think I got off lightly Their aim is to free loved ones of pain, but mercy killers are left with a terrible burden' (*Herald Scotland*, 15 Sept 2003) < https://www.heraldscotland.com/news/12532595.i-know-what-idid-was-wrong-and-i-think-i-got-off-lightly-their-aim-is-to-free-loved-ones-of-pain-but-mercy-killers-are-left-with-a-terrible-burden-by-anne-johnstone/> accessed 20 October 2019 which states "New research from the Voluntary Euthanasia Society, in a report, the Quality of Mercy, shows that 30% of mercy killers go on to commit suicide. Figures unearthed from the Home Office show that in 11 of the 38 reported cases of mercy killing between 1990 and 2002, the suspect committed suicide." The report could not be located online.
[450] Jeremy Waldron, 'The Rule of Law', *Stanford Encyclopaedia of Philosophy* (Summer 2020) < https://plato.stanford.edu/entries/rule-of-law/#Aca> accessed 14 May 2022.

omit to act) to avoid its implications. Admittedly, this will not deter all people; the desire to relieve a loved one's or patients suffering may override their fidelity to the law, instead choosing to act from a place of personal morality. Nonetheless, knowing how the law will operate in advance enables one to make plans and work within its requirements, and allows the legal institutions governing this area to base decisions on firm facts.

Advocacy of an alternative is the subject of later chapters. However, it is worth highlighting how the multiple failures of the current Scots Law on AD, as evaluated against Fuller's criteria, stem from the absence of an explicit proactive law on AD. In light of ageing populations with worsening health, jurisdictions are increasingly approaching this proactively by removing certain forms of AD from the criminal law and moving it into healthcare, thus removing or minimising the need for amateur assistance. This does not negate that some instances will still have to be investigated, but it would allow for a more straightforward analysis. If AD were legalised, the question would be whether HCPs acted within the predetermined guidelines. If they did not, they would rightly be subject to the criminal law.

Likewise, a permissive PAD law may not negate every circumstance in which amateur assistance would be required: there may be reasons such as not knowing PAD is available, not knowing how to navigate the process and fear of not being accepted within the criteria. It would, however, make the law clearer and easier to navigate for the general public and legal and medical professions, and would protect vulnerable people by ensuring any assistance was subject to robust safeguarding protocols *prior* to any death, an objective which the courts and parliaments have been keen to pursue. Undoubtedly, having the choice of PAD would show greater compassion to people such as Mrs Gordon and Mrs Webb, who saw no other option but to be assisted to die in distressing circumstances.

In this chapter, I have shown that the current prohibition of AD is untenable, for those who are suffering, for those who care for them, and for those whose

duty it is to ensure a just and compassionate end-of-life policy. It has been necessary to begin to unpack why the law of homicide in this context is not working, as the basis of the case for moving the regime into healthcare. In the absence of explicit statute or guidelines and with minimal case law in Scotland, the next chapter must look to the common law to help aid understanding of how the law deals with AD and to show the inadequacy of the present position.

Chapter Three: Case Law on Assisted Dying

In the United Kingdom, as in the other Convention States, the progressive development of the criminal law through judicial law-making is a well-entrenched and necessary part of the legal tradition.[451] Common law regulation of AD could work well when there is an abundance of precedent to draw upon. In Scotland, however, there is very little case law on AD.

This means that for guidance, we need to look to related areas of law, and although AD is not typically a 'heat of the moment' crime,[452] other broadly comparable offences against the person (such as rape) have a wealth of Scottish case law and legal analysis behind them. Additionally, homicides are often caused by actions that are crimes in their own right, for example, assaults or administration of noxious substances such as active poison.[453] Given that there is no specific offence of AD in Scotland and instances of it are grouped with homicide for record-keeping purposes, cases are challenging to locate. They are typically unreported and referred to only briefly by academic authors[454] and in court rulings.

Because of this, it may seem at first sight that there are not many instances of AD taking place between citizens – that this is not as significant an issue in Scotland as it is in other jurisdictions. While the number of cases might seem small, the severity of suffering, in combination with Scotland's commitment to value human rights, and thus the individual's autonomy and dignity, make the legalisation of PAD an urgent matter. [455]

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[451] *C.R. v UK* (1995) Series A no 335-C, para 36.
[452] Although not exclusively.
[453] Timothy H. Jones & Ian Taggart, *Criminal Law* (7th edn, W.Green 2018) 229.
[454] For example *HM Advocate v Brady* (1996) in Fergusson, 'Killing "Without Getting into Trouble"? Assisted Suicide and Scots Criminal Law.' (n 6).
[455] Angelika Reichstein, 'A Dignified Death for All: How a Relational Conceptualisation of Dignity Strengthens the Case for Legalising Assisted Dying in England and Wales'. (2019) 19 (4) Human Rights Law Review 733 <https://doi.org/10.1093/hrlr/ngz033> accessed 13 Nov 21.

Recently, more cases have come to light via the media. Whether this is the result of more frequent AD cases or a concerted effort by campaign groups to increase awareness is unclear. Only one Scottish case – *Gordon Ross v Lord Advocate* [2016] – deals with AD directly. Consequently, much of the development in this area of law has been brought about by English cases and ECHR rulings such as *Pretty*, *Purdy* and *Nicklinson*, all of which will be discussed. The following section assembles the Scottish cases that could be categorised as 'assisted dying' in a way that has not been done before. These examples have been comprehensively analysed and grouped to fill a knowledge gap about the prevalence and nature of AD in Scotland.

To recap, this thesis proposes that only physician-assisted dying should be legalised and incorporated into end-of-life healthcare. Later chapters will show that HCPs do already illegally assist people to die. However, this chapter will highlight that a consequence of the current prohibition on PAD is that citizens are left with no choice but to assist one another, outwith any legal or regulatory framework. This situation results in no prior safeguarding for dying people and severe emotional distress and turmoil for loved ones.

3.0 Scottish 'assisted dying' cases unearthed

The frame of reference for the cases mentioned herein will be 'assisted dying'. Although they encompass euthanasia in some circumstances, the fundamental premise is that *assistance to die to relieve suffering* has been given.

The cases of Hunter,[456] Brady,[457] Hainsworth,[458] Edge[459], B[460], Dr Kerr,[461] Dr Wilson,[462] Ian Gordon[463] and Susanne Wilson,[464] *HM Advocate v PB*,[465] alongside the known cases of Scots 'suicide tourism' uncovered by this thesis,[466] illustrate that AD is not unheard of in Scotland.

In an unreported case from 1980, 78-year-old **Robert Hunter**[467] ended his wife's life in a so-called 'mercy killing' and was charged with culpable

[456] NRS holds the following records for this case (which are all closed to public access): JC26/1980/283 (trial papers from the High Court); JC34/32/18 (appeal papers); AD24/1980/44 (precognition papers produced by COPFS); Reference to this case is at Colin Gavaghan, 'Assisting suicide in Scotland - where does the law stand now?' (*Euthanasia.Cc*) <http://www.euthanasia.cc/97-3as.html> accessed 20 May 2022. Assuming this case is '*HM Advocate v Hunter'*, I have not been able to identify a report (or transcript) of a matching case (date/subject) using the CL case citatory or Westlaw or Lexis. The National Library of Scotland and Advocates library also did not hold a record. It is also referred to here: *The Scotsman*, 'Victory in bid to legalise assisted suicides'. (30 July 2009) <https://www.scotsman.com/news/victory-bid-legalise-assisted-suicides-2480413> accessed 20 May 2022; *Scotsman,* 'We'll consider suicide law guidance' (Sept 2009) <https://www.scotsman.com/news/uk-news/we-ll-consider-suicide-law-guidance-1-776235> accessed 13 Nov 21.
[457] *HMA v Brady* [1997] (GWD 1-18).
[458] In Jennifer M. Scherer, Rita James Simon, *Euthanasia and the Right to Die: A Comparative View* (Rowman & Littlefield 1999) 65.
[459] *HMA v Edge* [2005] 20 (360) (GWD 26 April 2005).
[460] In *B*, the accused had been prosecuted for murder, although a plea of culpable homicide was ultimately accepted. It is very difficult to find any facts on this case, it is only referred to in *Gordon Ross v Lord Advocate* [2016] CSIH 12 [28]. It may be Paul Brady but we cannot be sure.
[461] *BBC Scotland*, 'Police review after retired GP Dr Iain Kerr admits helping patients to die' (13 March 2013) <https://www.bbc.co.uk/news/uk-scotland-glasgow-west-21769011> accessed 13 Nov 21.
[462] *The Telegraph*, Doctor in assisted suicide case has 'no regrets' (22 August 2010) <https://www.telegraph.co.uk/news/uknews/7959311/Doctor-in-assisted-suicide-case-has-no-regrets.html> accessed 13 Nov 2021.
[463] n 338.
[464] *Wilson (Susanne)* HCJ, Lady Rae, 9 January 2018, unreported.
[465] Lord Drummond Young in *Ross* at para 77 'a family member who had been asked by a relative suffering from a degenerative illness to kill him and had done so by administering an overdose of medication and subsequently smothering him was charged with murder, and a plea to culpable homicide was offered by the defence and accepted.' This case may also be Paul Brady, but again, we cannot be sure.
[466] As of May 2022, at least 25 Scots had travelled to Switzerland for an assisted death. Information provided to the author (private correspondence) from Silvan Luley (Dignitas, 18 April 2022 – 16 AD deaths) and Dr Erika Preisig (Life Circle, 19 April 2022, 9 AD deaths). See also: Helen Puttick, 'Family of women who died at Dignitas want law change' (17 Feb 2020) <https://www.thetimes.co.uk/edition/scotland/family-of-woman-who-died-at-dignitas-want-law-change-n0gjd5grk> accessed 22 May 2022.
[467] n 456.

homicide. He was sentenced to two years' imprisonment – a sentence which Lord Cowie assured him would have been harsher but for his age.[468]

The unreported case of **HMA v Brady** in 1997 [469] was Scotland's first recorded criminal case involving euthanasia. After being initially charged with murder for helping his terminally ill brother to die, Brady pled guilty to culpable homicide. The trial judge imposed the most lenient sentence available (admonishment). Lord McFadyen stressed that the deliberate taking of a life, for whatever reason, was a serious crime but accepted that there were powerful mitigating factors. "You brought your brother's life to an end at his own earnest and plainly heartfelt request."[470] McDiarmid, considering voluntary culpable homicide, notes that in this case, the reduction from murder to culpable homicide happened before the case reached the trial court.[471] These are all the facts about this case that are available.

The High Court case of **David Hainsworth** in 1997 is also noteworthy. Hainsworth attempted (unsuccessfully) to suffocate his 82-year-old father, who was dying from cancer. Once again, after initially charging Hainsworth with attempted murder, the prosecution accepted his plea of guilty to the lesser offence of assault. After the judge heard how he had moved back to his hometown to care for his father, who grew progressively ill, he was given a two-year probation order. His father later died whilst Hainsworth was in prison. The court also heard heart-rending letters of forgiveness from his brother, mother, and uncle. The "distress, strain and intense emotional

[468] Ibid.
[469] n 457.
[470] Cited in B. Christie, "Man Walks Free in Scottish Euthanasia Case" (1996) 313 BMJ 961; *The Independent*, 'Brother in mercy killing walks free from court' (14 Oct 1996) <https://www.independent.co.uk/news/brother-in-mercy-killing-walks-free-from-court-1358436.html> accessed 13 Nov 2021.
[471] University of Strathclyde, Criminal Law (M9419) lecture notes, Homicide (2016), p.13 < https://www.studocu.com/sv/document/university-of-strathclyde/criminal-law/criminal-law-lecture-notes-homicide-2016/1493177> accessed 20 May 2022.

pressures of caring for the terminally ill, combined with the lack of legal, medical, and social recourses, were demonstrated by this case".[472]

Another difficult-to-locate case – found whilst searching in earnest late one evening in the university library - is the 2005 unreported case, recorded in *Green's Weekly Digest* under 'culpable homicide', of ***HMA v Edge***. Mr Edge, an 80-year-old, had (on an earlier occasion) pled guilty to culpable homicide. He had been married to his 85-year-old wife for 50 years. She suffered from dementia, and he had had difficulties coping with her illness. Mr Edge placed a pillow over his wife's face and, without any resistance from her, smothered her. Mr Edge immediately phoned the police and told them what had happened. By the time of his case being heard in court, he had been diagnosed with severe depression, and the medical view was that it would be severely detrimental to his health to have to attend court. Mr Edge was admonished.[473]

As regards HCPs, in 2008, **Dr Iain Kerr** was found guilty of misconduct by the General Medical Council (GMC) and suspended from his Glasgow practice for six months for prescribing medicines to patients who felt their lives had become intolerable. Dr Kerr said:

> These were people who I thought had mental capacity, who had looked at the options, who had decided what was the best course of action for them and come to this conclusion.[474]

Dr Kerr said that it was not a decision he took lightly but, faced with the requests, and after a "fair amount of discussion", whereby he advised his patients to tell their relatives and make sure they agreed, he had advised the

[472] n 458. Later in the thesis it is recommended that all health and social care needs are explored prior to any AD taking place.
[473] n 466.
[474] n 461.

patients on what to do and made a prescription for drugs, which gave them the option of ending their own life.

Three of Dr Kerr's cases were reported to the procurator fiscal, and in each case, it was decided to take no action because it was not in the public interest for a prosecution to take place. However, in 2013 the Crown Office instructed the police to inquire whether any new evidence was available. It likely did this because, upon retirement in 2013, Dr Kerr spoke out in favour of AD and campaigned for a change in the law.[475] The Crown Office, wishing to deter such behaviour, may have wanted to send a message to the public that it was not actively accepting of this conduct. Arguably, the additional investigations were simply a bid to avoid the Crown Office looking as if it did not take the matter seriously.

In 2010, a retired family planning practitioner **Dr Elizabeth Wilson**, who resided in Glasgow, was arrested by Surrey Police for advising Cari Loder over the telephone on how to end her life. Cari did go on to end her life and, although Dr Wilson was based in Glasgow, the death took place in Surrey, meaning it was within their jurisdiction. The case was deferred seven times before the Crown Prosecution Service (CPS) discontinued it. Officials said a prosecution would not be in the public interest, even though there was enough evidence to prosecute. Dr Wilson stated that she would continue to advise people suffering on how to end their life.[476]

Neither the Kerr nor Wilson cases came to court: the furthest scrutiny they attained was consideration by the police, prosecutor and professional regulator. However, they are relevant because they show leniency (this time, on the part of the prosecuting authorities) towards PAD practices, and again, the cases reinforce the failure of Fuller's list regarding the achievement of

[475] Dr Kerr told BBC Radio Scotland's Call Kaye programme that during his career he had prescribed medicines to three people who were considering ending their lives. He became a board member of Friends at the End and actively campaigned to change the law.
[476] n 462.

congruence between the rules as announced and official action.[477] Fuller also considers the ad hoc basis upon which poor law is practised and the issue of contradictory rules. In this respect, whilst not directly comparable, the case of **HMA v Susanne Wilson 2018 [478]** must be considered, in contrast to *Ian Gordon* noted earlier.[479]

Susanne Wilson was initially charged with the murder of her 70-year-old chronically ill husband after smothering him at their home after he had taken medication to end his life. Mr Wilson had also previously tried to take his own life. Mrs Wilson admitted the lesser charge of culpable homicide, accepted by prosecutors on the basis of diminished responsibility. Newspaper reports stated that Mrs Wilson felt "only compassion for him" and that she had dialled 999 and confessed to the police.[480] At the High Court in Glasgow, Lady Rae told Mrs Wilson:

> There are exceptional circumstances and punishment would not be in the interests of justice. The main reason was your mental health at the time of the death of your husband.

Lady Rae deferring sentence for a period of six months for good behaviour and continued psychiatric treatment, later admonishing Mrs Wilson:

> You are a lady with a truly impeccable background and it is clear from the testimonials provided to me that you have considerable support not only from your family but also from members of your community. Having considered all the material before me, while recognising that in most cases such a crime would merit a significant custodial sentence, I am prepared, in the unusual and complex circumstances of this case

[477] *The Morality of Law* 81.
[478] n 464.
[479] At section 2.2.
[480] *BBC Scotland*, 'Wife walks free after killing husband' (9 Jan 2018) <https://www.bbc.co.uk/news/uk-scotland-glasgow-west-42621029> accessed 13 Nov 21.

> to impose a non-custodial disposal. There is no suggestion whatsoever that you are a risk to the public.
>
> I have come to the view that punishment is not appropriate and having reached that conclusion, I consider that a community payback order is not justified nor is it required.[481]

The cases outlined thus far show that the prosecutorial authorities charged the person in nearly all cases.[482] So, arguably, it is not the prosecutor who is avoiding responsibility, although it is unknown how many cases are presented to the prosecutor by the police, with no action taken. It must also be recognised that initial prosecutions for murder tend to be reduced to culpable homicide,[483] most usually on the basis of diminished responsibility.[484] The issue is, that once cases reach the court, the trial judge tends to favour leniency, which results in exoneration, probation,[485] or admonishment.[486] Whilst some custodial sentences have been imposed - two years in the case of *Hunter* and three years and four months in the case of *Ian Gordon* (although this was reduced to admonishment on appeal) - it seems that the full force of the law is not being used in cases of AD in Scotland – of concern when considering Fuller's requirement for the law to be consistent.

In 1980 Mr Hunter was given a custodial sentence, and as far as can be ascertained, the view was that what he did was appalling, compared with more recent case law, which speaks of the accused actions as ones of love and compassion.[487] Of course, the facts of each case are sensitive and specific, but it is evident that the law is now taking a more compassionate and sympathetic view to cases of AD. It cannot be proven why this is,

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[481] *Wilson (Susanne)* HCJ, Lady Rae, 9 January 2018, unreported.
[482] *Hunter, Brady, Hainsworth, Edge, Ian Gordon, Susanne Wilson*. Except that of *Dr Kerr*.
[483] *Brady, Hainsworth*.
[484] *Ian Gordon, Susanne Wilson*.
[485] *Hainsworth*.
[486] *Brady*, *Edge, Ian Gordon, Susanne Wilson*.
[487] *Ian Gordon* [30], for example.

perhaps growing societal support for AD, international laws being reformed to take a permissive approach, or a tendency towards compassion in the judiciary more generally, but either way, the law as stated (AD equals homicide) and the repercussions of a prosecution therein are not being fully borne out. This is something that Fuller was especially concerned with, devoting a chapter of *The Morality of Law* to the congruence between official action and declared rule.[488] Fuller described how:

> One of the problems of criminal law is to convey to the prospective criminal that you are not engaged in a game of idle threats, that you mean what you say.[489]

Fuller calls this the "pledge of the earnestness of the lawgiver". The repercussions of the law not doing what it says it will, i.e., prosecute for homicide in Scotland and the punishments aligned with this (and assisted suicide in England and Wales), sparks a reasonable suggestion that AD may increase if people think that they will not be subject to the full force of the law as stated. As indicated at the beginning of this chapter, it is impossible to know how many people receive some form of assistance to die in Scotland, but some information can be gleaned from records of Scots having assisted deaths abroad.[490] It is not clear why these cases are not being brought to the attention of the Lord Advocate.

One reason may be that the incidents are not publicised as much as in England, where many 'suicide tourists' have used the media to lobby for legislative change and are thus on the public's and DPP's radar.[491] Another possibility may be that actions punishable in England under Section 2 of the

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[488] *The Morality of Law* 81.
[489] *The Morality of Law* 202.
[490] n 466.
[491] Jessica Elgot, 'Man 'was making political stand' by writing about last day in Sun newspaper' (*Guardian,* 14 Aug 2015) <https://www.theguardian.com/society/2015/aug/14/bob-cole-cancer-dignitas-switzerland-sun-newspaper-political-last-stand> accessed 13 Nov 2021.

1961 Act are not criminal under the Scots law of homicide,[492] thus ruling out prosecution, although this proposition has not been thoroughly tested. One example of such actions would be assisting someone to travel abroad for AD, which is punishable under Section 2 in England but seemingly not in Scotland: Lord Hope said in *R (Purdy) v DPP* (2009) UKHL that: "It is an offence to assist someone to travel to Switzerland or anywhere else where assisted suicide is lawful. Anyone who does that is liable to be prosecuted."[493] Contrast this with Lord Carloway's remarks in *Ross*: "Such acts, including taking persons to places where they may commit, or seek assistance to commit, suicide, fall firmly on the other side of the line of criminality."[494] Lady Dorrian reaffirms this:

> [T]he clear situation of taking someone of sound mind and clear views to Switzerland to carry out a free and voluntary act would not even constitute the crime of culpable homicide in Scotland.[495]

It cannot possibly be established that the person was of sound mind with clear views, acting freely and voluntarily *after* the event, when the subject is deceased. The only witness may be the person who 'assisted' the deceased, who surely would be liable to be prosecuted if they acted, for example, out of ill will for gain, i.e., wickedly, as established by *Drury*. This is true even if the individuals were in Scotland, where any investigation would still happen retrospectively once the person was already deceased. Lord Carloway and Lady Dorrian's remarks indicate that we rely on the Swiss to assess competency criterion *inter alia* upon the person's arrival in Switzerland, therefore, outsourcing the problem due to the legislator failing to promulgate here. It also means that Scotland relies on the Swiss to keep records of its citizens having AD abroad due to a lack of formalisation and thus record-keeping here. In contrast, permissive PAD laws require HCPs to undertake

[492] i.e., travelling abroad for AD because of the causation issue in homicide.
[493] [27].
[494] [33].
[495] Ibid [50].

competency assessments and coercion detection *inter alia before* any death and have robust reporting and monitoring procedures in place, therefore implementing thorough safeguards for the individual and others involved in what is a highly complex situation.

Whilst the focus of this thesis is clarity in Scots Law on AD, it is worthwhile noting that despite Lord Hope's comments in *Purdy (*that it *is* an offence to have an AD abroad), there may now be a de facto difference. In an urgent parliamentary question on 5th Nov 2020, the day a second Covid-19 lockdown was introduced in England, Andrew Mitchell (MP) asked Health Secretary Matt Hancock to make a statement on the impact of new coronavirus regulations on the ability of terminally ill adults to travel abroad for AD. In his response, Matt Hancock stated that 'it is legal to travel abroad for the purpose of assisted dying where it is allowed in that jurisdiction.' He went on: 'The new coronavirus regulations … place restrictions on leaving the home without a reasonable excuse; travelling abroad for the purpose of assisted dying is a reasonable excuse, so anyone doing so would not be breaking the law.'[496] Baroness Meacher, a proponent of AD, also admitted in October 2021 that she had assisted a friend with arrangements for an assisted death abroad:

> Some time ago, a close friend who was dying asked me for help. I duly helped them to make arrangements for Switzerland. Like many families across the country, I was motivated purely by compassion. But in the eyes of the law my acts made me a criminal.[497]

Thus, it is not clear whether assistance abroad is criminal or not in England and Wales, but a tolerant approach to AD can be demonstrated, despite formal attempts to reform the law in England and Wales being rejected on

[496] HC 5 Nov 2020, Vol 683, cols 475-482 at 475.
[497] Molly Meacher, 'Assisted Dying Bill is a humane end of life insurance policy'. (*Times,* 21 October 2021) <https://www.thetimes.co.uk/article/assisted-dying-bill-is-a-humane-end-of-life-insurance-policy-jgn0z9krw> accessed 13 Nov 2021.

multiple occasions.[498] At best, it is contradictory and a shirking of responsibility to accept that AD is appropriate in some circumstances, yet to deny its implementation in similar circumstances across the UK. Legislation that proactively deals with PAD is the only route to solve this conundrum – police and prosecutorial examinations after the fact will always be traumatic for the relatives involved, challenging for the authorities to piece together, and unhelpful for others contemplating similar predicaments. Based on the lack of prosecutions, and the discrepancy between Lord Carloway's and Lord Hope's views on travelling abroad for AD,[499] arguably, the law in Scotland is more liberal than in England in this respect. However, this cannot be stated with certainty, given Mr Hancock's statements and the hundreds of citizens who have made the journey with no legal repercussions.[500] Again, Fuller's concerns around incongruence in law are illustrated here. It is important to reiterate here that the actions of citizens who assist loved ones at home or abroad are primarily borne from the fact that they cannot access legal PAD in the UK. Thus forgone are any medical interventions that could prevent assisted death, safeguarding to ensure PAD is the correct venture for the patient, support for relatives thereafter and protection from criminal liability for citizens and HCPs.

Fundamentally it is understood that the reason not to charge is either that there is not enough evidence or that, despite a sufficiency of evidence, prosecution is not considered to be in the public interest, in which case prosecutorial discretion is exercised. The prosecution is required to ask whether there is "sufficient evidence to provide a reasonable prospect of

[498] For example; The Patient (Assisted Dying) Bill 2003/Assisted Dying for the Terminally Ill Bill [HL]; Assisted Dying Bill (HL Bill 24) 2013–2014; During the passage of the Coroners and Justice Bill (now the *Coroners and Justice Act 2009*), two amendments that sought to amend the law on AD were tabled. Neither was successful and, on a free vote, the amendments were defeated by 194 votes to 141.
[499] Lord Carloway's statements (that travel abroad for AD is not illegal) and Lord Hope's comments in Purdy (that travel abroad for AD is illegal).
[500] Dignity in Dying, *The True Cost: How the UK outsources death to Dignitas* (2017) <https://cdn.dignityindying.org.uk/wpcontent/uploads/DiD_True_Cost_report_FINAL_WEB.pdf> accessed 20 May 2022.

conviction" and, if so, whether "the public interest requires prosecution".[501] While a decision not to prosecute will be inevitable where there is insufficient evidence to support charges, the matter is more complex when there is "sufficient evidence", but the prosecutor decides that it would not be in "the public interest" to proceed.[502] In that instance, the prosecutor is exercising a very wide discretion and one that the courts are reluctant to intrude upon.[503] For example, in the Scottish case of Dr Kerr, the accused had admitted his actions, meaning that the evidence requirement was satisfied. It would be interesting to know why the prosecutor then felt that a charge was not in the public interest.

The unpredictability in police investigations, charges, prosecution and sentencing in AD cases is problematic and fails Fuller's criteria by dint of creating ad hoc and non-comprehensible rules. Bandes, considering compassion and the rule of law generally has noted that:

> If defendants are lucky enough to draw Judge Weinstein, a powerful, iconoclastic, deeply moral judge, they will receive more compassionate sentences...The rule-of-law problems here are obvious – lack of notice or predictability, unequal treatment depending on the luck of the draw, arbitrariness.[504]

Whilst different judge's approaches are a feature of common law generally, there is also the more significant problem that if, instead of legislating for AD in its own right, we retain the status quo, permitting a few courageous judges/prosecutors to act as a safety valve, we miss the larger problem – that the framework itself is flawed, i.e., prohibition mitigated by individual acts of judicial/prosecutorial non-compliance. Perpetuating the scenario where a

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[501] COPFS, Prosecution Policy <https://www.copfs.gov.uk/publications/prosecution-policy-and-guidance?showall=&start=0> accessed 30 Jan 2022.
[502] Ibid.
[503] The courts have said that judicial intervention will be "rare in the extreme" in *R v Inland Revenue Commissioners, ex parte Mead* [1993] 1 All ER 772, 782 and "sparingly exercised" in *R v DPP*, ex p C [1995] 1 Crim App R 136, 140.
[504] Susan Bandes, 'Compassion and the rule of law' 188 (n 155).

handful of individual enforcers of the law make exceptions in some egregious cases is neither sustainable nor an appropriate framework for the rule of law by Fuller's standards.

Bandes considers that a sentencing scheme premised on compassion (as may be the case with AD) is persuasive but that it is not appropriate for compassion to be used as a stop-gap, deviation in regulation, or to make exceptions to the general rules, but considers how it could be used to frame the principles and rules themselves, especially those worthy of revisiting[505] – an argument I make in Chapter Ten.

The Rule of Law is thus violated when the norms that officials apply do not correspond to the norms that have been made public by the governing authorities (outlined in the second of Fuller's criteria), or when officials act on their discretion rather than the norms laid down in advance. It should, however, be part of the mission of the rule of law to attempt to reduce the amount of discretion in governance. The goal is not to eliminate discretion but to ensure that it is appropriately framed and authorised and that the application of rules and judicial procedures is preserved for those cases where liberty and well-being are most seriously at stake.[506]

There are no specific prosecutorial guidelines to consult in the Scottish context, no specific statutory offence to charge the person with, a lack of specific case law, and no specific sentencing guidelines. The exercise of prosecutorial discretion would thus seem more difficult than in England and Wales, where judges are guided in determining the length of the minimum term by a statutory scheme that includes aggravating and mitigating factors.[507] In Scotland, the absence of a distinguished "coherent legal system"[508] on AD means that we rely on generality. This lack of specificity contributes to the vacuum in Scots Law and impedes the aspirations of good

[505] Ibid.
[506] Jeremy Waldron, 'The Rule of Law' (n 94).
[507] Criminal Justice Act 2003, s 269, sched 21.
[508] *The Morality of Law* 46.

moral law, as highlighted by Fuller when articulating the issues with generality in law[509] and clarity.[510]

3.1 The Lord Advocate – Prosecutorial guidelines and the ECHR

As will be discussed at 3.3, litigants often use the courts to extract favourable judgements that are then used as a bargaining plea to Parliament to change the law to allow physician-assisted dying, removing the need for illegal citizens assisted deaths and subsequent court cases.

Likewise, pressure is applied to the prosecutorial authorities to inch towards a more liberal landscape, i.e., if prosecutorial guidance (on when AD is and is not prosecutable) can be obtained, this feeds into the argument that AD is, in some circumstances, appropriate and permissible. Evidenced alongside this are examples of tolerance of compassionate AD cases which have not been prosecuted, alongside those that have, perhaps too harshly. The discrepancies then solidify the argument that the law is not being applied to the letter in practice; thus, it would be better to have permissive legislation that allows AD in strict circumstances, which would reduce the number of cases presented to the court, removing the reliance on prosecutorial discretion.

The crux of this thesis is that greater clarity and compassion would be achieved if Scotland legislated for AD in its own right. Legislation is the preferred route for this, but the goal of greater clarity, and satisfaction of Fuller's criteria, could be contributed to by the publication of specific prosecutorial guidelines on this issue. Fuller is concerned with formal promulgation of law and denounces situations where "…some laws are published, others, including the most important, are not.[511] Even positivists,

[509] Ibid.
[510] Ibid 63.
[511] *The Morality of Law* 40.

such as Bentham[512] and Hart,[513] identify promulgation of law as an underpinning and essential element of any law.

The next section will first set out some background before arguing that the Lord Advocate is duty-bound to publish specific prosecutorial guidelines for Scotland on AD cases.

3.1.1 The lack of prosecutorial guidelines contributes to the lack of clarity

When considering prosecution for homicide in AD cases, the approach of the Lord Advocate and COPFS is to consult the general prosecution code. This sets out the criteria for decision-making and the range of options available to prosecutors dealing with reports of crime.[514] It is a general code with no specific mention of AD.

In the third section of Fuller's monograph, he says:

> Starting with the premise that law governs and judges men's actions by general rules, any criminal statute ought to be sufficiently clear to serve the double purpose of giving to the citizen an adequate warning of the nature of the act prohibited and of providing adequate guidelines for adjudication in accordance with the law.[515]

Since Scotland does not have a statute on AD, we must look to prosecutorial decision-making to make sense of the law. Laws must be public in their

[512] Bentham, 'Of Promulgation of the Laws', in I WORKS I55 (Bowring ed. I859); Bentham, 'Principles of the Civil Code', in I WORKS 297, 323 (Bowring ed. I859) (pt. I, C. XVII, 2d para.); Bentham, 'A Fragment on Government', in I WORKS 22I, 233 n.tm] (Bowring ed. I859) (preface, 35th para.).
[513] Hart, *The Concept of Law*, p. 123 (n 61).
[514] COPFS, Prosecution Code (July 2021) <https://www.copfs.gov.uk/images/Documents/Prosecution_Policy_Guidance/COPFS%20Prosection%20Code%20-%20August%202021.pdf> accessed 2 Jan 2022.
[515] *The Morality of Law* 103.

actual promulgation to satisfy the Convention tests of accessibility and foreseeability, which will be outlined in this section.
Whilst Fuller's principles primarily focus on the Rule of Law in relation to citizens, he does include legal institutions and professionals in his consideration of how the law must be understandable.

The Justice Committee report, which intended to focus on the legal aspects of the 2013 Bill, stated that suicide and attempted suicide are not in themselves illegal in Scotland and that the decision on whether or not to prosecute is for the COPFS, taking into account the circumstances of the case, including whether prosecution would be in the public interest.[516]
Patrick Harvie MSP stated that there was currently a lack of clarity about what might be prosecuted and under what circumstances and asked:

> Is the position that we are in [at present] not the most open and ill-defined legislative framework that we could possibly have? Is an attempt to outline a process that would be protected from those forms of prosecution not a positive step that increases the clarity that is available to people? [517]

In response to this, the Health and Sport Committee said:

> The policy goal of permitting assisted suicide is a separate issue from lack of clarity. The observation that the current law contains uncertainty does not necessarily weigh in favour of enacting the present Bill, since the Bill's purpose is not the neutral purpose of

[516] SP Paper 641, 3rd Report, 2015 (Session 4): Report to the Health and Sport Committee on the Assisted Suicide (Scotland) Bill, para 27 <https://archive2021.parliament.scot/parliamentarybusiness/CurrentCommittees/85275.aspx > accessed 11 June 2018.
[517] Health and Sport Committee, 1 st Meeting 2015, Session 4 <https://www.parliament.scot/chamber-and-committees/official-report/what-was-said-in-parliament/HS-13-01-2015?meeting=9717&iob=88991> accessed 30 Jan 2019.

> ‘clarifying’ the law, but the separate purpose of making assisted suicide clearly lawful if the requirements in the Bill are fulfilled.[518]

Whilst not the sole objective, clarifying the law was indeed one of the purposes of the Bill, as featured in the accompanying policy papers.[519] Although the primary policy objective was to allow AD under the qualifying criteria, clarifying the law was naturally intertwined with the law reform process and would have been an additional benefit. What Mr Harvie highlighted is that the current law is quite obviously failing the requirement for good law – that it should not be decided on an ad hoc basis, that it should be well publicised to inform decision making, be understandable and non-contradictory. The issue of prosecutorial guidelines in relation to AD has seen considerable activity at ECHR level, and it is valuable to explore that here.

In ***Gross v Switzerland*** **2013**[520]*,* the applicant had grown old and frail and had found her quality of life so intolerable that she wished to die. However, she could not find a doctor who would provide her with the necessary prescription for a lethal drug because her legal counsel was unable to guarantee that any doctor who prescribed the drug “would not risk any consequences from the point of view of the code professional medical conduct”.[521] The court observed that there could be “positive obligations inherent in an effective ‘respect’ for private life” under Article 8 ECHR and that this could include “both the provision of a regulatory framework of adjudicatory and enforcement machinery protecting individuals’ rights and the implementation, where appropriate, of specific measures”.[522] The court explained that the applicant’s case “primarily raises the question whether the State had failed to provide sufficient guidelines defining if and … under which

[518] Stage 1 Report on Assisted Suicide (Scotland) Bill (n 221).
[519] SP Bill 40, Assisted Suicide (Scotland) Bill Policy Memorandum, para 6, 8-10, 51 < https://archive2021.parliament.scot/S4_Bills/Assisted%20Suicide/b40s4-introd-pm.pdf> accessed 2 May 2018.
[520] (Application no. 67810/10)
[521] [11].
[522] [62].

circumstances medical practitioners were authorised to issue a medical prescription to a person in the applicant's circumstances".[523]

Having considered the Swiss law, the court held that the applicant's Article 8 rights were infringed. The court said that there was a "lack of clear legal guidelines", which was "likely to have a chilling effect on doctors who would otherwise be inclined to provide someone such as the applicant with the requested medical prescription".[524] The court explained that,

> …if there had been clear, state-approved guidelines defining the circumstances under which medical practitioners are authorised to issue the requested prescription in cases where an individual has come to a serious decision, in the exercise of his or her free will, to end his or her life, but where death is not imminent as a result of a specific medical condition, the applicant would not have found herself in a state of anguish and uncertainty regarding the extent of her right to end her life.[525]

Interference with Article 8(1) rights can only be justified if "necessary in a democratic society".[526] This means that the interference must respond to "a pressing social need".[527] The ECHR grants signatory states to the Convention a certain margin of appreciation when balancing the interests of the affected individual with the interests of society. So, in Scotland, a balance must be struck between the interests of the majority of Scots who want the choice of AD and the wider societal consequences – the court's inference here being that such consequences could be harmful.[528]

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[523] [63].
[524] [65].
[525] [66] .
[526] Art 8 (4) Necessary in a democratic society.
[527] ECHR, *The exceptions to Articles 8-11 of the ECHR,* at II.A. The rule of law test, p. 14. <https://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-15(1997).pdf> accessed 15 April 2021.
[528] Ian Marland, '75 per cent of Scots back change to assisted suicide law.' (*The Times*, 22 Jan 2018) <https://www.thetimes.co.uk/article/75-per-cent-of-scots-back-change-to-assisted-suicide-law-cm3plmglv> ;Dignity in Dying, 'Largest ever poll on assisted dying finds increase

That balance, to date, has swung too far towards the theoretical concerns around the potential for AD to be open to abuse. To date, reasons to resist legalising AD have centred on the need to protect vulnerable people (those who might be pressured (internally or externally) to request an assisted death), the argument that people need more care and not AD, and fears that society's respect for the sanctity of life may be undermined if we shift to a permissive, compassionate AD law. In previous years little empirical or anecdotal data could be ascertained on AD, so this approach was arguably warranted. This approach is now fundamentally imbalanced and requires recalibration.

There is now a multitude of studies both nationally and internationally, not least this thesis' contribution to the situation in Scotland, which have not been presented before, that show that *regulated* physician-assisted dying is safe[529] and thus that the protective function of the law has been heavy-handed in its bid to protect vulnerable people, to the detriment of terminally ill Scots. Testimonies of suffering 'too disturbing to describe' are increasingly shining a light on this issue in the Scottish media.[530]

In ***Koch v Germany* 2012**,[531] the Strasbourg court considered that the German courts' failure to entertain Koch's application, which was for a declaration that the refusal of a Federal drugs institute to enable him to obtain a lethal dose of medication was unlawful, infringed his Article 8 rights. For present purposes, the case is of interest mainly because the court

in support to 84% of Britons' (2 April 2019) <https://www.dignityindying.org.uk/news/poll-assisted-dying-support-84-britons/> accessed 13 Nov 2021.

[529] M Battin, et.al, 'Legal physician assisted dying in Oregon and the Netherlands: evidence concerning the impact of patients in "vulnerable" groups' (2007) 33 (10) JME 591-597; B. Colburn, 'Disability-based arguments against assisted dying laws' (n 219); *Carter v Canada* (Attorney General), 2015 SCC 5, [2015] 1 SCR 331 at para 795-98, 815, 837, 843, 852, 1242.

[530] Dani Garvelli, 'Insight: Daughters demand right to die in the name of their campaigning mother' (*Scotsman,* 21 June 2020) <https://www.scotsman.com/news/politics/insight-daughters-demand-right-to-die-in-the-name-of-their-campaigning-mother-2890577> accessed 13 Nov 2021.

[531] ECHR (Application no. 497/09).

explained that in 36 of the 43 member states (including the UK), "any form of assistance to suicide is strictly prohibited and criminalised by law".[532] The court elaborated on the procedural implications of Article 8, specifically the margin of appreciation afforded to domestic courts, stating that "the (fact that) state parties to the Convention are far from reaching a consensus" on the legal treatment of assisting suicide "points to a considerable margin of appreciation enjoyed by the state in this context". [533] The court also restated the decision in *Pretty*[534] that the right to private life does not entail an obligation for states to legalise AD.

We now turn to another key piece of UK case law, namely ***R (Purdy) v DPP* (2009) UKHL.**[535] This case later formed the basis of the first Scottish AD case, *Ross v Lord Advocate* [2016], discussed in detail in the next chapter.

Ms Purdy suffered from multiple sclerosis (MS), which rendered her progressively more incapacitated. When she considered her existence no longer tolerable, she wished to have an assisted death in a jurisdiction where this was lawful, namely, Switzerland. [536] However, as a wheelchair user and the inflictions of MS, she would need assistance to do so. Ms Purdy wanted the DPP to disclose the factors he would "take into consideration in deciding whether or not it is in the public interest to prosecute those who assist people to end their lives in countries where assisted suicide is lawful." [537]

Lord Hope described how Section 2 of the Suicide Act 1961 was clear, unequivocal and not ancillary to anything else: [538]

> …acts which help another person to make a journey to another country, in the knowledge that its purpose is to enable the person to

[532] *Koch* para 26.
[533] Ibid 70.
[534] See Section 1.5.1.
[535] *R (Purdy) v DPP* (2009) UKHL 45.
[536] Ibid para 17.
[537] Ibid 31.
[538] Ibid 18.

> end her own life there, are within its reach. Its application cannot be avoided by arranging for the final act of suicide to be performed on the high seas, for example, or in Scotland.[539]

Ms Purdy sought a judicial review of the DPP's failure to promulgate an offence-specific policy that sets out the factors which would be considered[540] in deciding whether it was in the public interest to prosecute encouraging or assisting suicide or not.[541] Ms Purdy sought judicial review of the DPP's refusal to create this policy on the ground that Section 2 violated her right under Article 8 of the Convention (right to respect for private life)[542] and that the interference with her Article 8 (1) right was not 'in accordance with law' as it must be by way of Article 8(2).[543] Note that Article 8 requires only 'in accordance with the law', whilst Articles 9,10 and 11 require measures to be 'prescribed by law'.[544] When considering whether legislative measures satisfy the requirements of Article 8(2), it is necessary to consider the following four questions as identified in *R (Aguilar Quila) v Secretary of State for the Home Department* [2012]: [545]

1. Is the legislative objective sufficiently important to justify limiting a fundamental right?
2. Are the measures which have been designed to meet it rationally connected to it?
3. Are they no more than are necessary to accomplish it?
4. Do they strike a fair balance between the rights of the individual and the interests of the community?

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[539] Ibid 18.
[540] Under Section 2(4) of the 1961 Act.
[541] *Purdy* para 28.
[542] ibid 28-29.
[543] "There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law…".
[544] n 523, p.14.
[545] Lord Wilson in *R (Aguilar Quila) v Secretary of State for the Home Department* [2012] UKSC 45, [2012] 1 AC 621, at [45].

Ms Purdy sought to exploit the ECtHR's ruling in *Pretty* that Section 2(1) of the Suicide Act 1961 engaged Article 8(1) ECHR. Purdy identified 115 cases in which individuals had travelled abroad for an assisted death with only eight referrals to the DPP. Six did not proceed due to insufficient evidence, while in the remaining two cases, prosecution was 'not needed in the public interest'.[546] The *Daniel James*[547] case was the only one where the DPP provided reasons for his decision not to prosecute. There also appeared to be other cases discontinued by the police on public interest grounds.[548]

It is worth noting that in England and Wales, successive DPPs have adopted a motive-centred approach to prosecution.[549] To date, this has not resulted in any prosecutions for assisted deaths that have occurred abroad, and only four for those in the UK, despite there being hundreds of cases.[550] The Health and Sport Committee responsible for scrutinising the Scottish 2013 Bill had concerns that the Bill was silent about the assisters' motives, stating that:

> [T]he motivation of the assister is one of the factors that has been identified as relevant in deciding whether to prosecute cases of assisted suicide in England and Wales; and notwithstanding that

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[546] *Purdy* Para 30.
[547] Daniel was 23 years old when he sustained a permanent spinal injury in a rugby accident. He tried on multiple occasions to end his life and after pleading with his parents, in 2008, travelled to Switzerland for AD, accompanied by his parents who were investigated but not prosecuted. *BBC*, 'No Charges over assisted suicide'. (9 Dec 2008) <http://news.bbc.co.uk/1/hi/england/hereford/worcs/7773540.stm> accessed 13 Nov 21.
[548] *Purdy* Para 30 (Lord Hope).
[549] CPS (2014) 'Policy for prosecutors in respect of cases of encouraging or assisting suicide' para 44 (n 268)
[550] CPS, 'Latest Assisted Suicide Figures' (2022) <https://www.cps.gov.uk/publication/assisted-suicide> accessed 13 Nov 21. From 1 April 2009 up to 31 March 2022, there have been 174 cases referred to the CPS by the police that have been recorded as assisted suicide. Of these 174 cases, 115 were not proceeded with by the CPS and 33 cases were withdrawn by the police. There are currently 8 ongoing cases. 4 cases of encouraging or assisting suicide have been successfully prosecuted. One case of assisted suicide was charged and acquitted after trial in May 2015 and eight cases were referred onwards for prosecution for homicide or other serious crime.

> motive currently makes the difference between murder and culpable homicide in Scotland.[551]

This is clearly inaccurate. The distinction is the presence or absence of a wicked *intent* to kill. Motive is not, and never has been, a *facta probanda* in Scots Law – it is legally irrelevant.[552] Likewise, in the absence of specific guidelines for Scotland, the committee had to look to England and Wales to inform their position for Scotland. They are not the only legal institution to publicly do so, with prosecutors in Scottish AD cases having done so too.[553] Looking to other jurisdictions as an aid to inform deliberations is routine practice, but here due to the deficit in Scots law, it had to be relied upon to attempt a conclusion that was still inaccurate.

The Divisional Court found against Ms Purdy, holding that the purported interference with Ms Purdy's Article 8(1) ECHR right to private life was 'in accordance with the law' for the purposes of Article 8(2):

> The [Code for Crown Prosecutors], promulgated under [Section 10 of the Prosecution of Offences Act 1985], together with the general safeguards of the administrative law, are sufficient to satisfy the requirement that the discretion [exercised under Section 2(4) of the Suicide Act 1961] be "in accordance with the law" of [Article 8(2) ECHR] as interpreted by the Strasbourg jurisprudence.[554]

The Court of Appeal also rejected Ms Purdy's submission that the discretion conferred on the DPP by Section 2(4) of the Suicide Act 1961 was not in 'accordance with the law'.[555] The Court stated that the combination of the Code for Crown Prosecutors, and the written reasons for no prosecution in

[551] Stage 1 Report on AS (Scot) Bill 2013 para 40 (n 221).
[552] P.Ferguson, 'Causing death or allowing to die? Developments in the law' (1997) (n 413) see also: J.Horder, 'On the irrelevance of motive in the criminal law.' in J. Horder (ed) *Oxford Essays in Jurisprudence*, 171–195. (OUP 2000).
[553] *Ross* IH Lord Carloway [78]. The SP Justice Committee also, see (n 40).
[554] *Purdy* [82].
[555] ibid [63-79].

the *Daniel James* case, which the DPP had published, provided 'ample material… to address the likelihood of a prosecution'. The absence of a 'crime-specific policy' concerning assisted suicide did not render the effect of Section 2(1) of the Suicide Act 1961 unlawful, or 'not in accordance with the law for the purposes of [Article 8(2)]'.[556]

Ms Purdy appealed to the House of Lords, which by unanimous decision reversed the judgment of the Court of Appeal. Following the ECtHR's decision in *Pretty,* the House of Lords held that Ms Purdy's Article 8(1) rights were engaged. They also held that her Article 8 rights were infringed by the DPP's refusal to give her the requested information. Given that her rights were engaged, Article 8 required that "the law must indicate with sufficient clarity the scope of any such discretion conferred on the competent authorities and the manner of its exercise".[557] The House of Lords rejected the DPP's argument that the Code for Crown Prosecutors, which applied to all crimes, gave Ms Purdy sufficient guidance. Lord Hope said the DPP should be required:

> [T]o promulgate an offence-specific policy identifying the facts and circumstances which he [would] take into account in deciding, in a case such as that which Ms Purdy's case exemplifies, whether or not to consent to a prosecution under Section 2(1) of the 1961 Act.[558]

In Scotland, this would relate to whether or not a prosecution was brought in relation to homicide and would give a clearer steer as to why cases such as Dr Kerr's were not prosecuted in the public interest. The DPP's argument in *Purdy* was that the Code for Crown Prosecutors provided adequate guidance, but the Lords rejected this argument as the Code applied to all crimes and "[fell] short of what [was] needed to satisfy the Convention tests

[556] ibid [79].
[557] Lord Hope at [43], quoting from *Hasan and Chaush v Bulgaria* (2000) 34 EHRR 1339.
[558] *Purdy* [56] (Lord Hope); ibid [1] (Lord Phillips), [69] (Baroness Hale), [87] (Lord Brown), [106] (Lord Neuberger).

of accessibility and foreseeability".[559] Lady Hale said, "the object of the exercise should be to focus, not upon a generalised concept of 'the public interest', but upon the features which will distinguish those cases in which deterrence will be disproportionate from those cases in which it will not".[560]

If the Suicide Act 1961 explicitly prohibits suicide assistance, surely unless parliament amends this, all cases of suicide assistance should be deterred. This fails against several of Fuller's criteria; particularly relevant are the principles of contradictory rules, incongruence between the rules as stated and official action, and most importantly, a failure to publicise or at least make available the rules expected to be observed.

In *Purdy*, all five Law Lords agreed that the right to respect for private life in Article 8 was engaged.[561] Consequently, the Court ordered the DPP to draw up a policy to clarify when prosecutions would and would not be pursued.[562] Outlining his reasons for this, Lord Hope said:

> The cases that have been referred to the Director are few, but they will undoubtedly grow in number. Decisions in this area of the law are, of course, highly sensitive to the facts of each case. They are also likely to be controversial. But I would not regard these as reasons for excusing the Director from the obligation to clarify what his position is as to the factors that he regards as relevant for and against prosecution in this very special and carefully defined class of case…it ought to be possible to confine the class that requires special treatment to a very narrow band of cases with the result that the Code will continue to apply to all those cases that fall outside it.[563]

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[559] per Lord Hope [53].
[560] [64].
[561] ibid [39] (Lord Hope); ibid [62] (Baroness Hale), ibid [71] (Lord Brown), ibid [95] (Lord Neuberger).
[562] [56].
[563] [55].

The DPP subsequently published specific guidelines and, in February 2010, issued the *Policy for Prosecutors in Respect of cases of Encouraging or Assisting Suicide*, which considers the specifics of the alleged crime with particular emphasis on three key aspects: the public interest stage, factors in favour of prosecution, and factors against prosecution.[564] This policy does not apply to Scotland, where there is no specific offence and to date, the Lord Advocate has refused to produce guidance despite Purdy's clear ruling that this is a breach of Article 8 ECHR. Instead, the Scottish prosecutor continues to rely on the general prosecution code, despite criticism that this is not fit for purpose in this context.[565] It is apparent again that Fuller's criteria for good law are not satisfied; the reliance on general laws in an area so in need of specificity is troublesome; the legal repercussions of this are evident from the cases mentioned and repeated attempts to reform the law – the societal consequences are also stark and will be outlined in Part III of this thesis.

Black argued that the DPP guidance in England and Wales exceeds the mandate of the court and that informal legal change has been accelerated by *Purdy.* [566] If that is true, then it could be argued that the situation has reprieved Parliament and the courts of their legitimate duties by placing the burden of making law onto the shoulders of the DPP, something that is not constitutionally appropriate in the UK. However, the DPP policy did not represent substantive legal change; what it does do, however, is make the law, regardless of whether it is used or not, accessible and clear as required by ECHR tests of foreseeability and accessibility and also by Fuller's standards.

The basis of the argument in *Purdy* was that the law should be formulated with sufficient precision to enable the individual, if need be with appropriate advice, to regulate their conduct; it was not an attempt to change the law.

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[564] CPS, 'Policy for prosecutors in respect of cases of encouraging or assisting suicide' (n 268).
[565] Chalmers, J. 'Assisted suicide: jurisdiction and discretion' p.299 (n 6).
[566] Isra Black, 'Better off Dead?' p.124 (n 5). See also Penney Lewis, 'Informal legal change on assisted suicide: the policy for prosecutors' (2011) 31(1) LS 119.

The Scottish Human Rights Commission has addressed the need for greater clarification in prosecutorial policy in Scotland, suggesting that:

> … until a policy, including legislative change, in Scotland has been achieved, the Commission considers that the head of the prosecution service in Scotland, the Lord Advocate, should issue interim guidelines to further clarify the position for the public in relation to the prosecution of assisted suicide.
>
> The principle of legality under the European Convention on Human Rights calls for the law to be foreseeable. In the Commission's view there is a strong case for increased clarity in the law of Scotland on the criminalisation of assisted suicide in Scotland, following the decision of the House of Lords in *Purdy v DPP*.[567]

Thus, while the DPP issuing guidance in England and Wales helps that jurisdiction go some way to meeting Fuller's criteria for clear and accessible law, prosecutorial guidelines alone would not solve all of Scots Law's issues on this subject and would further entrench the status quo of *after the fact* investigations. With this subject and the consequences therein, only formal promulgation of legislation is appropriate. The momentum and ambition to reform the law on AD are evident via the case law, but across the UK, the sovereign body is Parliament, so it is neither constitutionally appropriate nor possible for the courts or prosecutors to change the law. I will turn now to the relationships between the courts, parliament, and reform.

3.2 The courts as an instrument for reform

It is evident from the cases discussed thus far that attempts are being made to move the UK towards a permissive approach to AD via the courts. In England,

[567] Scottish Human Rights Commission, 'Assisted Suicide (Scotland) Bill: Written Evidence to the Justice Committee' (n 179).

Tony Nicklinson was 'locked in' his own body after suffering a stroke at fifty-eight. Had it not been for medical interventions at the time of Tony's initial stroke, he would have died quickly from natural complications. Those interventions kept him alive but in a permanently paralysed state. As a result, he could move only his head and eyes, and could communicate only by blinking to spell out words, initially via a Perspex board and subsequently via an eye blink computer. He considered his life "dull, miserable, demeaning, undignified and intolerable, and wished to end it".[568]

This reminds us of Thomas Hobbes's aphorism that life is 'solitary, poor, nasty, brutish and short'[569] and asks us to consider what Finnis adopts as an Aristotelian starting point: what constitutes a worthwhile, valuable, desirable life?[570] For some, there is an intrinsic value ascribed to human life and an inherent dignity attached to that, regardless of the person's state, i.e. whether that be a foetus, at any stage of gestation, or someone in a permanent vegetative state.[571] Dworkin himself has said that one should treat life as "something we should respect and honour and protect as marvellous in itself".[572] For many people, Mr Nicklinson's predicament would be unbearable and unjust, when he finds no real value in his existence or reprieve from his suffering. Lord Justice Toulson summarised Nicklinson and his co-claimant's predicaments:

> Put simply, the claimants suffer from catastrophic physical disabilities but their mental processes are unimpaired in the sense that they are fully conscious of their predicament. They suffer from "locked in syndrome". Both [Tony and Martin][573] have determined that they wish

[568] R (on the application of Nicklinson and another) (Appellants) v Ministry of Justice (Respondent) [2014] UKSC 38 para 3.
[569] Thomas Hobbes' poem *Leviathan*, 1651.
[570] John Finnis, *Natural Law and Natural Rights* (OUP 1980).
[571] See generally, Sensen, *Kant on Human Dignity* (De Gruyter 2011).
[572] R.Dworkin, *Life's Dominion. An Argument about Abortion and Euthanasia* (Harper Collins 1993) at 73.
[573] Martin was a co-claimant who joined the *Nicklinson* case at second appeal.

> to die with dignity and without further suffering but their condition makes them incapable of ending their own lives.[574]

The only alternative was death by "self-starvation".[575] Fuller questions a life of suffering, and doubts "if most of us would regard as desirable survival into a kind of vegetable existence in which we could make no meaningful contact with other human beings".[576]

Mr Nicklinson applied to the High Court in 2010 for (i) a declaration that it would be lawful for a doctor to assist him in terminating his life or, if that was refused, (ii) a declaration that the current state of the law in that connection was incompatible with his rights under Article 8 of the Convention.[577] He was seeking a judicial review on the basis that Section 2 of the Suicide Act 1961 disproportionately interfered with his right to a private life under Article 8 of the ECHR.

The case reached the Supreme Court, which held that a blanket ban on AD was not outside the margin of appreciation as the provisions in section 2(4) of the Suicide Act prevented it from being so.[578] As the ECtHR had decided that it was for Convention states to decide whether their own law on assisted suicide was compliant with Article 8,[579] the domestic courts had constitutional competence to decide whether section 2 infringed Article 8.

The court held that whilst it was within their competence to do so, it would not be institutionally appropriate for the court to grant a declaration at that time. Instead, parliament should be given the opportunity to consider amending

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[574] *Nicklinson* para 2.
[575] Ibid 12.
[576] Ibid 186.
[577] Ibid. On appeal from: [2013] EWCA Civ 961.
[578] para 63.
[579] *Pretty v United Kingdom* (2346/02) [2002] 2 F.L.R. 45, [2002] 4 WLUK 606, *Haas v Switzerland* (31322/07) (2011) 53 E.H.R.R. 33, [2011] 1 WLUK 313, *Koch v Germany* (497/09) [2013] 1 F.C.R. 595, [2012] 7 WLUK 645 and *Gross v Switzerland* (67810/10) [2013] 3 F.C.R. 608, [2013] 5 WLUK 331.

Section 2 in the light of the judgment.[580] The court held that the Parliamentary process was a better way of resolving controversial questions of fact arising from moral and social dilemmas.[581] While, ultimately, The Supreme Court concluded that it would be institutionally appropriate for Parliament, rather than the court, to consider the matter of AD, they flagged concerns that the proportionality of a prohibition on AD was uncertain:

> The interference with Applicants' Article 8 rights is grave, the arguments in favour of the current law are by no means overwhelming, the present official attitude to assisted suicide seems in practice to come close to tolerating it in certain situations [and] the rational connection between the aim and effect of [the ban] is fairly weak.[582]

Mr Nicklinson died soon after the ruling, refusing food and fluid and subsequently contracting pneumonia. His wife, Jane, testified to how he was forced to endure a life and a death that he did not want. Mr Nicklinson's QC recognised the 'emotional insurance'[583] aspect of his request - that worse than the physical discomfort of his situation was the mental pain it caused. Mr Nicklinson himself was reported as saying:

> I can't tell you how significant it would be in my life, or how much peace of mind I would have, just knowing that I can determine my own life instead of the state telling me what to do - staying alive regardless of my wishes or how much suffering I have to tolerate until I die of natural causes.[584]

The prohibition undoubtedly produces unintended consequences for people waiting for death in physical and mental pain, experiencing undignified deaths,

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[580] *Nicklinson* [111-118].
[581] Ibid [230-232].
[582] *Nicklinson* [108] [314-319].
[583] That having the choice of AD allows people to maintain a quality of life with reduced anxiety and existential symptoms. L. Ganzini et al., 'Interest in physician-assisted suicide among Oregon cancer patients' (2006) Journal of Clinical Ethics 17:27-38.
[584] Cathy Gordon, 'Locked in man Tony Nicklinson 'condemned to suffer' (*Independent,* 19th June 2012) <https://www.independent.co.uk/news/uk/home-news/locked-man-tony-nicklinson-condemned-suffer-7865905.html> accessed 13 Nov 2021.

with the distress of their loved ones as an additional corollary. Whilst a permissive approach to AD would not restore dignity and remove suffering for all citizens, it would give great comfort and relief to many who want the choice.

The media exposure of the cases mentioned has had a substantial impact in mobilising public support both for and against legal change.[585] This is hardly surprising. The facts behind these cases are shocking, centring on tragic instances of human suffering, which call on people to consider their own mortality. According to Birkland and Knill, such shocks should, in turn, provide a window of opportunity for policy change.[586]

When parliament refuses to pass the law that people feel is needed, one option is to accept that the democratic argument has been lost, parliament has spoken, and the case is closed. However, what is happening here is that people are taking it upon themselves to have assisted deaths, regardless of the law's prohibition. Prosecutors seem to strategise around this by taking a particular prosecution pattern, and campaigners turn to other strategies trying in effect to change the law in court, by pressing for judges to clarify ambiguous law in favourable ways, and by seeking to establish permissive precedents. The problem with this judicial/prosecutorial strategy is that it would confer dubious legitimacy on any such change, even if it proved successful. The judiciary cannot manipulate or finesse the country into more progressive politics via purposive construction and judicial law-making, and it would not be constitutionally appropriate for them to do so. This is truly a matter for parliament to legislate on, as has been recognised by the judges in almost every AD case examined.

Despite this, attempts at law reform via the judicial route have been increasing. Campaign organisations usually support such cases to obtain

[585] Utilising the media to share personal stories is a campaign tactic used by interest groups on both sides of this debate, especially in more recent years - social media campaigns. See: C. Jaye, et al., 'The people speak: social media on euthanasia/assisted dying' (2021) 47 (1) Med Humanit. 47-55.
[586] T.A. Birkland, *After Disaster: Agenda Setting, Public Policy, and Focusing Events* (Georgetown University Press, 1997) 324.

judgments that will put pressure on parliament to act by legislating. Arguably, they are not looking for judicial decision-making, and are aware of Parliament's sovereignty in the UK, but by obtaining judgements in their favour and further highlighting the problems with the current prohibition, judicial decisions can be used as a bargaining plea to Parliament. Saimo Chahal, the solicitor representing *Nicklinson* and *Lamb*, said after the 2014 Supreme Court decision:

> It's a good decision. It's fallen short of what we wanted it to be … It's disappointing that they haven't gone so far as to declare [the Suicide Act] incompatible with human rights law. But they have given a clear message to parliament that it must review the ban on assisted suicide and the judges have said they may be minded to make a declaration next time around … It creates a national debate and a necessity for parliament to look at it. [587]

Despite repeated unsuccessful attempts[588], this is still a popular way to bring attention to the issue.[589] Incompatibility cases, in particular, are an attempt to nudge parliament in the hope that a decision is reached in their favour that adds to the case for reform, which is then taken back to MPs to push them into action. There is a nuanced relationship between parliament and the courts, evidenced by the use of judicial reviews, incompatibility attempts and lobby groups intervening in cases.[590] This series of actions and reactions by

[587] Owen Bowcott, 'Assisted suicide campaigners fail to get supreme court to overturn ban' (*The Guardian*, 25 June 2014) <https://www.theguardian.com/society/2014/jun/25/assisted-suicide-ban-doctors-supreme-court> accessed 16 January 2022.
[588] For example, the campaigning organisation Dignity in Dying intervened in the *Martin* case and brought the *Noel Conway* case, amongst others. Friends at the End and Humanist Society Scotland supported the *Ross* case.
[589] The 2019 case of Phil Newby was supported by Dignity in Dying, Friends at the End and My Death My Decision.
[590] For example, Care Not Killing intervened in the *Nicklinson* case; Humanists UK intervened in *Conway* at Court of Appeal; the Voluntary Euthanasia Society and the Catholic Bishop's Conference for England and Wales also intervened in *Pretty* (2002).

parliament and the courts is seen throughout the jurisdictions that have attempted to legalise AD.

3.3 Conclusion

The principle point I have made in this chapter, aside from summarising the case law, some of which has been presented for the first time,[591] is that current AD law fails vis-à-vis Fuller's criteria. This is visible in the judgements as pronounced, which often take a compassionate approach to the defendant who has assisted a loved one to die, rather than inflicting the full force of the law, resulting in a disjoint between declared rule and official action. The lack of Scottish prosecutorial guidance further complicates the issue, resulting in a myriad of complex cases where difficult decisions have to be taken without any explicit legal framework to guide them, starkly illustrating Fuller's concerns about a lack of clarity and promulgation.

The chapter discussed how AD has seen activity at the ECtHR level, most of which has been unhelpful for law reform purposes. The same arguments for law reform have been produced in nearly all AD cases; namely, the use of article rights to try and secure a declaration of incompatibility is notable. Likewise, the same arguments for finding against the petitioner in a bid to protect the vulnerable are ubiquitous. There is, however, some evidence to suggest that the issuing of a declaration, as sought in *Nicklinson*, would create political pressure and that enacting a law to remedy the incompatibility could result,[592] so there is merit in this approach. However, it is a costly, resource-intensive way of trying to reform the law, though incremental change has often happened with the help of small victories in the courts.[593]

On balance, however, hard cases should be dealt with via existing rights, not populist policies and this chapter has outlined why Parliament is the most

[591] At section 3.0 Scottish AD cases unearthed.
[592] C. Chandrachud, 'Reconfiguring the discourse on political responses to declarations of incompatibility' [2014] Public Law 624.
[593] Devashree Gupta, 'The Power of Incremental Outcomes: How Small Victories and Defeats Affect Social Movement Organizations' [2009] 14(4) Mobilization 417-432.

appropriate route for reform, something on which campaigners, the courts, and prosecutors agree.[594] Allowing judicial policymaking in marginal cases would undermine the role of judges as protectors of rights and remove too much responsibility from the legislator. If something is important enough to warrant reform, this change should be made by the UK's sovereign body, by Parliament. The question is: how might the problems with the law as identified be addressed, using resources already implicit in Scots Law and culture? Chapter 10 deals with this and recommends incorporating clarity *and* compassion into the law reform process.

It is submitted that the protective function of the law has given too much credence to the *potential* abuse of AD, which has resulted in the *actual* suffering of the terminally ill (who want the choice of AD) not being given the due diligence it deserves. Arguably, too much weight has been given to the hypothetical view that some might be negatively affected, which has meant that the experiences of real dying people have resulted in bad deaths. As a society, we should respond compassionately to this and seek to do what we can to prevent it. It is, therefore, appropriate to consider law reform not only for reasons of clarity but for reasons of compassion, equality and justice. Legislating for physician-assisted dying would allow the claimants in cases such as *Purdy* and *Nicklinson* to avail themselves within a strictly regulated AD framework, negating the need for cases to be brought to court.

Fuller disagreed with Hart that "the tacit assumption that the proper end of human activity is survival" and that "an overwhelming majority of men do wish to live, even at the cost of hideous misery",[595] and instead recognised that:

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[594] In *Pretty* Lord Steyn said: "In our Parliamentary democracy…such a fundamental change cannot be brought about by judicial creativity…it must be a matter for democratic debate and decision-making by legislatures." [57]; Lord Hope was keen to stress in *Purdy* that "it is no part of our function to change the law…this must be a matter for Parliament." [26]; H. MacQueen., 'Lord Advocates Statement on Assisted Suicide' (*Scots Law News*, 23 Sept 2009) <http://www.sln.law.ed.ac.uk/2009/09/23/lord-advocates-statement-on-assisted-suicide/> accessed on 6 Dec 2017.

[595] *The Morality of Law* 185.

> ...the proposition that the overwhelming majority of men wish to survive even at the cost of hideous misery, this seems to me of doubtful truth...I believe that if we were forced to select the principal that supports and infuses all human aspiration we would find it in the objective of maintaining communication with our fellows. [596]

Thus, Fuller recognises that the sanctity of life is not absolute but conditional based on the quality of life, particularly in our ability to have meaningful relationships with others. Mr Gordon Ross articulated a stark example of this in the first Scottish AD case, *Ross v Lord Advocate* 2016, which built its argument upon the ruling in *Purdy.* I turn to this case next, the significance and complexity of it warranting a chapter in itself.

[596] Ibid.

Chapter Four: Scotland's Test Case: *Ross v Lord Advocate* [2016]

4.0 *Gordon Ross v Lord Advocate* [2016][597]

In Scotland, the law on AD had never been explicitly tested in the courts until *Ross*. There have been other cases 'in and around'[598] the question of the lawfulness of AD, but nothing directly on point. The *Ross* case worked its way through the Scottish courts at the same time as the 2013 Bill was being considered in the Scottish Parliament.[599] Despite Scotland's legal institutions enjoying a separation of powers; the bearing of the Bill's defeat (before the Inner House ruling) and the influence of that defeat is illustrated by Lord Drummond Young's comment:

> Counsel for the petitioner suggested that rejection of the Bill in the Scottish Parliament was "entirely irrelevant" to the question presently before the court. I cannot agree. Rejection of that Bill, and the corresponding Westminster Bill, is a clear demonstration that the people's elected representatives are opposed to assisted suicide in the United Kingdom. In considering the issues raised in the present case, the court must in my view take that factor into account. [600]

In the aftermath of *Ross*, it was suggested that this case, and in particular Lord Carloway's observations, shed light upon this area of law.[601] This chapter challenges that suggestion and instead argues that the judgment highlights precisely how unclear the law on AD is in Scotland and how in fact, it contributed to even more confusion.

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[597] *Gordon Ross v Lord Advocate* [2016] CSIH 12.
[598] Cases on Causation, case law like *Brady* for example.
[599] *Ross* was heard in 2015 during scrutiny and deliberation at Stage 1 of the Assisted Suicide (Scotland) Bill, with the final vote in May 2015.
[600] *Ross* [85].
[601] Andrew Tickell, 'Assisted Suicide: bringing a little light' (*Llalands Peat Worrier*, 14 Jan 2016) <http://lallandspeatworrier.blogspot.co.uk/2016/02/assisted-dying-bringing-little-light.html> accessed 11 November 2021.

Ross is a judgement of the Scottish Court of Session,[602] originating before the Lord Ordinary (Lord Doherty) in the Outer House, before appeal was made to the Inner House and was heard by the Lord Justice Clerk (Lord Carloway), who delivered the opinion of the court, Lady Dorrian and Lord Drummond Young.

Gordon Ross, who died in January 2016, laterally resided in a care home, living with diabetes, heart problems, Parkinson's disease, and peripheral neuropathy.[603] Lord Carloway outlined the circumstances which Mr Ross faced:

> He anticipates that there will come a time when he will not wish to continue living, as he will find his infirmity and consequent dependence on others intolerable. He would require assistance to commit suicide because of his physical state. He is apprehensive that anyone who assisted him would be liable to prosecution. He considers that he may require to take action to end his life himself, sooner than he would otherwise wish to, in order to avoid living on in an undignified and distressing condition. This dilemma causes him uncertainty and anguish.[604]

Mr Ross brought an action for judicial review, seeking *inter alia* a declaration that the Lord Advocate had breached Article 8 of the ECHR[605] by "failing to promulgate a policy identifying the facts and circumstances which he will take into account in deciding whether or not to authorise the prosecution in Scotland of a person who helps another person to commit suicide".[606]

[602] Scotland's supreme civil court.
[603] *Ross* [3].
[604] Ibid.
[605] Article 8: Right to respect for private and family life.
[606] *Ross* [2016] CSIH 12.

To recap, in 2002, in *Pretty v the United Kingdom,*[607] the court had concluded that the right to decide the manner of one's death is an element of private life under Article 8. Later case law had articulated that an individual's right to decide the way in which, and at which point, their life should end, provided that they are in a position to form their own judgement freely and to act accordingly, is one of the aspects of the right to respect for private life within the meaning of article 8 of the Convention.[608]

Interference with a person's Article 8(1) rights[609] must be justified under Article 8(2)[610] as (i) identified and established in the law of Scotland; (ii) adequately accessible; and (iii) sufficiently foreseeable.[611] Furthermore, legislation had established that the Lord Advocate must make available to the public a statement setting out in general terms the matters about which a prosecutor requires to be satisfied in order to initiate, and continue with, criminal proceedings in respect of any offence.[612] At issue in *Ross* was whether the Lord Advocate was breaching Article 8 by not publishing guidance regarding the factors weighing for and against prosecution of someone who assists another person in ending their life. In the judgment, Lord Carloway said that the general prosecution code currently used:

> contains general guidance to allow the issues, which the petitioner submits are relevant, to be taken into account. The attitude of the victim, the motive for the offence and whether there are any mitigating factors are all present in the code. However, the respondent has gone further in stating that, although all of those factors may be relevant

[607] *Pretty v. the United Kingdom*, no. 2346/02, ECHR 2002-III.
[608] *Haas v. Switzerland*, no. 31322/07, ECHR 2011.
[609] "Everyone has the right to respect for his private and family life, his home and his correspondence".
[610] "There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."
[611] *Silver and Others v. the United Kingdom* [25 March 1983] Series A no. 61.
[612] Criminal Justice (Scotland) Act 2016 Section 97 (1) Publication of prosecutorial test.

> considerations, where there is a sufficiency of evidence (that a homicide has been committed), there will be a prosecution in the absence of exceptional circumstances. There is no attempt by the Lord Advocate to distance himself from his Code.[613]

In effect, this judgement found that the general prosecution code, which sets out thirteen factors[614] to be considered in relation to prosecution, alongside public statements about AD made by the Lord Advocate (in the press and official papers to the Scottish Parliament),[615] is sufficiently clear and detailed, and thus meets the qualitative criteria that law should be "accessible and foreseeable".[616] Lord Carloway took the general prosecution code together with the Lord Advocate's public statements to mean there was no uncertainty in the law,[617] although what would constitute mitigating factors and exceptional circumstances is not clear.

An almost identical argument[618] and decision[619] had previously been advanced in England in *Purdy*.[620] Chapter Three of this thesis has outlined that the petitioner was ultimately successful, and the HOL ordered the DPP to produce offence-specific guidelines.[621] Having found that Purdy's Article 8(1) rights were engaged, the HOL concluded that the interference was not "in accordance with the law"[622] as required by Article 8(2) and that the DPP's

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[613] Lord Carloway in *Ross* [35].
[614] COPS Prosecution code, Public Interest Considerations, p.8 (n 508).
[615] Comments on assisted suicide in the form of written evidence to the Scottish Parliament's Health and Sport Committee in response to a request dated 13 January 2015 and in a further written submission to the Justice Committee, both in respect of the Assisted Suicide (Scotland) Bill; Lord Advocate, 'The law relating to causation with regard to homicide is clear' (*The Herald* 4 April 2015) <https://www.heraldscotland.com/opinion/13208583.law-relating-causation-regard-homicide-clear/> accessed 21 Nov 2020.
[616] As established in *C.R. v UK* (1995) Series A no 335-C, par 33. *Ross* [13].
[617] *Ross* [14].
[618] Save that it hinged on the English Section 2 Suicide Act 1961 offence, which does not apply to Scotland.
[619] The Court of Appeal decision in *Purdy* ruled almost identically [79] to Lord Carloway in *Ross. Purdy* was only successful once appeal was made to the HOL.
[620] *R (Purdy) v DPP* [2009] UKHL 45 as outlined at 3.1.1 of this thesis.
[621] CPS, 'Suicide: Policy for Prosecutors in Respect of Cases of Encouraging or Assisting Suicide' (n 268).
[622] *Purdy* [85].

general prosecutorial code was *not* sufficiently precise and accessible to allow individuals to foresee whether or not they would be prosecuted for assisting a suicide. This was despite the DPP at the time having already gone further than Scotland ever has, by way of public statements and by publishing a detailed report on why he did not prosecute in the case of *Daniel James*.[623] The court in *Ross* thoroughly considered the reasoning in *Purdy* but ultimately dismissed it as not applicable.

Elish Angiolini QC, who was Lord Advocate at the time of *Purdy*, issued a statement in response to that decision, advising that she would not be issuing similar guidance for Scotland. She outlined the reason for this decision: the ruling in *Purdy* was applicable only to cases in England and Wales by virtue of the statutory offence under Section 2 of the 1961 act, which does not apply in Scotland. She also stated that any criminality in Scotland falls under the common law of homicide, and any change to the law of homicide was a matter for Parliament to decide.[624] However, as noted at 3.1.1, the DPP's guidelines were not an attempt to amend the law of homicide or assisted suicide in England and Wales, and the DPP was at pains to stress this.[625] The English guidelines were produced simply to comply with the Article 8 regulations and provide greater clarity. The position taken by Elish Angiolini is one that her successors have consistently reaffirmed.[626]

Some commentators disagreed with Ms Angiolini's stance of denying the applicability of *Purdy* to Scotland, arguing that the case for guidance is in fact stronger in Scotland "because the potential consequences for an individual are more severe in Scotland than under English law…'[627] due to there being

[623] Keir Starmer QC, 'Decision on Prosecution The Death by Suicide of Daniel James' (2009).
[624] H. MacQueen., 'Lord Advocates Statement on Assisted Suicide' (n 591).
[625] Keir Starmer, 'Why I am clarifying the law on suicide', (*Telegraph*, 23 Sept 2009) <https://www.telegraph.co.uk/news/politics/6219464/Why-I-am-clarifying-the-law-on-assisted-suicide-by-Keir-Starmer-Director-of-Public-Prosecuitions.html> accessed 13 Nov 2021.
[626] Elish Angolini declined to produce guidelines after the *R (Purdy) v DPP* 2009 case and subsequent Lord Advocate's (Frank Mulholland, James Wolffe) have upheld this.
[627] J. Chalmers, 'Assisted suicide: jurisdiction and discretion' p.299 (n 6).

a mandatory life sentence for murder, with the potential for this sentence even for culpable homicide. In England and Wales, the maximum penalty for a Section 2 of the Suicide Act charge is 14 years' imprisonment.[628]

Fuller gives another helpful analogy via the "mere realist" and considers how this person views the requirement of promulgation:[629]

> ...we have thousands of laws, only the smallest fraction of which are known, directly or indirectly, to the ordinary citizen. Why all this fuss about publishing them? Without reading the criminal code, the citizen knows he shouldn't murder and steal. As for the more esoteric laws, the full text of them might be distributed on every street corner and not one man in a hundred would ever read it.

Bear in mind Fuller's manuscript was written in the 1960s, and since then, we have seen the number and volume of statutes increase exponentially – but Fuller replies to the mere realist with:

> Even if only one man in a hundred takes the pains to inform himself concerning, say, the laws applicable to the practice of his calling, this is enough to justify the trouble taken to make the laws generally available. [630]

Citizens are entitled to know precisely what the law is so that they are better informed before any subsequent action is taken, which may indirectly influence the actions of many others. Another valuable contribution from Fuller is that laws require publication to be subject to public criticism. This is an attractive view for lawyers, who know the law is non-stagnant, ever-evolving, and must be open to constructive criticism in light of changing social circumstances. Furthermore:

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[628] Ibid.
[629] *The Morality of Law* 50.
[630] Ibid 50-51.

> ...if the laws are not made readily available, there is no check against a disregard of them by those charged with their application and enforcement...The requirement that laws be published does not rest on any such absurdity as an expectation that the dutiful citizen will sit down and read them all. [631]

In *The Christian Institute & Ors v The Lord Advocate (Scotland)*,[632] the court outlined two qualitative elements of accessibility and foreseeability: first, a rule must be formulated with sufficient precision to enable any individual – if need be with appropriate advice – to regulate his or her conduct;[633] and, second, it must be sufficiently precise to give legal protection against arbitrariness.[634] On the matter of obtaining legal advice, this is an essential part of the Rule of Law – that competent professionals can offer advice to citizens. The court in *Ross* also tied the ability of citizens to access legal advice if necessary to the fact that the law is accessible and foreseeable.[635]

However, as we have seen, even the most senior and experienced legal experts in Scotland have voiced their dissatisfaction with the status quo in relation to the Scots Law on AD.[636] Consider a layperson (HCP or ordinary citizen) whom a person has asked to help them die. They would not likely know that the law of homicide governs this area, where to access legal information of this nature, or how to read the case law or prosecution code and understand what it meant for them and the consequences therein. They would therefore have to hire a lawyer to advise them on this, which they probably would not do for fear of implicating themselves in a crime.

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631 Ibid.
632 [2016] UKSC 51.
633 *Sunday Times v United Kingdom* [1979] 2 EHRR 245, para 49; *Gillan v United Kingdom* [2010] 50 EHRR 1105, para 76.
634 *The Christian Institute & Ors* [79] quote with reference to *Gillan v United Kingdom*, para 77; *Peruzzo v Germany* [2013] 57 EHRR SE17, [2013] ECHR 743, para 35.
635 Respondent at [27] supported by Lord Carloway [32], Lady Dorrian [62], Lord Drummond Young at [70] [72].
636 See Section 2.0.

In comparison, if someone in Scotland wishes to buy a house, they are easily able to approach someone for professional advice or to do an internet search of 'property law' or 'how to buy a house', and they will be guided by an abundance of available information and, more specifically for the professionals working in this area, the law (statue, cases, guidance) governing this important aspect of civic life. In comparison, if someone in Scotland researches 'can I help someone die?', they are first directed to campaign groups advocating for AD to be legalised.[637] The law must be such as to make it possible for professionals at least to get a reliable picture of what the law requires.[638] Legal professionals are not clear on what the law is in Scotland, and individuals may avoid seeking advice for fear of raising the alarm, so the opportunity for citizens to obtain such legal advice is limited, curtailing the accessibility of the law.

It is not the business of the law to prescribe for excellence but rather to ensure the minimum baseline from which development towards excellence might move. Fuller himself voices that the law furnishes a "baseline for self-directed action, not a detailed set of instructions for accomplishing specific objectives".[639] Having analysed the Scots Law on AD against Fuller's criteria, I have shown that Scotland has only a minimum baseline from which to work, being vague and confusing as to what the law actually is. It is too general for a 'crime' so specific and fact-sensitive. As Aristotle wrote:

> … equity, although just, and better than a kind of justice, is not better than absolute justice only than the error due to generalisation … it is a rectification of law in so far as law is defective on account of its generality.[640]

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[637] Google search 'can I help someone die?' 22 May 2022.
[638] Jeremy Waldron, 'The Rule of Law' (n 94).
[639] *The Morality of Law* 210.
[640] Aristotle, *Ethics,* transl. J.A.K. Thomson, revised H.Tredennick (Harmondsworth: Penguin, 1976), p. 200 in J. E. Penner & E. Melissaris, *McCoubrey & White's Textbook on Jurisprudence* (5th edn, OUP 2012) p.18.

Prima facie, the facts in *Purdy* and *Ross* are almost identical: both prosecutors had relied upon general prosecution codes, and in both cases, it was acknowledged that the claimant's Convention rights were engaged. In England, however, this resulted in success for *Purdy*. The Outer House ruled that *Ross* could not be directly compared with *Purdy*, nor did the outcome have to be the same, for three reasons:

(1) Unlike the position in England and Wales, in Scotland, there is no statutory crime of assisting or encouraging suicide.

(2) In *Purdy*, there was a marked inconsistency between the law and its application in practice, evidenced by several cases of assisted suicide taking place but very few proceedings for prosecution being initiated.[641] It was said that it had not been demonstrated that there was a similar divergence in Scotland, or that an unknown or unpublished policy was being applied.[642]

(3) In *Purdy* (and in the DPP's written explanation of why he did not prosecute in the case of *Daniel James*), the DPP had accepted that many of the factors set out in the Code for Crown Prosecutors had *little or no relevance to the decision* on whether or not a prosecution for a contravention of s 2(1) Suicide Act 1961 was in the public interest. In Scotland, however, the Lord Advocate "does not distance himself from the factors set out in the Prosecution Code. On the contrary, he has identified the factor in the Code which is likely to prevail in cases where there is a sufficiency of evidence – (and) that

[641] Dignity in Dying, True Cost of Dignitas Report (2017) (n 494) 'Since the DPP published the guidelines in 2010, over 250 Britons have died at Dignitas alone – there are various other clinics available. A 2016 Freedom of Information request to police forces and the Crown Prosecution Service (CPS) by *The Economist* suggest that less than half this number of offences were recorded and investigated.'
[642] *Ross* [38].

> the serious nature of the offence makes it likely that the public interest will require a prosecution". [643] [644]

Each of these three points will now be examined in turn, concluding firstly that the lack of statutory offence in Scotland is not critical because, regardless, both jurisdictions have an outright ban. Secondly, it will be shown that there is, in fact, a divergence between law and practice. Lastly, that the view from the Lord Advocate that the general prosecution code is fit for purpose skewed the judgement in the crown's favour.

4.1 No statutory crime of 'assisting suicide' in Scotland

Since Scotland has no statutory equivalent of the Suicide Act 1961, the issue raised by the petition in *Ross* related to a much narrower category of cases - prosecution for homicide, where the circumstances of the 'homicide' involve assisted suicide. Lord Carloway stated:

> First, the underlying substantive criminal law in Scotland is different from that in England and Wales. There is no equivalent of section 2 of the Suicide Act 1961 in Scotland. That is because suicide, and hence attempted suicide, is not a crime in Scotland, albeit that the circumstances of an attempt may involve the commission of an act otherwise criminal (e.g., a breach of public order).[645]

Chalmers argues that there is no reason why the different label attached to the offence in Scotland ('homicide' rather than 'assisted suicide') should avoid the issue identified in *Purdy,* which was that failing to produce guidelines is a breach of Article 8; particularly when we consider that the

[643] *Ross* [39].
[644] It should be noted that Lord Drummond Young, in the Inner House considered an additional fourth point, a general one, resting on the *Purdy* case not being concerned with murder or manslaughter, the equivalent of culpable homicide (para 80). Since this general point is covered within point 1, it will be covered as part of the analysis of the three OH points.
[645] *Ross* [33].

maximum penalty under Section 2 (1) of the 1961 Act is 14 years in prison, which is less than that for murder in Scotland, which attracts a mandatory life sentence.[646] Chalmers argues that the labelling is beside the point, i.e. it is unconvincing that because Scotland has no statutory equivalent to rely on, the petitioner's case was not comparable. Chalmers outlines how the "critical act" of assisting suicide is little different in Scotland from England, given that suicide itself does not result in prosecution.[647]

Regarding the practice of 'suicide tourism', Lord Carloway continued:

> The conduct [travelling abroad for AD] anticipated in *R (Purdy) (supra)* would not be criminal if prosecuted in Scotland. Section 2 [of the 1961 Act] created a broad offence, which criminalised behaviour which would not otherwise be so. It was, and is, not applicable in Scotland.[648]

However, Section 2 does not explicitly deal with the issue of travelling abroad, nor is there any mention of it in the prosecutorial guidance. The only legal guidance we have regarding Section 2 criminalising suicide tourism is Lord Hope's remarks in *Purdy*.[649] Hundreds of UK citizens have travelled abroad for an assisted death, and those who have accompanied or 'assisted' them have not been prosecuted.[650]

Lord Carloway explained that simply accompanying would not be enough to establish causation and thus warrant a charge for homicide.[651] The accompanying person's role would have to go beyond simply transporting the

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[646] Section 269 of the Criminal Justice Act 2003.
[647] J. Chalmers, 'Assisted suicide: jurisdiction and discretion' p.299 (n 6). Chalmers drew his conclusions before the judgement in *Ross* was available.
[648] Lord Carloway [33].
[649] *Purdy* [18]. Political statements have been made since that 'suicide tourism' does not contravene s.2 of the 1961 Act, as outlined at 3.0.
[650] HC Deb 4 July 2019, Vol 662, Col 1436 Karin Smyth MP <https://hansard.parliament.uk/commons/2019-07-04/debates/EFD57ADB-AE18-4D6B-9DA8-CCDDF99D1D0A/AssistedDying> accessed on 13 Nov 2021.
[651] *Ross* [31].

other party. If the accompanier contributed to the process within the clinic, liability might arise on an art and part (accessory) basis for homicide, and the Scottish courts would have jurisdiction. Typically, in art and part homicide cases, where there is pre-concert, and the common plan was such that it was objectively foreseeable that risk to life was present, the person would be guilty of murder.[652]

If the accused cannot be proven to have participated in the *actus reus* of the crime, they can only be guilty art and part if there is evidence of prior concert.[653] In a case where antecedent concert is libelled, the prosecution must establish that the commission of the 'crime' was a likely result of the psychological assistance rendered by the accused. The instigation would have to be such as to induce the criminal conduct.[654]

Lord Carloway provides a conclusive answer to the question of whether assistance with suicide tourism is criminal:

> In the same way, other acts which do not amount to an immediate and direct cause are not criminal. Such acts, including taking persons to places where they may commit, or seek assistance to commit, suicide, fall firmly on the other side of the line of criminality. They do not, in a legal sense, cause the death, even if that death was predicted as the likely outcome of the visit. Driving a person of sound mind to a location where he can jump off a cliff, or leap in front of a train, does not constitute a crime. The act does not in any real sense amount to an immediate and direct cause of the death.[655]

[652] *McKinnon v HM Advocate* (2003) and *Poole v HM Advocate* (2009).
[653] *Spiers (William Albert) v HM Advocate* [1980] J.C. 36. See *Little (Veronica) v HM Advocate* [1983] J.C. 16, for an example of instigation as the basis for art and part guilt.
[654] Timothy H. Jones & Ian Taggart, *Criminal Law,* 7th edn (Thomas Reuters, 2018) p.139.
[655] *Ross* [31].

The sole authority cited in support of this conclusion is a paragraph in *MacAngus and Kane*, where Lord Hamilton said only that such actions "do not necessarily" break the causal chain and that:

> What appears to be required is a judgment (essentially one of fact) as to whether, in the whole circumstances, including the inter-personal relations of the victim and the accused and the latter's conduct, that conduct can be said to be an immediate and direct cause of the death.[656]

This is by no means a definitive basis on which to draw conclusions such as those drawn by Lord Carloway. Lady Dorrian's comments on causation are more cautious. She notes that:

> [T]he question of causation is a central one, and whilst the voluntary act of the victim may not suffice to break the chain of causation in the particular circumstances of the case, the critical question is whether a direct causal link can be established.[657]

In *Ross*, Lord Carloway asserted that "[e]xactly where the line of causation falls to be drawn is a matter of fact and circumstance for determination in each individual case. That does not, however, produce any uncertainty in the law."[658] Nevertheless, it remains unclear what test is to be applied in assessing the facts and circumstances. He adds that:

> … the voluntary ingestion of a drug will normally break the causal chain. When an adult with full capacity freely and voluntarily consumes a drug with the intention of ending his life, it is this act which is the immediate and direct cause of death. It breaks the causal link …[659]

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[656] *MacAngus & Kane v HMA* [2009] HCJAC 8 [42].
[657] *Ross* [58].
[658] [29].
[659] [30].

No argument or authority is deployed in order to reach this conclusion; thus, great care must be taken with this opinion.[660] Lady Dorrian adds an acknowledgement that a settled intention to end one's life "may be an important consideration in a question of causation",[661] while Lord Drummond Young's opinion does not address the issue. Lord Carloway's remarks do not fit with those of the Solicitor General, who stated during consideration of the 2010 Bill that the state of the victim's health did not matter and that voluntary ingestions did not break the chain of causation:[662]

> For example, if I supply someone with a lethal cocktail of drugs and that person ingests them, the chain of causation is not broken, so that would be a sufficient causal connection.[663]

Thus, it appears that should HCPs prescribe drugs for their patients to ingest themselves and end their own life, such as Dr Kerr did, that would not break the causal chain. However, as has been evidenced, the legal repercussions of this have not been borne out in practice.[664] Furthermore, Lord Carloway's comments do not accord with the decision in *MacAngus,* where it was held that a deliberate decision by the victim to ingest the drug supplied by the accused would *not necessarily* break the chain of causation.[665] The issue raised in *MacAngus* was whether the Scottish approach to cases involving death following the supply of drugs adopted in *Lord Advocate's Reference (No.1 of 1994)* was accurate in light of the HOL decision in the English case *R v Kennedy (No.2)* (2007) UKHL 38.

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[660] Shelagh McCall QC, Opinion to Friends at the End (Dec 2016), p.3.
[661] *Ross* [61].
[662] Stage 1 Report on the End of Life Assistance (Scotland) Bill para 16 (n 224).
[663] End of Life Assistance (Scotland) Bill Committee. *Official Report, 28 September 2010*, Cols 231.
[664] (n 461).
[665] *MacAngus and Kane* [48] (n 295).

The *Lord Advocate's Reference No.1*[666] concerned a charge of culpable homicide where drugs had been supplied to a woman who took them and died. In *R v Kennedy*,[667] the HOL had stressed the general principle that freely chosen acts by autonomous individuals should usually be regarded as breaking the chain of causation. Although Lord Carloway does not directly reference *Kennedy*, it seems likely that Lord Carloway was influenced by that ruling and that it was the basis for his dictum regarding autonomous acts breaking the causal link in *Ross*.[668] The authority he relied upon, *MacAngus*, had considered *Kennedy* in depth and how the position in Scotland should be reviewed following that decision.[669] However, that was ultimately not the view taken by the court in *MacAngus*, which was reluctant to follow *Kennedy* on the question of causation because it was not consistent with the longstanding approach of the Scottish Courts. Chalmers supports this:

> ... In England, the stress laid on free will by the House of Lords in *R v Kennedy* (No 2) [2008] 1 AC 269 would almost certainly mean that the causal chain would be regarded as broken by the deceased's own actions, but Scots law does not recognise the clear principle laid down in Kennedy.[670]

The decision in *MacAngus* was influenced by the decisions in two previous criminal cases: *Khaliq v HMA 1984*[671] and *Ulhaq v HMA 1991*[672], neither of which was discussed by Lord Carloway in *Ross*, although Lady Dorrian does reference them in her judgment.

Khaliq[673] concerned a shopkeeper selling glue-sniffing kits to children. He was charged with culpable and reckless conduct. He argued that the sale of

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666 *Lord Advocate's Reference* (*No 1 of 1994*) [1996] JC 76.
667 *R v. Kennedy* (On Appeal from the Court of Appeal (Criminal Division)) ([2007] UKHL 38)
668 n 659.
669 *MacAngus* [4].
670 James Chalmers, 'Assisted Suicide: why the Lord Advocate is wrong' (n 51).
671 JC 23.
672 SLT 614.
673 1983 SCCR 483 (CCA); 1984 JC 23; 1984 SLT 137.

glue to children was not unlawful, that he was not himself administering the substance directly to the children, and that the voluntary and informed act of the children in inhaling the substance broke the chain of causation. The Crown argued that the accused knew the kits would be used for self-harm and that the "wilful and reckless administration of a dangerous substance to another causing injury or death is a crime at common law in Scotland".[674]

The court held that, depending on the circumstances, supply could be the equivalent of administration and thus could be taken as the cause of the harm or injury. It held that the voluntary inhalation was not an extraneous event, so it did not break the chain of causation. The Crown argued that the harm was foreseeable, as the shopkeeper knew how the kits would be used, and thus he was acting recklessly. An averment of recklessness having been included, the court held the charge as relevant. This case illustrates that it is not necessary for the accused's act to be unlawful in and of itself. The same would be true had a child died as a result of the inhalation, as culpable homicide does not require an unlawful act in circumstances which (if the person did not die) would otherwise constitute a relevant charge of reckless endangerment of life or culpable and reckless conduct.[675]

In *Khaliq,* the accused was selling readymade kits to minors, but in *Ulhaq v HMA,* the accused was charged with wilful and reckless conduct for selling lighter fluid and solvents in their proper form to adults to be inhaled by them. The court held that the essence of the charge was that the accused knew the purposes for which the solvents were to be used, and therefore the supply was the cause of the abuse. The recipient's age did not matter.[676] These cases were followed by the court in Lord Advocate's Reference No 1, where again, the voluntary act of the victim was not treated as breaking the chain of

[674] Lord Justice General Emslie [32-4].
[675] *Sutherland v HMA* 1994 SLT 634.
[676] Lord Justice-General Emsllie said "That the persons supplied were children is not…essential to the relevancy of the charge" *Khaliq v HM Advocate,* 1984 J.C. 23 [33]. It was felt that his remarks were obiter since public concern at the time had centered on glue sniffing by children (Jones & Taggart, *Criminal Law*, (7th edition 2018) at p.223.

causation. In considering whether the voluntary act broke the chain, Lady Dorrian states the court would consider the nature, significance and intent behind the voluntary act.[677] Lord Carloway does not make reference to the cases of *Khaliq* and *Ulhaq*, which helped shape the decision in *MacAngus*, in his decision, but Lady Dorrian does.[678] It is argued that Lady Dorrian's opinion is a more accurate articulation of the criminal law of Scotland[679] and that the circumstances in which a voluntary act breaks the chain of causation remain unclear.[680]

These cases demonstrate that until *Ross,* it was understood that the actions of victims do not necessarily break the chain of causation, and that what is required is a judgement of facts as to whether the actions of the accused can be said to be the immediate and foreseeable cause of death.[681] It could be argued that the courts' use of a wide scope for causation, was guided by questions of the *mens rea*, based on the foreseeability of harm[682] and the societal impacts of harmful substances. Again, this highlights the difficulties in interpreting *Ross* in the context of Scotland's existing common law, the difficulties in dealing with AD cases which have entirely different motives to the existing Scots common law, and thus the difficulties arising from having no specific offence to deal with AD.

4.2 No gap between law and practice

The petitioner submitted that no reported cases of AD had been prosecuted in Scotland.[683] They argued that in four prosecutorial decisions, the Crown Office had reached decisions that were inconsistent with stated policy.

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[677] *Ross* [60].
[678] [60-61] and [84]. Lord Drummond Young considers *Khaliq* v *HMA* at [84].
[679] Lady Dorrian adds an acknowledgement that a settled intention to end one's life "may be an important consideration in a question of causation" [61] in contrast to Lord Carloway's statement that the causal link is broken [30]. Lady Dorrian also considers *Khaliq v HMA* and *Ulhaq v HMA* in her judgment but Lord Carloway does not.
[680] p.146-147.
[681] *Ross* [42].
[682] See *McDonald v HMA* 2007 SCCR 10 to illustrate further.
[683] *Ross* IH [21].

In the judgement of the Inner House, Lord Carloway considers assisted suicides that had been brought to the Scottish prosecutor's attention, including 'suicide tourism'.[684] He goes on to say:

> No instance was cited in which the respondent had considered that there was a sufficiency of evidence but had decided not to prosecute in the public interest. Only two instances of assisted suicide were identified by the respondent as having been reported to him.[685]

These two instances are not named, but we can infer that they are *B* and *HC.* The petitioner added *MacAngus v HM* (although this was not explicitly an AD case) and *HM Advocate v PB*, which we can assume is the aforementioned case of *Brady*.[686]

The prosecutor said there was only a small pool of cases to consider, starting with *B,* where the accused had been prosecuted for murder, although a plea of culpable homicide was ultimately accepted. No information is available on this case, and reference to it is made only in *Ross*. The next case of *HC* refers to Helen Cowie, a mother who admitted, on a radio show, to taking her son abroad to have an assisted death. No charge had been brought because there was insufficient evidence of a crime.[687] The petitioner argued that:

> The act of HC was a crime in Scotland, as the court had extra territorial jurisdiction in cases of homicide (section 11(1) of the Criminal Procedure (Scotland) Act 1995). If it was not a crime in

[684] For discussion see: A.Mullock, 'Prosecutors Making (bad) law?' (2009) 17 (2) MLR 290–299 <https://doi.org/10.1093/medlaw/fwp009> accessed 13 Nov 2021.
[685] *Ross* IH [34].
[686] At section 3.0.
[687] Helen Cowie took her son to Switzerland to have an assisted death. Again, it was very difficult to find facts on this case and it is only referred to in the *Ross* appeal at [21]. See *The Guardian*, 'Scottish police look into man's Dignitas death Helen Cowie tells radio show she helped her son Robert take his own life in Switzerland' (18 June 2011) <https://www.theguardian.com/society/2011/jun/18/scottish-police-mans-dignitas-death> accessed 13 Nov 2021.

> Scotland for a person to travel with another to a country where suicide was lawful, then the respondent ought to state that. The respondent ought to specify the factors that he took into account in deciding not to prosecute HC. His failure to do so had the appearance of an arbitrary exercise of discretion. [688]

Ultimately, the Lord Advocate instructed that there was insufficient evidence for criminal proceedings but that the case should be re-reported if further evidence came to light. In the third case *MacAngus* v *HM Advocate*, the accused had purchased controlled drugs which were ingested by the deceased and subsequently caused his death. Proceedings were raised for culpable homicide, but the Appeal Court decided that culpable homicide could not be established because the accused's act was not directed in some way against the victim. The case was reconsidered for prosecution in light of that decision, and it was decided that the evidence was unlikely to result in a conviction.

The other noteworthy case, *HM Advocate v PB*, was described by Lord Drummond Young as "most troubling":

> The deceased appeared to have taken his own life, but consideration was given as to whether a member of the deceased's family had taken any action that caused the death. Both Crown Counsel and the Lord Advocate considered that there was insufficient evidence to support a charge of culpable homicide and recommended that no further action should be taken. Crown Counsel nevertheless considered what should have happened if there had been sufficient evidence for a prosecution. In that event, he considered that proceedings would not have been in the public interest. In forming that opinion, he had express regard to the DPP's policy on Encouraging or Assisting Suicide. Counsel acknowledged that that guidance related to section 2 of the Suicide

[688] *Ross* IH [21].

> Act 1961, which does not apply in Scotland, but considered that there were *sufficient similarities* between culpable homicide and the statutory charge (S.2 1961 act) to render the guidelines valuable on the question of whether prosecution was in the public interest. [689]

If the finding in *Ross* stands, that is, that the general Scottish prosecution code is adequate, then it is difficult to justify why Crown Counsel chose to consult the English DPP guidelines for guidance on public interest factors. At the very least, this might imply that the Scottish prosecution code is not in itself sufficient. In any case, the court in *Ross* ultimately did not address this and disapproved of the results of the exercise, with Lord Drummond Young specifically disagreeing with Crown Counsel's reasoning:

> ... I am of the opinion that there is a clear distinction between the offence in section 2 and the offences of murder and culpable homicide as understood in Scots law. I accordingly consider that Crown Counsel was in error in following the English guidelines.[690]

Chalmers has said, "I have no doubt that, in deciding whether to prosecute, the Crown Office would take into account factors broadly similar to those listed in the Crown Prosecution Service Policy for Prosecutors in respect of Cases of Encouraging or Assisting Suicide."[691] Nevertheless, this is the only Scottish case in which reference was made to the DPP's code. Any legal or general assistance to be gained by looking at the DPP's code seems to be a subjective matter, with the Lord Advocate and the judges in *Ross* thinking the Scottish prosecution code is sufficient, whilst others, including Crown Counsel in *HM Advocate v PB*[692] and leading commentators such as

[689] ibid [78] emphasis added.
[690] Lord Drummond Young [78] in *Ross* IH.
[691] Scottish Parliament, 'Assisted Suicide (Scotland) Bill Response to Question Paper: The Position under Existing Scots Criminal Law Written Submissions HS/S4/15/5/1 p.5 (n 227).
[692] What Lord Drummond Young describes at the 'fourth case' in *Ross* [78].

Chalmers,[693] believing that it is not sufficient, in and of itself, in the context of AD in Scotland.

Ultimately, the petitioner's arguments failed, with Lord Drummond Young observing that three of the four cases turned on a conclusion that there was insufficient evidence for prosecution, in which case the question of prosecutorial discretion did not arise.[694] Lord Drummond Young considered *HM Advocate v PB*, on the basis that the exercise of discretion over prosecution charges could not be explained or justified in terms of the Prosecution Code (which might be considered evidence that the Code is in some way inadequate):

> … a family member who had been asked by a relative suffering from a degenerative illness to kill him and had done so by administering an overdose of medication and subsequently smothering him was charged with murder, and a plea to culpable homicide was offered by the defence and accepted. The facts available were sparse, but nothing appears to be significantly contrary to the statements of the Lord Advocate*; the only issue of doubt is why a plea to culpable homicide was accepted, but no information is available about that.*[695]

The argument that there is no gap between law and practice is not strong. The court in *Ross* did not consider the cases of *Hunter, Hainsworth, Edge, Dr Kerr*, or *Dr Wilson* that have been examined at 3.1 and which are directly relevant. In addition, it is known that there have been multiple suicide tourism deaths from Scotland,[696] and yet there is no evidence of any of the deaths resulting in prosecutions. Whilst Lord Carloway asserts that suicide tourism is not illegal, there is no discernible legal basis for this, and we have no way of knowing if the tourists were forcibly encouraged to partake or otherwise. This

[693] J.Chalmers, (2015) 'Assisted suicide in Scotland: (not) clarifying the law' (n 258).
[694] *HC, B, MacAngus.*
[695] LC IH [77].
[696] n 466.

signals a direct incongruence between forms of 'at home' amateur assistance equalling homicide, and ADs carried out abroad as being considered not unlawful. Stating that AD is illegal in Scotland and is to be avoided, while simultaneously accepting the reality that people can and do already access AD elsewhere is an unacceptable legal position. At the very least it discriminates in favour of citizens who happen to have the means both to comprehend the law on AD and to travel abroad to avoid prosecution for it.

In summary, the court held that there was "no such gulf apparent in the practice of the respondent".[697] It was held that the Lord Advocate's actions and his policy were conducted in a way that (as per Lord Doherty in the Outer House) "… is consonant with the rule of law. The public know what his policy is, and there is no suggestion that it is being applied inconsistently".[698] If the public knows what the policy is, then Fuller's criteria for publicising and making available the rules expected to be observed are fulfilled. However, whilst the public may know that there is a general prosecution code for all crimes (and even this is in doubt unless the majority have some form of formal legal training), they cannot know with any degree of certainty or probability what factors would be taken into account in cases of AD, because this information has never been published by parliament or by COPFS.

Furthermore, whilst direct data is not available, it is likely that AD cases are happening more regularly but (i) are not being prosecuted (a clear divergence of law and practice) and/or (ii) we are not aware of them because they are grouped and categorised as homicides. Since the *R*oss ruling, numerous other Scottish citizens have travelled abroad for an assisted death with no legal repercussions. [699]

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[697] *Ross* [34].
[698] Lord Doherty, *Ross* OH [44].
[699] Richard Selley, 'It is time to go, says Richard Selley as he prepares to die at Dignitas' (*The Times* 2nd September 2019) <https://www.thetimes.co.uk/article/it-is-time-to-go-says-richard-selley-as-he-prepares-to-die-at-dignitas-8fchdftsf>; Helen Puttick, 'Family of woman who died at Dignitas want law change' (*The Times* 17th Feb 2020) <https://www.thetimes.co.uk/article/family-of-woman-who-died-at-dignitas-want-law-change-n0gjd5grk>; Stuart Wilson, 'Prestwick family call for end to blanket ban on assisted dying'

4.3 Prosecution code not fit for purpose

We have seen that the court's first argument for not following *Purdy* (that the legislation does not apply in Scotland) is irrelevant. The second (no divergence between law and practice) can be demonstrated as inaccurate through the cases mentioned. Perhaps the third factor, an admission from the prosecutor that the prosecution code is not fit for purpose, would have tipped the balance in the petitioner's favour.

In *Purdy*, the gap between law and practice was given great weight, particularly after high profile cases such as that of *Daniel James*[700] (in which there was sufficient evidence to prosecute the parents for assisting Daniel to Switzerland to have an AD, but it was not in the public interest to do so). This case focused the public's attention, especially given that the DPP admitted that he had been unable to derive much guidance from the Code in deciding whether to prosecute the parents of Daniel James.

Given that admission, it was evident that the Code did not provide sufficient guidance on how English prosecutors should deal with such cases. Chalmers has said that if a case similar to *Daniel James* were to occur in Scotland, the Scottish courts would likely have had jurisdiction over the course of conduct which commenced in Scotland and had a strong territorial link to the jurisdiction where life was ended, and that the actions of those who had assisted with travel or provided other aid were a "significant contributory factor" in the death.[701] There would, therefore, be a stateable case of homicide. Following this, consideration would then have to be given to whether prosecution was in the public interest – a decision heavily influenced by prosecutorial discretion, and therefore by the resultant unpredictability analysed above.

(*Daily Record* 10th June 2021) <https://www.dailyrecord.co.uk/ayrshire/prestwick-family-call-end-blanket-24273746> accessed 19 Jan 2022.

[700] n 623.

[701] Chalmers, 'Assisted Suicide: why the Lord Advocate is wrong' (n 51).

Had the Lord Advocate been willing to accept that the general prosecution code in Scotland does not give a strong enough steer as to what to do in cases of AD, as the DPP in England and Wales had, it is arguable that Lord Carloway and the court may have accepted this, agreed with it and found in favour of Mr Ross. Presumably, this might have precipitated a new prosecutorial code for AD in Scotland, which would have required more clarity, transparency and debate on this important issue, and ultimately would have been a step forward in meeting Fuller's criteria.

Nevertheless, it is crucial to consider that even if specific guidance had been produced after *Ross*, it would not have solved many of the problems analysed above in relation to AD in Scotland (i.e., the absence of reporting, reviewing, and safeguards prior to the death, *inter alia*). Legislation that allows citizens to access PAD via their healthcare practitioner at home would still be the better avenue for law reform, entailing as it does the prior safeguarding, reporting, and oversight necessary for AD to operate safely and effectively.

Ross was the first case to publicly challenge the legal position in Scotland. It is unclear whether evidence of more cases (as uncovered by the research in this thesis at 3.0, for example) would have prompted a change in the Lord Advocate's attitude on the need for better prosecutorial guidance. It is possible that it might have because, in England, one convincing line of reasoning was a 'need' to produce guidelines, as assisted deaths and 'suicide tourism' were increasing in number. Certainly, there have been more AD and suicide tourism cases in England and Wales as a proportion of the larger population, but the number in Scotland is nevertheless not insignificant, and the issue is unlikely to disappear. In any case, the court in *Ross* simply did not have this information to consider in their deliberations, nor did they have an overview of the additional cases analysed in this thesis.

Overall, this section of the thesis has cast doubt on the reasons for dismissing Mr Ross' case. On the basis of this analysis, it is conceivable that a plausible alternative view might have seen Section 2 and culpable homicide as sufficiently similar and ruled in Mr Ross' favour. Additionally, it has been shown that there is, in fact, a divergence between 'law' and practice in Scotland, and AD cases may be unreported, unprosecuted, or result in very light sentences. The DPP's admission that the English code was insufficient is perhaps the main distinguishing factor here and the point that has the most impact. If the Lord Advocate had also believed the general prosecution code for homicide in Scotland was insufficient in this context, the decision in *Ross* may have been different.

4.4 Analysis of the *Ross* findings

The petitioner's objective in *Ross* was to gain legal clarity by way of specific prosecutorial guidance. Although the judgement did not require guidance to be produced (in distinction to *Purdy* in England and Wales), some have argued that it did produce greater clarity in the criminal law and its application to AD. Andrew Tickell went as far as to say:

> The court declined to force [the Lord Advocate] Frank Mulholland to publish additional guidance on how his prosecutors would treat cases – the remedy Ross sought. But in the course of reaching that decision, Lord Carloway and his colleagues arguably did something better – they stated the law in this area with a simplicity and a clarity which has hitherto eluded the authorities… Lord Carloway suggested "the criminal law in relation to assisted suicide in Scotland is clear." For my own part, I'm unconvinced this is a particularly convincing interpretation of the law as it stood before Mr Ross's legal action. But

> the Lord President's legal analysis in this decision goes a long way to bringing that clarity about. [702]

Tickell made these remarks with reference to Lord Carloway's statements in *Ross* at paragraph 30 and 31:

> When an adult with full capacity freely and voluntarily consumes a drug with the intention of ending his life, it is this act which is the immediate and direct cause of death. It breaks the causal link between any act of supply and the death[703]…other acts which do not amount to an immediate and direct cause are not criminal. Such acts, including taking persons to places where they may commit, or seek assistance to commit, suicide, fall firmly on the other side of the line of criminality.[704]

Tickell's analysis was not reflected in the views of other commentators, for instance:

> What Gordon Ross … needed yesterday from Lord Doherty was clarity about his legal situation. Sadly for Mr Ross and for wider Scottish society, we did not have that clarity. The judge sided with the Lord Advocate in ruling that the law is already clear but this is disputed.[705]

Likewise, Chalmers is also not convinced that the judgement brought clarity to the law: [706]

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[702] Andrew Tickell, 'Assisted Suicide: bringing a little light' (*Llalands Peat Worrier*, 14 Jan) <http://lallandspeatworrier.blogspot.co.uk/2016/02/assisted-dying-bringing-little-light.html > accessed 11 November 2021.
[703] *Ross* [30].
[704] i.e. that it would not be illegal [31].
[705] *Herald Scotland*, 'Clarity frustratingly lacking on the law and assisted suicide' (9 Sept 2015) <https://www.heraldscotland.com/opinion/13654996.clarity-frustratingly-lacking-on-the-law-and-assisted-suicide/> accessed 13 Nov 2021.
[706] J. Chalmers, 'Clarifying the law on assisted suicide? Ross v Lord Advocate.' (2017) 21 (1) ELR 93.

> In the aftermath of Ross, it was suggested that the observations of Lord Carloway significantly clarified the law on assisted suicide. In a formal sense, this is not strictly true.

In Scotland, the relevant cases to date have concerned: (i) a direct action such as the administration of a lethal drug; or (ii) the provision of the means combined with the knowledge of the likely outcome, i.e., death and (iii) instances of suicide tourism. Whilst cases in this area are incredibly fact-sensitive, a clear line beyond which any particular action will be too remote or indirect would contribute to better law by Fuller's standards, as, at present, it is not clear. Currently, an individual considering assisting another to end their life would run the risk of being indicted on a legally relevant charge, with the question of causation being left to a jury to decide as a matter of facts and circumstances.

On balance, Tickell's claims can be refuted for the reasons above, namely that Lord Carloway's analysis of causation would have been steadier if it had relied on the precedent set down in *MacAngus* and that Lord Carloway's statements in *Ross* do not in practice bring legal clarity to this issue because although he is Scotland's most senior judge, I contend that his comments in *Ross* are no more than *obiter dicta* informed by scant,[707] obsolete[708] or inapplicable[709] legal precedents.

It is difficult to predict the extent to which the Lord President's remarks might persuade a future criminal court. As a matter of precedent, the criminal courts would not be bound by Lord Carloway's remarks, as they were made in a

[707] As outlined, there is minimal case law in relation to AD in Scotland and no effort was made by the court to do a scoping review such as this thesis has.
[708] Lord Carloway appears to have relied on rulings such as *Kennedy*, which were pre *MacAngus*.
[709] In that they do not directly concern Scots Law or Assisted Suicide – Importantly, *MacAngus* did not agree with the ruling of the HOL in *Kennedy.*

non-criminal context.[710] Instead, a future criminal court would pay more attention to earlier criminal cases,[711] and, as argued above, these do not support Lord Carloway's conclusion that a deliberate decision by a person will break the chain of causation.[712]

In considering the effect of *Ross* in Scotland, it is instructive to also consider and compare the actions taken as a result of *Purdy* in other jurisdictions. Whilst not bound by the ruling, Northern Ireland proactively produced guidelines following the *Purdy* case. The DPP in Ireland stated:

> This policy is issued as a result of the decision of the Appellate Committee of the House of Lords in R (on the application of Purdy) v Director of Public ... The Director thought it appropriate to issue policy guidance which is applicable in Northern Ireland.[713]

Whilst Northern Ireland also has a specific offence under Section 13 of the Criminal Justice Act (Northern Ireland) 1966, in the same way that England and Wales have the Section 2 offence under the 1961 Act, it is still difficult to understand why the Scottish prosecutor did not decide, in the interests of transparency and good practice during or after *Ross*, to produce specific guidance. Instead, it signals an ongoing avoidance of the issue and a failure to aspire to make good law.

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[710] It is interesting that members of the civil court have been willing to make statements about the criminal law; in *Law Hospital Trust v Lord Advocate* (1996) CSIH, where the Court of Session was asked to grant a declarator that it would be lawful to cease to provide treatment to a patient in a persistent vegetative state, the court held that it was not open to it to pronounce on the scope of the criminal law. However, these difficulties did not arise directly in *Ross*, where there was no question of issuing a declarator.

[711] *MacAngus and Kane, Khaliq, Ulhaq, Lord Advocate's Reference* 1994.

[712] Nonetheless, the practical reality is that statements made by senior judges will rightly be treated with respect.

[713] Crown Prosecution Service for Northern Ireland, 'Policy on Prosecuting the Offence of Assisted Suicide' (Belfast, 2010) at 1.4 <https://www.ppsni.gov.uk/publications/policy-prosecuting-offence-assisted-suicide> accessed 13 Nov 2021.

The Lord Advocate producing guidelines would not be an extraordinary event. He/she has produced many offence-specific guidance notes.[714] The Lord Advocate states:

> Lord Advocate's Guidelines or prosecution policy and guidance is only published where its publication would not, or would not be likely to, prejudice substantially the prevention or detection of crime; the apprehension or prosecution of offenders; or the administration of justice. Prejudice may include allowing offenders to circumvent the law by restricting their offending to conduct which falls short of a prosecution threshold or, for example, a threshold which determines the prosecution forum.[715]

Given that it has been said that the DPP guidelines have 'decriminalised'[716] AD, it is understandable that the Lord Advocate is reluctant to publish such guidelines in Scotland. However, the DPP pointed out that his guidelines did not constitute 'a tick box exercise'[717] on how to avoid prosecution.

Importantly, after the *Ross* ruling, the Criminal Justice (Scotland) Act 2016 was brought into law, Section 97 of which states:

> (1) The Lord Advocate must make available to the public a statement setting out in general terms the matters about which a prosecutor requires to be satisfied in order to initiate, and continue with, criminal proceedings in respect of any offence.

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[714] COPFS, 'Lord Advocate Guidelines' <http://www.copfs.gov.uk/publications/prosecution-policy-and-guidance?showall=&start=4> accessed 13 Nov 2021.
[715] Ibid.
[716] G. Williams, 'Assisting suicide, the code for crown prosecutors and the DPP's discretion' (2010) 2 Common Law World Rev 181–203; J.Finnis, 'The Lords Eerie Swansong; a note on R (Purdy) v DPP' (2009) Oxford Legal Studies Research Paper No. 31/2009; John Bingham, 'Assisted suicide guidelines relaxed by Director of Public Prosecutions', (*Telegraph,* 16 Oct 2014) https://www.telegraph.co.uk/news/health/11168519/Assisted-suicide-guidelines-relaxed-by-Director-of-Public-Prosecutions.html accessed 13 Nov 21.
[717] CPS, 'DPP Publishes Assisted Suicide Policy' (25 February 2010) <http://www.cps.gov.uk/news/press_releases/109_10/> accessed 24 May 2021.

Thus, it seems more obvious than ever that the Lord Advocate is legally obliged to produce guidelines, not only on homicide as it relates to AD but on other criminal offences too. Mullock notes that guidance "might be viewed as presenting a pragmatic, procedural compromise which sits in the middle ground, between explicitly allowing AD and robustly prohibiting it".[718] Nevertheless, Mullock acknowledges that even though AD proponents have a strong case, the validity of complaints that the DPP in England and Wales has effectively usurped parliament must be recognised.[719] This state of affairs is not how the criminal law can or should be made in the UK.

The status quo around prosecutorial guidance in Scotland fails Fuller's criteria in the following ways:

1. failure to establish rules at all, leading to uncertainty and ad hoc decisions
2. failure to make comprehensible rules
3. making rules which contradict each other
4. discontinuity between the stated content of rules and their administration in practice

At first instance, the Lord Advocate should produce some guidance on AD, over and above the general prosecution code, because this would help satisfy the ECHR criteria of accessibility and foreseeability and make the law on AD altogether more transparent. Bringing in guidance would help move away from Fuller's failures and toward the laws of aspiration. But what is really needed is legislation that permits PAD, and any guidance produced should only be in addition to a law created by Scotland's democratically elected parliament, not used as a stop-gap to fill the lacuna which presently exists in Scots Law. Permissive PAD legislation would set firm boundaries

[718] A. Mullock. 'Compromising on Assisted Suicide: Is Turning a Blind Eye Ethical?' (2012) 7 (1) Clin Ethics 17.
[719] Bear in mind that the DPP was instructed by the court to produce the guidelines.

between what is and is not allowed, remove substantial generality and ambiguity from the current situation, and protect healthcare practitioners alongside conferring legal rights on citizens to choose and secure a compassionate and peaceful death. Undoubtedly this would reduce the number of cases having to be considered by the police, prosecutor and courts.

4.5 Conclusion

In the aftermath of *Ross*, it was suggested that Lord Carloway's observations significantly clarified the law. This chapter challenged that suggestion, arguing that Lord Carloway's remarks ignore the established precedents in *MacAngus, Khaliq* and *Ulhaq* and appear to rely instead on the English case of *Kennedy*, which is not an authoritative precedent in Scotland.

It has been argued here that Lady Dorrian's more cautious remarks have a sounder basis in Scots Law and should therefore be preferred.[720] Having considered the reaction to Lord Carloway's statements, it is concluded that their significance should not be overstated. They were *obiter dicta* about the criminal law, made in a civil case by a single judge. The statements lacked a sound legal basis and were not endorsed by the other judges in the case; even if they had been, they would not be binding on future judges sitting in criminal cases. The Inner House arrived at perhaps the expected conclusion in *Ross,*[721] but it did not support its conclusions on as sound a legal basis as it could have done.

The court in *Ross* argued that the law in Scotland was clear. It may be clear to some experts, including the Lord Advocate and the Inner House, but the layperson may find it an impossible task to glean what it is from the various relevant sources, which poses a problem when we return to Fuller's criteria for good law. Legal artefacts, including official judgements, committee

[720] Section 4.1, p. 150.
[721] As per Lord Drummond Young's comments (n 600).

transcripts and prosecution policies, all of which comprised the Lord Advocate's public statements, are not accessible for the average person to find and are even harder to fully comprehend. The European Court of Human Rights (ECHR) qualitative standards, namely Article 8 (2), require the law to be identifiable and established, adequately accessible and sufficiently foreseeable.[722] The Lord Advocate's public statements and the thought process behind prosecution could be gathered into one easily accessible guidance document and put on the Crown Office and Procurator Fiscal Service website; this would be helpful for the layperson, medical and legal professionals and would further satisfy Fuller's and ECHR accessibility and foreseeability criteria.

It is worth noting that the particular way in which any case is presented to the court can have a major effect on how the law is developed (or not developed) as a result of that case, and that this is not satisfactory in areas like AD where the ramifications are significant. For instance, in *Ross* Lord Carloway stated that:

> The petitioner did not contend that the criminalisation of homicide lacked a legal basis in domestic law, or that the law in that respect was not sufficiently precise and accessible so as to enable a party to foresee the consequences of his actions and to allow him to regulate his conduct accordingly. The crux of the challenge was that the law was being applied by the respondent in a way which was arbitrary.[723]

This raises the possibility that had Mr Ross argued that using the law of homicide to address AD cases was both lacking a legal basis and not accessible and foreseeable, rather than mirroring the approach taken in *Purdy*, he might have been more successful. This did, however, form part of

[722] *C.R. v UK* (1995) Series A no 335-C [33]. If criminalising AD in Scotland would be considered under the ECHR to be an interference with a person's article 8(1) rights, the interference must be justified under article 8(2) and (i) identified and established in the law of Scotland; (ii) adequately accessible; and (iii) sufficiently foreseeable.
[723] *Ross* [36].

the petitioner's argument[724] with the court of the opinion that the law was sufficiently foreseeable and accessible[725] and that if need be, they could "take legal advice to see what acts and omissions could constitute a crime."[726] As has been shown, however, even the most senior legal minds in Scotland have illustrated that "the criminal law in this field is an unpredictable mess"[727] so suggestions to obtain legal advice would likely bear little fruit. Furthermore, it is noteworthy that Lord Doherty in the Outer House quashed any considerations of article rights based on necessity (as had been argued in *Nicklinson),*[728] as they had not been properly presented to the court:

> The issue raised by this petition is the legality of the interference – whether it "is in accordance with the law" in terms of Art 8.2. In my opinion it is very clear that the petition does not raise any issue as to the necessity of the existing law and practice in Scotland relating to homicide in cases of assisted suicide. There has been no failure on the part of the respondent to justify the necessity of the interference. While, of course, if the matter had been properly put in issue the onus would have been upon the respondent to make out that aspect of the Art 8.2 justification, it was for the petitioner to raise the matter in the petition if he sought to put it in issue ... This is a case where the terms of the petition give not the slightest indication that the necessity of the law is being questioned ... Had the matter been properly raised ... (the issue) would not have been confined to the legality issue.[729]

The concept of necessity implies a conflict between two goods, one of which is considered more important and thus given priority. In this context, the conflict exists between maintaining life on the one hand and alleviating suffering on the other hand. With AD, the alleviation of suffering is considered

[724] See para [10] [14].
[725] Lord Ordinary as reported in IH judgement at [14] and Lady Dorrian at [62].
[726] Respondent at [27] supported by Lord Carloway [32], Lady Dorrian [62[, Lord Drummond Young [70] [72].
[727] Andrew Tickell, 'Is the current law in Scotland clear? Nope…' (n 235).
[728] See section 3.2 of this thesis.
[729] *Ross* [32].

more important.[730] One wonders what the outcome might have been had the petitioner produced the line of argument outlined by Lord Carloway or based on necessity as outlined by Lord Doherty. Again, this suggests that even with excellent legal advice, as Mr Ross had, members of the public and the profession are not able to properly grasp or grapple with the Scottish law on AD.

It could be argued that Scotland currently has a blanket ban on AD, and that there is scope to bring an action based on an argument of (i) necessity/disproportionality and/or (ii) as mentioned by Lord Carloway, that the law of homicide lacks a legal basis in this context and therefore does not allow citizens to competently access it, foresee the consequences of their actions, and thus to regulate their conduct accordingly. Either way, the progress of the case law shows how inappropriate it is to rely on the common law, in all its ad hoc glory, to create important criminal law in Scotland.

The point has been made that when the consequences of AD are life, death, and suffering in extremis, it is not appropriate to allow the common law to develop alone and be reliant on ad hoc cases arising from time to time. Indeed, this is one area of law where we would *not* wish to see cases building the legal framework; nobody wishes for amateur citizen-assisted deaths where no safeguarding is present to increase in number. Instead, it is preferable to build a regulated framework that permits physician-assisted dying, negating the need for amateur assistance. This would prohibit assisted deaths carried out with malice, and robustly safeguard those facilitated by compassion, thus giving clear guidance and legal protection to citizens and the medical and legal profession. The law can send a message of firm deterrence *and* exceptions to rules without eroding the sanctity of life. The most appropriate way to do this is to legislate for safeguarded, regulated,

[730] Evelien Delbeke, 'The Legal Permissibility of Continuous Deep Sedation at the End of Life: A Comparison of Laws and a Proposal' in Sigrid Sterckx, Kasper Raus and Freddy Mortier (eds), *Continuous Sedation at the End of Life: Ethical, Clinical and Legal Perspectives* (Cambridge University Press, 2013) 134.

physician-assisted AD and keep all other illegal assistance within criminal law.

The significance of *Ross* is that it is the first direct piece of law, specifically on AD, that Scotland has seen. It raised numerous and far-reaching issues, including article rights, the divergence between Scotland and the rest of the UK and the state of criminal law more generally in this area. Whilst Mr Ross was unsuccessful in his efforts, his case opened up Scottish judicial discussion on this topic in a way that all UK AD cases prior had not.

Chapter Five: Analysis of Part II

5.0 Collective Issues pertaining to Scotland's failure

This chapter reflects on the lessons and principles unearthed by the research in Chapters Two, Three and Four. Part III of the thesis will move away from the criminal law analysis toward the healthcare law issues and socio-legal consequences of the prohibition. This chapter provides pause and reflection to digest the critical commentary, claims and recommendations that have made up Part II of the thesis.

Fuller sets out the minimum criteria for recognisable legal activity in eight criteria which would individually and cumulatively indicate failure in law-making. While Scots Law does not fail on all these eight points, it presents a significant problem in the areas in which it does fail. Part II has demonstrated that the status quo fails to meet the criteria for good law and has argued that the Scottish Parliament, Courts and COPFS are failing in their duty to provide legal clarity on AD and are not meeting the foreseeability and accessibility criteria required by ECHR. The practical application of convention rights is an essential feature of clear law and a fundamental aspect of the elements that constitute the Rule of Law.

As mentioned at 1.2, a failure on any of the criteria (even if it is only one) is sufficient, on Fuller's view, to mean that we are not talking about a law. I have made clear that that is not my view: I am using Fuller's criteria as a tool to think about how good the current law is, rather than trying to draw an analytic line between law and non-law (as Fuller was).[731]

The lack of statute and specific guidelines on AD highlights **the failure to establish rules**, which has led to uncertainty and ad hoc decision making. Although there are statutes and guidelines on homicide, the general

[731] n p.36 - 38.

prosecution code for homicide is not acceptable for this nuanced area, and the point was made in chapter two that genuine cases of AD should not be considered homicide in the first place.[732] Explicit provision in legislation - Fuller's **making of comprehensible rules** - should be produced to bring Scotland in line with the rest of the UK with the opportunity afforded to consider clarifying the law in this area to allow citizens to access PAD in a narrow set of circumstances, negating or at least minimising the reliance on amateur assistance.

Penney Lewis expressed concerns about the risks posed by amateur assistance and that unless PAD is legalised:

> Assistance is likely to remain a relatively amateur activity, by which I mean someone with no medical training, carried out by people who have no experience in assisting death, and without the assistance or advice of professionals… This is worrying because unless the victim is fortunate enough to have a healthcare professional among their family and friends and that person is not treating them and therefore might escape prosecution, they're likely to end up in a situation which is quite burdensome on the suspect, or potential assistor, and also they run the risk of a botched suicide, of suffering during the death, and they lose out on the possibility of some form of medical screening, for example, for undiagnosed depression.

Seale expresses similar concerns about the potential for botched suicides:

> There is quite a lot of evidence from the USA and Australia, from the 1980s and 1990s where a kind of euthanasia underground grew up where by people were assisted to die by informal carers and in some cases enthusiastic medically qualified people, when AIDS was a terminal illness. And what happened here was there was a very

[732] At section 2.1.2 and 2.4.

> frequent incidence of botched suicides with rather unpleasant and sometimes quite horrific consequences, which required better medical expertise to avoid or remedy.

Debbie Purdy, discussing the risks of amateur assistance from a patient perspective, said that:

> If you choose to be at home, and all things being equal I would choose to be at home, [you have] the fear of not taking the right quantity or quality of drugs and ending up in a worse situation than I would be in anyway.[733]

It is for these reasons, and those already addressed around monitoring, reporting and safeguarding, that provision for AD should be carried out exclusively within the healthcare setting. Every jurisdiction that has *explicitly* legalised AD has taken this route.[734]

Another of Fuller's criteria is **rules which contradict each other,** and here we are told that AD is homicide, but case law has shown us that individuals are not always prosecuted for it, that lenient sentences are given, and that the law turns a blind eye to people travelling from Scotland to access AD abroad. Likewise, one leading authority suggests that certain acts in Scotland are not illegal due to the chain of causation being broken, but with no concrete precedent to support this.[735]

Fuller is also concerned by the **discontinuity between the stated content of rules and their administration in practice.** An argument presented in

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[733] Demos, The Commission on Assisted Dying, '"The current legal status of assisted dying is inadequate and incoherent..."' (2011) p. 98 – 99 <https://demosuk.wpengine.com/files/476_CoAD_FinalReport_158x240_I_web_single-NEW_.pdf?1328113363> accessed 11 March 2022.

[734] Switzerland, for example, do not have explicit legislation on AD and permit and practice AD outwith the healthcare sector, although HCPs are always involved in the process. Article 115 of the Swiss Federal Criminal Code 1937 (StGB) permits AD for unselfish reasons.

[735] Lord Carloway in *Ross.*

Ross was, that unlike in England and Wales, there was no disparity between what the prosecutor said and what is done in practice. The court accepted this. This was an error, as the prosecutor has consistently stated that a charge of murder or culpable homicide would be levied if in the public interest, and there was sufficient evidence to do so.[736] This makes it difficult to reconcile instances where there is sufficient evidence and yet no prosecution has been brought.[737] Likewise, the arbitrariness in sentencing in these cases in Scotland leads to further discontinuity between the stated rules and their administration in practice. If we wish to deter people from AD by grouping it with homicide, then the consequences must follow.

The extent to which the law says one thing but does another is not as evident in Scotland as in England and Wales. In England and Wales, there have been hundreds of AD cases, with the vast majority not prosecuted. However, England and Wales have more robust reporting procedures, given that there is a specific offence. It is thus not possible to say that non-prosecution does not happen in Scotland, but only that we cannot quantify it. Fuller considers a fundamental principle of the Rule of Law to be that acts of legal authority towards a citizen must be legitimised by being brought within the terms of a previous declaration of general rules:

> There can also arise acute problems of conscience touching the basic integrity of legal processes... a still more fundamental question can be raised: whether there is not a damaging and corrosive hypocrisy in pretending to act in accordance with preestablished rules when in reality the functions exercised are essentially managerial and for that reason demand – and on close inspection are seen to exhibit – a rule-free response to changing conditions.[738]

[736] n 615.
[737] For example with the case of Dr Kerr outlined at 3.0.
[738] *The Morality of Law* 214.

Regarding AD cases, McDiarmid considers how the law mediates its own principles - by using culpable homicide as the conviction, it allocates the issue to the Crown's discretion, thereby "bypassing the law on the distinction of murder".[739] Whilst this may seem to deliver justice in an individual case, it does not assist in understanding or developing the legal principles about that distinction. McDiarmid goes on to consider *Ross v Lord Advocate* and states:

> While clearly the so-called right to die raises particularly fraught issues of law, ethics, morality and compassion it is precisely in such cases, and because of the intense anxiety which attends them, that clearer legal principle is valuable and necessary. Without bespoke legislation in relation to assisted suicide, the common law on homicide requires to do this work. [740]

Fundamentally, it is understood that the reason not to charge someone with culpable homicide in AD cases in Scotland is that either there is not enough evidence or that, despite a sufficiency of evidence, prosecution is not considered to be in the public interest, in which case discretion not to prosecute is exercised. However, in several of the mentioned cases, the accused has admitted their actions, meaning that the evidence requirement is satisfied.[741] Reliance on the 'catch all' broad public interest justification does not produce any certainty in the law.

Furthermore, what is certain is that there are instances of AD happening in Scotland, but they are 'under the radar', in that they are not being investigated and prosecuted or, when they are, those accused are being shown leniency, often relying on defences such as diminished responsibility. Suppose we support the idea of 'law sending messages' or 'making

[739] McDiarmid, 'Killing Short of Murder: Examining Culpable Homicide in Scots Law' 8 (n 293).
[740] Ibid.
[741] See Section 3.0.

statements' through its action/inaction.[742] In that case, the message being sent is that the police, prosecution and courts have sympathy with the accused in these difficult situations and, in some narrow circumstances, helping another person to die is morally and legally acceptable. The Supreme Court noted the 'tolerance' of AD being at odds with the blanket ban in *Nicklinson*.[743] Smith thus describes the current prohibition as a show of "symbolic force" even if very little happens to people who break the law.[744]

The current policy could be viewed as a compromise position – routes are utilised to divert the accused from court, bring lesser charges, or impose non-custodial sentences. Huxtable states:

> Such manoeuvres do, at least, signal that the law-in-action is capable of achieving a compromise. Yet this model of compromise seems to require subterfuge and to rely upon legal fictions, such as that the assistant must have acted with 'diminished responsibility'.[745]

Nevertheless, the constraints of the current law mean that even the most that can be done is inadequate. Maintaining a prohibition but not investigating or prosecuting and charging with homicide any but the most serious examples does not avoid the harmful consequences. As Dworkin said: "There are dangers both in legalising and refusing to legalize; the rival dangers must be balanced and neither should be ignored."[746] It has been said that the unwillingness of governments to confront this category of cases leaves the law in a state of impoverishment and duplicity.[747]

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[742] Cass R. Sustein, 'On the Expressive Function of Law' (1996) 144 (5) University of Pennsylvania Law Review 2021.
[743] *Nicklinson* [108] [314-319].
[744] Stephen Smith, 'Nicklinson and the ethics of the legal system' In: Smith et al. (eds) *Ethical Judgments: Re-Writing Medical Law* (Oxford, UK: Hart Publishing 2017) pp. 221-226.
[745] Richard Huxtable, 'Splitting the difference? Principled Compromise and Assisted Dying' (n 334).
[746] Dworkin R. *Life's Dominion,* 198 (n 572).
[747] A. Ashworth, 'Sentencing: Murder - Mercy Killing' [2011] 24 J Crim LR.

The Scottish and UK Governments have not directly tackled the issue, with any parliamentary reform proposals emerging from backbenchers. They have, however, had ample opportunity to consider it and have rejected any change after careful analysis. Previous legislation attempts have lost support by not being clear, coherent, effective, and accessible.[748] However, it has been shown that the status quo as a starting point is also not clear, coherent, effective or accessible. It is a balancing act to find a solution to this issue, and it may well lead to harmful consequences, even if very few.[749] However, no system is entirely flawless, and the present parliamentary paralysis condemns us to a system that couples prohibition with non-prosecution and/or arbitrary consequences, which does not provide a solution.

There is much to commend reform. For one thing, this would codify – and clarify – practices that already occur, even in Scotland's seemingly prohibitive legal system. As the law in operation in Scotland demonstrates, stern pronouncements that AD is unlawful rarely translate into convictions for homicide. If the basic substantive law is complex, obscure, or uncertain – and Scots Law on AD is arguably all three – it is difficult for those who must apply the law to do so effectively and competently.[750]

In Scotland, the lack of explicit Scots Law and guidance on this point means that practices in England & Wales are very influential here, even though we are in a different jurisdiction. So, it is worth noting that in October 2019, 18 police and crime commissioners in England and Wales wrote to the Secretary of State for Justice calling for an inquiry into the current law on AD:

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[748] Health and Sport Committee, Stage 1 Report on Assisted Suicide (Scotland) Bill, 6th Report, Session 4, (2015) said that the 2013 Bill contained "significant flaws". p.50. < her15-06w.pdf (parliament.scot)> accessed 11 Jan 2018.
[749] H. Hendin, G. Klerman 'Physician-assisted suicide: the dangers of legalization.' (1993) 150 (1) Am J Psychiatry 143-5 < https://pubmed.ncbi.nlm.nih.gov/8417557/> accessed 11 Feb 2022.
[750] SLC, 'A Draft Criminal Code for Scotland with Commentary' Eric Clive, Pamela Ferguson, Christopher Gane, and Alexander McCall Smith. Pg.4 <https://www.scotlawcom.gov.uk/files/5712/8024/7006/cp_criminal_code.pdf> accessed 20 May 2020.

> We believe it is time for a renewed look at the functioning of the existing law on assisted dying. While there are clearly differences of opinion as to whether or how the law should change, we contend that the law is not working as well as it could and seek an inquiry to confirm that ... We owe it to dying and bereaved people, and their families, to try and find a better way of dealing with terminal illness, including the position around assisted dying.

Amongst their concerns were "The cost of these investigations – financial, emotional and societal". [751] When almost half of police and crime commissioners across England and Wales recognise that a law is not working, it is difficult to accept the argument that it is. This is another reason why legislated PAD is the preferable route to reform as regulation of AD as part of the established end-of-life healthcare sphere allows ease of regulation and monitoring via professional duties and guidelines that would not apply where ordinary citizen assistance legalised, for example.

Some believe that the existing law and deference to the judiciary embody useful flexibility, combining firm deterrence with scope for compassion.[752] Fuller considers the flexibility in law and the idea that toleration of illicit practices enhances the powers of the superior by affording it the opportunity to obtain gratitude and loyalty through the grant of absolutions, whilst at the same time leaving the option of visiting the full rigour of the law open on those "he considers in need of being brought into line". [753] However, he goes on to say that this welcome freedom to act, or not, would not be possible if the law firstly cannot point to the rules as giving significance to the action, "one cannot, for example, forgive the violation of a rule unless there is a rule

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[751] Open Letter to Rt Hon Robert Buckland QC MP, Lord Chancellor and Secretary of State for Justice (24th October 2019) <https://dorsetpccpolice.s3.amazonaws.com/20191024%20Open%20Letter%20to%20Lord%20Chancellor%20and%20SoS%20for%20Justice%20from%20PCCs.pdf> accessed 13 Nov 2021.

[752] P. Saunders., 'assisted suicide in the UK', (*CMF*, Sept 2017) <https://www.cmf.org.uk/resources/publications/content/?context=article&id=26683> accessed 13 Nov 2021.

[753] *The Morality of Law* 213.

to violate".[754] This is where Scotland is deficient in a way that the rest of the UK is not.

5.1 Protective Function of the Law

The general aim in this thesis is to show that the current Scots Law on AD is inadequate but also that there are already resources within Scots Law and culture to address the problem by motivating progressive legislative change. In the introductory chapter of this thesis, I stated that a protective principle would emanate from the analysis undertaken in Part II.[755]

It has been shown that the primary reason for finding against litigants in AD cases and for voting against proposed permissive PAD legislation rests on protecting vulnerable people. I turn this proposition on its head at this intersection and argue that a permissive PAD law, rather than being a threat to vulnerable peoples' safety, is a protective measure, in and of itself.

AD cases are often tragic[756], sometimes violent[757] and arguably discriminatory[758], immoral[759] and unethical.[760] To date, the claimants in AD cases have been either terminally ill or extremely disabled individuals who possess a strong will and have retained a sharp, competent mind. From jurisdictions that have legalised PAD, we know the characteristics that are

[754] Ibid.
[755] p.57-181.
[756] With the person suffering from a terminal, unbearable disease that leaves them in pain, indignity and not able to enjoy life, knowing that there is no prospect of recovery.
[757] One example is 56-year-old farmer, Christopher Case, who shot himself after struggling to live with the deterioration inflicted upon him by MND. George Lythgoe, **'**Farmer from Swarthmoor near Ulverston diagnosed with motor neurone disease shot himself - inquest told**'** (*Westmorland Gazette* 27th Nov 20) <https://www.thewestmorlandgazette.co.uk/news/18898115.farmer-diagnosed-motor-neurone-disease-shoots-himself-inquest-told/?ref=twtrec> accessed 13 Nov 2021.
[758] Only those who are financially and physically able to travel to places where AD is legal are afforded the option.
[759] See Isra Black, 'Better off dead?', Chapter Five Is assisted death immoral? (n 5).
[760] It has been argued that 'forcing' people abroad to places like Dignitas to ensure a peaceful death is unethical. Sarah Knapton, 'Nearly a quarter of suicide cases at Dignitas are Brits.' (*The Telegraph,* 20 Aug 2014)<https://www.telegraph.co.uk/news/science/science-news/11046232/Nearly-quarter-of-suicide-cases-at-Dignitas-are-Brits.html> accessed 13 Nov 2021.

typical of those who avail themselves – highly educated, middle class, and white.[761] Less common are reports of vulnerable people being coerced into assisted deaths for non-benevolent reasons.

Assuming the law should have a deterrent effect, the present position across the UK fails (or at least falls short) in the objective of deterring people from assisting in suicide. If the chances of being prosecuted are so low as to be negligible, this will not prevent increasing numbers from disregarding the prohibition.[762] Peter Saunders of Care Not Killing has said:

> The [current] law is working because the penalties that it holds in reserve provide a very powerful disincentive to exploitation and abuse and make people think twice. At the same time, it gives discretion to prosecutors and to judges to temper justice with mercy in hard cases [...] On one hand, it has a stern face to deter abuse; on the other hand, it has a kind heart to deal compassionately with difficult cases. [763]

The discussion so far has demonstrated the weakness of this view. By perpetuating a policy of non-prosecution and light sentences, the current approach fails to uphold a sufficiently stringent or clear message that it is criminal to assist another's death, thus negating any deterrent value. It has not served to deter but has meant that assisted deaths have taken place under the radar, with no accountability from assisters and no prior screening to ensure that death was the victims' wish. Furthermore, this matter should not be left to judges to settle on a case-by-case basis, or for prosecutors to contend with, with all the indeterminate consequences that these involve.

Of course, prosecutors and judges should continue to enjoy discretion, tempering justice with compassion in complex cases, but discretion should

[761] Emanuel, Ezekiel J.; et al. "Attitudes and Practices of Euthanasia and Physician-Assisted Suicide in the United States, Canada, and Europe" (2016) 316 (12) JAMA <https://pubmed.ncbi.nlm.nih.gov/27380345/> accessed 13 Nov 2021.
[762] A. Mullock, 'Compromising on Assisted Suicide: Is Turning a Blind Eye Ethical? (n 718).
[763] n 752.

firstly be clearly demarcated by robust AD laws. This would negate the need for amateur assistance and protect HCPs who could legally assist patients after a robust safeguarding pathway had been followed, thus acting as a bulwark against concerns of 'abuse'. Any malevolent pressure or coercion detected as part of the HCP screening process, a safeguarding feature of most permissive AD laws, would be reported and dealt with accordingly, thus further protecting people. Likewise, any depressive or other non-terminal illness that could be appropriately addressed to remove the desire for AD could be attended to.

Many members of the public seem to have a simple view of the law, comprising the basic tenet of the command theory[764] – that legal rules (most notably, legislation) should be present to regulate behaviour in an obedient way. Criminal law consists largely of rules of this sort, which is why criminal law is not equipped to deal with the nuances of AD. Other legal rules are presented to society in different ways for different functions. Hart considered that these alternative laws "provide facilities more or less elaborate for individuals to create structures of rights and duties for the conduct of life within the coercive framework of the law".[765] For example, this is true of the rules that allow individuals to make contracts, wills, trusts and other matters that mould people's general relations with others. Such rules, unlike the criminal law, are not "factors designed to obstruct wishes and choices…on the contrary, these rules facilitate the realization of wishes and choices. They do not say (like commands) "do this whether you wish it or not", but rather, "if you wish to do this, here is the way to do it"".[766]

Thus, the criminal law commands that we obey or do not obey and are subject to the consequences therein. Taking the practice of AD out of the criminal law and moving it into healthcare law where it would be regulated

[764] By officially declaring rules of behaviour, the legislature tells citizens what they can and cannot do.
[765] Hart, 'Positivism and the Separation of Laws and Morals', 71 (n 57).
[766] Ibid.

and accessible via HCPs only would move away from this approach to a person-centred, rights-based autonomous approach, where the right to AD would be conferred on those who choose it.[767] [768] The focus is on the traditional *protective* function of the law, which states that law is there to protect individuals and as an instrument for social policies.[769] Citizens' voluntary co-operation is imperative in this model. When there are no specific legal rules to manage the moral maze that is AD, or if the 'rules' that do exist are at odds with the morals of most of the population, as noted earlier,[770] people begin to take the law into their own hands. When people cannot access PAD as part of their end-of-life healthcare choices, they find alternatives with relatives helping loved ones to die,[771] travelling abroad to have an assisted death,[772] or dying by suicide at home.[773]

Societal resistance is afforded equal consideration by positivists and natural lawyers, with Bentham, for example, acknowledging that there may come a time in society when the law's commands are at such odds with said society's morals that resistance has to be faced.[774] Fuller explores the concept of fidelity to Law in *The Morality of Law* and acknowledges that whilst citizens may respect constituted authority, this is not to be confused with *fidelity* to law.[775] With issues as complex and personal as dying, the formal status of law may be rejected, as illustrated by the following comment:

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[767] Hagerstrom, 'Inquiries into the Nature of Law and Morals' 217 (Olive- crona ed. I953): "[T]he whole theory of the subjective rights of private individuals . . is incompatible with the imperative theory.

[768] This would align with the Scottish Government's objective to move the country toward a progressive, person-centred, rights-based jurisdiction. Scottish Government (2022), 'National Performance Framework' <https://nationalperformance.gov.scot/> accessed on 15 April 2022.

[769] Van der Burg, et al., 'The Care of a Good Caregiver: Ethical Reflections on the Good Health Care Professional' (1994) 3 Cambridge Quarterly of Health Care Ethics 33; Also, Austin, *The Province of Jurisprudence Determined* I84-85 (Library of Ideas ed.1954) 13.

[770] at 3.1.1.

[771] e.g. *Ian Gordon* (n 338).

[772] e.g. *Richard Selley* (n 699).

[773] See Part III.

[774] Bentham, 'Principles of Legislation', in *The Theory of Legislation* I, 65 n. (Ogden ed. I931).

[775] *The Morality of Law* 41.

> ...law binds in conscience, yet this is because it is the law only if just and promulgated by legitimate authority, not because the majority or the law can be a standard of conscience…the law has an educational function and tends to develop moral virtues…[but] the state has not the authority to make me reform the judgement of my conscience any more than it has the power of imposing upon intellects its own judgement of good and evil.[776]

A disregard for the law in preference of individual standards of conscience, motivated by distressing personal circumstances including unbearable suffering, could explain why AD, although illegal, does occur both between individuals and in the doctor/patient relationship.[777] The police routinely investigate AD cases, yet most are not prosecuted in the UK.[778] Stauch and Wheat have said:

> ...it seems that doctors in practice not infrequently aid the incurably ill to die, but that most cases are never investigated, let alone prosecuted, because of lack of evidence and/or any prospect of obtaining a conviction.[779]

It is hypothesised that the police investigate many more AD cases than I have been able to obtain proof of in this research, but the prosecutor takes no further action because amateur assistance by relatives is considered as acts of compassion, not criminality, and assistance in death between HCPs and patients is considered good medical practice. Raz and Finnis subscribed to the view that there is no prima facie moral obligation to obey an unjust

[776] J. Maritain, *The Rights of Man and Natural Law* (Trans. Doris Anson) (New York Gordian 1971) 77.
[777] See Section 6.4.
[778] Sharon Young, 'A Right to Die? Examining Centrality of Human Rights Discourses to End of Life Policy and Debate in the UK' (n 5) p. 54.
[779] Stauch & Wheat. *Text, Cases and Materials on Medical Law and Ethics* Chapter 12 'Treatment at the End of Life' 600 (n 401).

law.[780] Being or doing good is not always synonymous with obeying the law, and at present, citizens are breaking it to act out of compassion. Finnis, in particular, viewed principles of legality, such as those proposed by Fuller, as principles for keeping legal systems in good shape.[781]

Whilst Chalmers and Tickell have noted that the vague situation at present might be better than the current law actually doing what it says it will i.e., prosecution for homicide, it is my – and Fuller's – conviction that "a specious clarity"[782] can be more damaging than an honest open-ended vagueness.[783] Pronunciations by the Scottish prosecutor, courts and parliament that the law is clear have been rebuffed by the evidence presented in Part II of this thesis.

In contrast to Fuller's views, Hart said that general rules were the standard way in which law functions because "no society could support the number of officials necessary to secure that every member of the society was officially and separately informed of every act which he was required to do."[784] However, let us return to the fact that whilst this holds good for general societal functioning, if there are to be robust and explicit laws on any part of humanity, they must be on those concerning life and death. The resounding argument in this thesis is that the Scots Law on AD is not clear.

With reference to the importance of clarity, Huxtable makes an important point:

> [C]rucially, it seems that no legal system can operate successfully if it is not clear about so fundamental an issue as ending life. Indeed, if

[780] G. Christie, 'On the moral obligation to obey the law' (*Columbia Legal Theory Workshop* 1990) <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3133&context=dlj> accessed 10 Dec 2017.
[781] John, Finnis., 'Natural Law and Natural Rights' 270 (n 570) ("The name commonly given to the state of affairs in which a legal system is legally in good shape is 'the Rule of Law'...").
[782] As purported by the current legal institutions and officers.
[783] *The Morality of Law* 64.
[784] *The Concept of Law* 21 (n 62).

> society is to exist at all, it probably requires law in this area above all others.[785]

Given that it is humans who make, administer, and apply legal rules, no system will ever be perfect. Considering Hart's rule of recognition,[786] it is evident that there will inevitably be some uncertainty in the law. There will inevitably be some uncertainty for all kinds of reasons, vagueness in the language of statute perhaps being the most obvious, and the impossibility of legislation to cover all situations. We are guaranteed that there cannot be a clear legal answer to resolve every legal dispute because the law, unlike mathematics, is not considered numerically or thematically. There is too much fluidity in the societal, political, and judicial system to allow for such certitude.

If there is a gap in the postulated formal structure, this will only widen as the phenomenon of AD continues to grow. Whilst at present, it *seems* to be AD primarily for compassionate reasons that is being (leniently) dealt with. If the net grows wider and the gap is not plugged, it is obvious to see how this policy of non-prosecution and leniency could be subject to abuse. It is here that the law as a protective measure becomes essential.

Thus, whilst Fuller is concerned with *law* being a precondition of any *good law* that might follow, he sees a "lawless unlimited power" expressing itself solely in unpredictable, patternless, and haphazard interventions in human affairs as unjust. With AD in the UK, we seem to have an unjust law that results in arbitrary patterns of tolerance by the authorities. Fuller said that:

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[785] R. Huxtable & M. Möller. 'Setting a Principled Boundary'? Euthanasia as a Response to 'Life Fatigue' (2007) 21 (3) Bioethics p.475.

[786] Rule of recognition is a central part of H.L.A. Hart's theory on legal positivism. It is the fundamental rule by which all other rules are identified and understood. According to Hart, a society's legal system is centred on rules. There are primary and secondary rules of obligation.

> To live the good life requires something more than good intentions, even if they are generally shared; it requires the support of firm base lines for human interaction, something that – in modern society at least – only a sound legal system can supply. [787]

Thus, whilst parliamentarians, the Lord Advocate, and courts have remained steadfast in their approach to AD (there being no need for legislation or guidelines), their approach is limiting the potential for Scotland to have unequivocal laws on the phenomenon of AD – the legal institutions are not aspiring to produce any law, least of all *good law*. It would be preferable to act proactively in light of increasing pressure to change the law and, for the purposes of this work, to comply with Fuller's criteria, i.e., produce clear law, which tempers protection, deterrence and compassion. Thus, whilst this thesis ponders, *inter alia,* what the law on AD is, i.e., the age-old jurisprudential question of 'What is Law?', it is at least as interested in What is *Good* Law.

5.2 Conclusion

This analytical chapter (and the preceding ones that together form Part II of this work) brought together an analysis of the current state of the law. While the law on AD across the UK has remained formally unchanged and, thus, steadfast in its prohibition, the exercise of prosecutorial and sentencing discretion has reflected a more liberal approach, which has perpetuated a permissive climate. The grossly under-clarified character of Scots Law in this field suggests that the problems merit more attention; such attention would aid in understanding the scope and meaning of the law itself, and would help contribute more fully to discussion on how it *ought* to be reformed. [788] Tickell summarised this well:

[787] *The Morality of Law* 205.
[788] 'What We Talk about When We Talk about Persons: The Language of a Legal Fiction' (2001) 114 (6) HLR 1745-1768 < https://doi.org/10.2307/1342652> accessed 12 May 2022.

> The Scots law on assisting suicide is unclear, unpredictable and unable to give anything approaching definitive guidance to the citizen on what is and is not criminal, and what conduct may or may not attract a life sentence in prison. That is intolerable. The fact that few people find themselves in courts facing charges is some practical comfort that the Crown are adopting an enlightened and compassionate policy here.
> But in principle, the vagueness of the law, and the more or less complete lack of transparency from the Crown Office on its application, represents an unacceptable fudge, the continuation of which can no longer be justified ... the Scottish Parliament must act to remove the Damoclean sword which unjustly hangs over too many people, trying to do the right thing, to live compassionately according to their lives, and to live within the law. [789]

The current (unofficial) policy clearly avoids overcrowding the criminal justice system with (seemingly well-intentioned) people who perhaps reluctantly complied with desperate requests from relatives and patients and who are unlikely to offend again. However, it also prevents the state from establishing, regulating, and funding mechanisms to facilitate PAD and protect against potential abuse. Carving out safeguarded legal access to PAD via the doctor/patient relationship would mean that the vast majority of cases illustrated in Part II would no longer happen and that the intention and needs of the person being assisted to die would be fully realised and explored *before* the death. The requirement for individuals to comply with a safeguarded process before death would identify other health or social care support that could make their life more tolerable.[790] At the very least, it would allow dying people to have open and honest conversations with their HCP about their wishes or plans to end their life before their suffering becomes

[789] Andrew Tickell, 'Is the current law in Scotland clear? Nope…' (n 235).
[790] As proposed in the Assisted Dying for Terminally Ill Adults (Scotland) Bill 2021 consultation p.19.

intolerable, which is currently impossible due to the law's restrictions.[791] Additionally, as highlighted by police and crime commissioners across England and Wales, investigations' financial, emotional and societal costs would be forgone with a shift from the criminality of assisters' actions to simply providing compassionate support to the dying person.

It is not enough to have vague ideas about what the law is, brought together from ad hoc documents providing little legal certainty. It is imperative in a civilised society that we know what our laws are and can communicate them to the citizens whom we expect to abide by them. We have seen that, in England and Wales, most AD cases are not prosecuted, on the basis of prosecution not being in the public interest. This could also be the situation in Scotland: the number of assisted deaths might not be minimal, just difficult to quantify, given that they are unreported and grouped with homicide. It seems that, in this context, the 'public interest' factor is the vague instrumental concept used to provide overwhelming discretion to the prosecutor. Whilst this flexibility is important for a legal system more generally, in this context, it does not meet the test of good law as set out by Fuller. Moving AD into healthcare would mean that robust monitoring and reporting records are kept, thus providing accurate figures on the number of people who avail themselves at the end of life and providing informed data on how best to support people at the end of life and allocate resources. This data has proved highly useful in other jurisdictions and has contributed to additional resources being directed toward palliative and other end-of-life care.[792]

[791] BMA, 'Responding to patients requests for assisted dying: guidance for doctors' (June 2019) < https://www.bma.org.uk/media/1424/bma-guidance-on-responding-to-patient-requests-for-assisted-dying-for-doctors.pdf>.

[792] When Victoria, Western Australia and Queensland passed their assisted dying laws, the governments also increased funding towards palliative care services by between $17m and $170 million (£9m - £96m). After legalising assisted dying in New South Wales, it was announced that palliative care and specialist health services were to receive a record $743 million (£423m) funding boost over the subsequent five years. Anne Lim, 'Palliative Care gets funding boost in wake of latest VAD law'. (15th June 2022 *Eternity*) < https://www.eternitynews.com.au/australia/palliative-care-gets-funding-boost-in-wake-of-latest-vad-law/> accessed 19 August 2022.

AD in Scotland is not an established area of law but an emerging one that we can identify as being dealt with under the common law of homicide, but where handling in practice varies considerably. Given the absence of a specific offence, permissive legislation, specific guidelines, or much case law, it is arguable that Scotland's approach to AD is not easily identifiable, accessible, or sufficiently foreseeable. In this respect, I have drawn attention to the European Convention on Human Rights provisions.[793]

The Convention provisions are a crucial element in the legislative competence of the Scottish Parliament. The Scots Law approach to AD should be amended to ensure compliance with the Convention. However, the Convention is also of importance as a statement of the fundamental values of the law. In that context, there are various principles that the Convention sets out. First, there is clarity and certainty of criminal law.[794] The Convention sets out various rights that States must observe; a State may limit the exercise of these rights in various circumstances but must do so in accordance with the law. In explaining this idea, the European Court of Human Rights has observed:

> ...a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.[795]

It is widely believed that a system of law that fails to respect fundamental human rights should not be dignified with the term "The Rule of Law". [796] Nearly all challenges to the law on AD stem from arguments based on citizen's human rights being interfered with, because of the lack of permissive law versus human rights as an instrument to protect vulnerable people.

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[793] Particularly in chapter 3 and chapter 4 in the *Ross* analysis.
[794] Article 7 of the ECHR, No punishment without law.
[795] *Silver v United Kingdom* (1983) 5 EHRR 347 [88].
[796] Waldron, The Rule of Law, at 5.3 Substantive Theories (n 94).

While a proponent of PAD, Dworkin did not appeal to rights when considering bioethical issues such as this.[797] He made clear that a rights framework is insufficiently sensitive to deal with the moral dimensions of these problems.[798] However, the rights framework is the basis of much judicial activity in the UK, especially with bioethical issues such as PAD and abortion. Thus, the law is not changing, partly because appeals to article rights have not been successful either nationally and at the ECHR level; appeals of this kind are not a rich seam for moving matters forward. For reasons of constitutionality and clarity, the appropriate way to do this is via parliament.

It has been argued that in Scotland, AD could be happening on a similar scale to the rest of the UK but deficiencies in the way that current information on the issue is recorded means that this is purely speculative. It is known that people are travelling abroad for assistance to die,[799] ending their own lives at home, or receiving illegal help from doctors/relatives,[800] whilst authorities turn a blind eye. The law in Scotland is not clear; it fails in its ECHR duties and fails to protect and show compassion to its citizens. The way to rectify this is to craft a framework; a clearly drafted statute that sets boundaries and parameters would build transparency, regulation, and oversight and allow us to attempt to meet Fuller's list.

In summary, Part II has illustrated how the legal institutions of Scotland – the parliament in their refusal to produce statute; the Lord Advocate's resistance to AD prosecutorial guidance; and the courts in their ambiguous decisions on the case law - are failing in their various legal obligations, including European Court of Human Rights (ECHR) qualitative standard tests.[801] Article 8 (2)

[797] R.Dworkin, *Life's Dominion,* (n 572).
[798] Ibid, in the context of abortion and the rights of the mother/unborn child.
[799] n 466.
[800] i.e. Mrs Gordon, Mrs Webb and others mentioned in Part II and later in Part III of this thesis.
[801] *C.R. v UK* (1995) Series A no 335-C, par 33. If criminalising AD in Scotland would be considered under the ECHR to be an interference with a person's Article 8(1) rights, the interference must be justified under Article 8(2) and (i) identified and established in the law of Scotland; (ii) adequately accessible; and (iii) sufficiently foreseeable.

requires the law to be identified and established, adequately accessible and sufficiently foreseeable and for any interference to be proportionate.[802] I argue that, at present, Scots law is not. The current law favours the protection of potentially vulnerable people over those already vulnerable (by nature of a terminal illness) and who want the choice of PAD to alleviate their suffering. If there is no statute or promulgated policy in existence, citizens can neither access it, nor foresee the consequences of their potential actions. We can, however, quite starkly see what the consequences of the current prohibition are, as illustrated by the negative repercussions that it produces for society. This will now be explored in Part III.

[802] *MS v Sweden* (1997) 3 BHRC 248.

Part III

Consequences of the ban on assisted dying

Despite comprehensive attempts in Parliament and the courts, neither institution is taking ownership of this issue. One argument is that the matter is settled - tried, tested and failed. However, the position remains unsatisfactory because of the negative consequences that remain with the law, or lack thereof.

Earlier parts of this thesis have outlined how the current law on AD in Scotland is unclear, and that it is contradictory and obscure throughout the UK. This part of the thesis will show that the consequences of the law being in this state are that it becomes uncompassionate, unjust, unsafe, and unintentionally produces negative consequences. The theoretical failings of the status quo are, in other words, matched by serious practical costs. Analysing those costs points to a way to repair the law to meet Fuller's criteria and embody the value of compassion, which is implicit in Scottish legal and cultural practices.

Approached from a UK context, with specific consideration to Scotland,[803] Part III considers the unintended consequences which arise because of legal prohibitions on AD, specifically:

1. Prolonged/increased avoidable suffering, disempowerment, and/or traumatic deaths without dignity.
2. Suicide, including suicide tourism.
3. Contradictory and confusing medical practice.

Part III argues that due to the negative consequences produced by the prohibition on AD, there is a need for legal reform.

[803] Whilst the legal landscape in Scotland is distinct, the negative consequences that permeate this debate are borne out across the UK. Again, as mentioned, the majority of peer reviewed research is UK wide and so must be relied upon to inform this work.

Chapter Six: Avoidable suffering, disempowerment, and traumatic deaths without dignity

In this chapter, case studies and academic literature are used to show that the prohibition on PAD results in people being forced to endure unnecessary suffering, disempowerment, and deaths without dignity.

The chapter starts with some background on the complexities and context of modern-day dying to show that how we die is increasingly multifaceted. Instead of persisting with the tried and tested approach (which will be shown not always to work and produces harm), the chapter argues that we should respond to this evolving situation by increasing the choices available at the end of life. The balancing act between protection and harm is explored, which concludes that more harm is being done by the ban on PAD than any harm that a permissive law could potentially do, evidenced by data from jurisdictions that have moved to permissive regimes.

Case studies are analysed, which show that more and better care does not negate the need for PAD, and that one way to address the problem of suffering, disempowerment and traumatic deaths without dignity is to allow PAD. A key theme here will be understanding the demands of *compassion*, with a view to providing the foundations for the solution I later offer to the problem of how to make Scots Law on AD consistent with Fuller's criteria.

6.0 The realities of modern-day dying

Medical advances mean that more people are living longer, including people with chronic and life-limiting conditions.[804] Whilst this is welcome if an acceptable quality of life can be maintained, it is not without issue.

[804] Sue Randall and Helen Ford, 'Long-Term Conditions: A Guide for Nurses and Healthcare Professionals'. Chapter 10. (John Wiley & Sons 2011).

Across the UK, the number of people living beyond the age of 80 is set to rise significantly, with the proportion of people in this age group requiring round-the-clock care projected to rise by 82 per cent by 2030.[805] Most who live into their seventieth year will have more than one long-term health problem, with one in three dying of cancer and organ failure and one in three dying from dementia and/or because they have grown old and frail.[806]

People can expect an average of 15 years of poor health before they die.[807] Polypathology[808] is usually present, and it is not uncommon in Scotland for patients to have multiple morbidities,[809] often receiving treatment for heart disease, Alzheimer's or cancer.[810] Some people have good deaths, supported by friends and family and by the excellent palliative care that Scotland can provide.[811] For others, the process of dying is long, painful, lonely and distressing, with evidence that pain relief, for example, does not work in approximately 10 per cent of cases,[812] with an estimated 25 per cent of people dying in pain.[813] Furthermore, commonly-used opiates do not work for most

[805] C. Jagger et al., 'Capability and dependency in the Newcastle 85+ cohort study: projections of future care needs', (2011) 11(21) BMC Geriatrics <http://bmcgeriatr.biomedcentral.com/articles/10.1186/1471-2318-11-21> accessed on 13 Nov 2021.
[806] Scottish Partnership Palliative Care, Briefing: Choice and control at the end of life, <https://www.palliativecarescotland.org.uk/content/publications/?cat=13.> accessed 14 Jan 2022.
[807] Office for National Statistics, 'Health State Life Expectancies, UK: 2014–2016', (Dec 2017) Point 8, table 1 <https://www.ons.gov.uk/peoplepopulationandcommunity/healthandsocialcare/healthandlifeexpectancies/bulletins/healthstatelifeexpectanciesuk/2014to2016#people-living-in-scotland-spend-the-highest-proportion-of-life-in-good-health-despite-having-the-lowest-life-expectancy> accessed 13 Nov 2021.
[808] A condition where the seriousness of a situation results from not one disease but from a combination of different conditions that cannot be improved and result in serious disability.
[809] Calvin Lightbody, 'Why Is this Dying Patient in my Resus Room?' (*St Mungo's,* 24 Jan 2018) <https://stmungos-ed.com/blog/palliativecare> accessed 17 Feb 2021.
[810] National Records of Scotland, 'Leading Causes of Death in Scotland' (2019) <https://www.nrscotland.gov.uk/statistics-and-data/statistics/scotlands-facts/leading-causes-of-death-in-scotland> accessed 13 Nov 2019.
[811] Professor David Clark, 'International comparisons in palliative care provision: what can the indicators tell us?' (15th September 2015) SP Paper 784 9th Report, 2015 (Session 4) at para. 72 in ref to the Quality of Death Index.
[812] L.Colvin, 'Difficult pain' (2006) 6332 (7549) BMJ 1081-3.
[813] A.Klint et.al., 'Dying With Unrelieved Pain – Prescription of Opiods Is Not Enough', (2019) 58 (5) Journal of Pain and Symptom Management < https://doi.org/10.1016/j.jpainsymman.2019.07.006> accessed 11 Nov 2021.

people with chronic pain, and long-term opioid use is beset by problems with side effects without good evidence of benefit.[814]

These statistics sit alongside the fact that the majority of the UK and Scottish public support a change in the law to allow PAD.[815] This support has remained steadfast for decades.[816]

Medical interventions cannot remove all suffering, and sometimes well-meaning interventions increase or prolong suffering. Overtreatment at the end of life is prevalent,[817] with one-third of patients receiving non-beneficial treatment, despite its futility.[818] Scotland's chief medical officer is working to rectify this via a Realistic Medicine approach,[819] which puts the person receiving health and social care at the centre of decisions to fit their needs and situation.[820]

6.1 Suffering and its consequences

Suffering is multifaceted, but it generally includes a physical decline and its consequences; fear of the future, loss of social significance, loss of hope for a

[814] H.L Fields, 'The doctor's dilemma: opiate analgesics and chronic pain' (2011) 69 (4) Neuron 591-594. <doi:10.1016/j.neuron.2011.02.001> accessed 11 Oct 2019.
[815] Ian Marland, '75 per cent of Scots back change to assisted suicide law.' (*The Times*, 2018) <https://www.thetimes.co.uk/article/75-per-cent-of-scots-back-change-to-assisted-suicide-law-cm3plmglv> ;Dignity in Dying, 'Largest ever poll on assisted dying finds increase in support to 84% of Britons' (2 April 2019) <https://www.dignityindying.org.uk/news/poll-assisted-dying-support-84-britons/> accessed 19 Nov 2021.
[816] YouGov Poll, '75% of Scots back change to assisted suicide law.' (*The Times*, 2018) <https://www.thetimes.co.uk/article/75-per-cent-of-scots-back-change-to-assisted-suicide-law-cm3plmglv> accessed on 22 Feb 2018.
[817] The Parliamentary Ombudsman's Report, 'Dying without Dignity' (2015) <http://www.ombudsman.org.uk/reports-andconsultations/reports/health/dying-without-dignity>; M. Cardona-Morrell, et.al., 'Non-Beneficial Treatments in Hospital at the End of Life: A Systematic Review on Extent of the Problem', (2016) International Journal for Quality in Health Care Advance Access 1 –14. <https://doi.org/10.1093/intqhc/mzw060> accessed 11 Dec 2017.
[818] L. Willmott, et al. 'Reasons Doctors Provide Futile Treatment at the End of Life: A Qualitative Study' (2016) 42 JME 496–503 <http://dx.doi.org/10.1136/medethics-2016-103370> accessed 11 Dec 2018.
[819] Scottish Government, 'The Chief Medical Officer for Scotland's Annual Report 2014/5: 'Realistic Medicine', (20 Jan 2016) <http://www.gov.scot/Resource/0049/00492520.pdf> accessed 13 Aug 2021.
[820] NHS Inform, 'Realistic Medicine' <https://www.nhsinform.scot/care-support-and-rights/nhs-services/using-the-nhs/realistic-medicine> accessed 11 Dec 2020.

better future, loss of pleasurable activities[821] and loss of agency.[822] The complexities of managing physical, physiological, emotional and social pain – "total pain"[823] - mean that people with chronic conditions can die in traumatic and/or undignified ways through disease progression.

This level of suffering can present an inherent risk to the person's dignity. The end of life is an area where threats to dignity are particularly pertinent, with loss of dignity often cited by people living with life-limiting illnesses. This is a result of their illness and/or treatment inflicting physical consequences on them; Hair loss, severe weight loss, drastic changes in skin tone and condition, voice changes and loss of the ability to speak and walk normally are just some of the things that may cause people to feel a loss of dignity.[824] Even more troubling for some are the indignities associated with needing to be bathed or assisted to use a toilet, be fed, wear incontinence pads or have a colostomy bag regularly replaced.[825]

In Scotland, Heather Black had spent her life campaigning to improve the lives of others. Living in a community ravaged by drug use, she set up SHADA (Support Help and Advice on Drug Addiction) and worked with some of the most vulnerable people in society. Ms Black was instrumental in changing policy on needle exchanges to prevent the transmission of HIV and held the hands of those for whom such measures came too late. At a time when AIDS patients were still being stigmatised, she strove to ensure their deaths were as dignified as possible. After developing oesophageal cancer and the subsequent suffering that entailed, Ms Black begged her daughters

[821] ME., Gaignard, S. Hurst, 'A qualitative study on existential suffering and assisted suicide in Switzerland' (2019) 20 34 BMC Med Ethics <https://doi.org/10.1186/s12910-019-0367-9> accessed 11 Nov 2020.
[822] Jennifer Corns, 'Suffering as significantly disrupted agency' [2021] (forthcoming) Philosophy and Phenomenological Research < https://doi.org/10.1111/phpr.12841> accessed 11 Oct 2021.
[823] D. Clark, 'Total pain', disciplinary power and the body in the work of Cicely Saunders, 1958-1967' (1999) 49 Social Science and Medicine 727.
[824] Stephen Duckett, 'Pathos, death talk and palliative care in the assisted dying debate in Victoria, Australia' (2020) 25:2 Mortality 151-166.
[825] Guy, M., and T. Stern., 'The desire for death in the setting of terminal illness: A case discussion.' (2006) 8 (5) Primary Care Companion to the Journal of Clinical Psychiatry 299–304. <doi:10.4088/PCC.v08n0507> accessed 11 Nov 2019.

to end her life, which they considered doing before she died a horrific "undignified death". Ms Black's final days are excruciating to comprehend, but her daughters have spoken of how such deaths must be shared, "…if we don't confront the truth about the end of life, how are we to progress?". They described: the choking noise she made as she struggled to breathe; the awful smell that emanated from her as she vomited brown foam; the way she would rise out of her bed, "as if possessed", tearing at her nightdress.[826]

Chapter 4 discussed the case of Gordon Ross, once a fit, active and cherished member of his community, who subsequently suffered from diabetes, heart problems, Parkinson's disease and peripheral neuropathy towards the end of his life. Mr Ross endured episodes of shaking and spasms many times each day, could no longer live independently and resided in a care home.[827]

In England, Paul Lamb who was added as a claimant to Tony Nicklinson's case (before the hearing in the Court of Appeal) and subsequently raised his own legal challenge in 2020,[828] had been a healthy man who enjoyed a full life. Since a catastrophic car crash in 1990, Mr Lamb had become completely immobile, save that he could move his right hand. He required carers 24 hours a day, suffered pain every day, and was permanently on strong opiates. He spoke of the pain and indignity of his condition, which was irreversible and stated that "what we need in this debate is not sympathy, but compassion and respect".[829]

Another AD case claimant, Omid T, was 55 years of age and suffered from Multiple Systems Atrophy. He was bed-bound, had poor mobility, could not

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[826] Dani Garvelli, 'Insight: Daughters demand right to die in the name of their campaigning mother,' (*The Scotsman*, 21st June 2020) <https://www.scotsman.com/news/politics/insight-daughters-demand-right-die-name-their-campaigning-mother-2890577> accessed on 13 Nov 21.
[827] *Ross* para 3.
[828] Humanist UK, 'Paul Lamb's assisted dying case refused permission by Court of Appeal', (25 Nov 2020) <https://humanists.uk/2020/11/25/paul-lambs-assisted-dying-case-refused-permission-by-court-of-appeal/> accessed 7 Aug 2021.
[829] *Nicklinson v MOJ* [2014] UKSC 38 On appeal from: [2013] EWCA Civ 961 at [8].

feed himself, his speech was almost incomprehensible, and he lived in a nursing home requiring 24-hour care and support. His condition was degenerative and incurable. Omid described how he deeply regretted his loss of autonomy and dignity and wished to have a dignified death via AD. [830] By 2018 Omid T's suffering had become unbearable, and he had an assisted death at Life Circle in Switzerland. Despite being deeply upset at having to go to a foreign country for AD, he died "peacefully and contentedly knowing that his suffering was about to end and that he would be released from the living hell which he had been in for several years."[831]

Many more examples could be given, some are omitted for reasons of space, and some are too graphic to include.[832] These cases have been made public by the individuals and their families, and what cannot be stressed strongly enough is that they are likely to be the tip of the iceberg, with many more people in Scotland and the UK potentially dying in similar distress. This is because dying, for the most part, takes place in private and away from public perception; thus, it is omitted from proper consideration in the law-making process. However, the unprecedented response to the proposed *Assisted Dying for Terminally Ill Adults (Scotland) Bill* 2021 consultation has, for the first time, provided a data set of thousands of Scots who have shared their stories of bad deaths, illustrating starkly just how necessary is law reform on PAD.[833]

6.2 Increased care does not negate the need for AD

Inbadas and others, studying the disagreements between proponents of palliative care and AD via declaration documents, stated that:

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[830] Bindmans, 'Omid T dies - legal case left unresolved', (5 October 2018) <https://www.bindmans.com/news/omid-t> accessed 13 June 2019.
[831] Ibid.
[832] Some people experience other unavoidable symptoms such as severe nausea and vomiting, constipation, faecal vomiting, bowel fistulae, fungating wounds and terminal haemorrhages.
[833] Once published, the responses to this consultation and the case studies therin can be found at assisteddying.scot.

> Palliative care activists continue to argue that the problems which lead to assisted dying requests can usually be dealt with in ways that do not require death to be hastened. They promote an emphasis on quality of life in the face of advanced disease and reject the idea of dying on demand. At best they suggest that discussions on the legalisation of assisted dying should be postponed until the world is properly served by palliative care provision.[834]

Addressing total pain is a key priority for end-of-life practitioners, but even in the most well-resourced environments, where the palliative care team might include a psychologist or other counsellor, a chaplain, social worker, and access to support groups, the loss of dignity can be ever-present. This was illustrated in Scotland by the case of Richard Selley, who was suffering from Motor Neurone Disease (MND) and died at Dignitas in September 2019. Mr Selley testified to the excellent palliative care that he received but that there was nothing more that could be done for him: [835]

> The palliative care I have received at the Cornhill hospice in Perth over the past four years has been outstanding but there is a limit to what they can now do for me. Assisted dying in terminal cases like mine would never replace palliative care; it would complement it by offering a choice for those who feel they have suffered for long enough.

Opponents of PAD often respond with the argument that increased medicalisation of the end of life, focusing on more/better palliative care, is preferable. While more investment and research into palliative care is to be encouraged, no amount of increased care can improve the quality of life for some people. To propose more care for people in this predicament shows a lack of understanding, empathy and compassion. More or better palliative care

[834] Inbadas, Hamilton et al. "Representations of palliative care, euthanasia and assisted dying within advocacy declarations." (n 23).
[835] Richard Selley, 'Assisted Dying can complement palliative care' (*The Times*, 2 Aug 2019) https://www.thetimes.co.uk/article/assisted-dying-can-complement-palliative-care-5hrxdrdpq accessed 19 Dec 2020.

will not nullify the need for PAD; though the two can work in tandem, as they do in jurisdictions such as Belgium.[836] Colburn states that it would be a mistake to:

> …oppose legalising assisted dying until those wider problems are fixed. For one thing, changes in the law to allow assisted dying, perhaps precisely by drawing attention to that wider context, can go hand in hand with developments that improve other aspects of end-of-life care. It bears repeating that there is no tension between assisted dying and a well-supported palliative care regime for patients who do not seek to end their lives. For another, the opposing stance is in danger of ignoring the ongoing costs of the status quo.[837]

Arguments of Sufficient Palliation often fail to hear how much anguish, suffering, loss of dignity and independence terminal patients experience. No amount of even the best, most holistic palliative care will relieve this suffering fully - patients may be free of pain and other physical discomfort and yet still have a strong preference for an early death because of a loss of dignity.[838] For some people, this can be countered by introducing Dignity Therapy, which addresses psychosocial and existential distress, and other interventions. This has been proven to decrease anxiety, depression and burden on family members throughout the palliative process and in some cases, reduces a desire for death or suicidal thoughts.[839] However, studies of end-of-life patients receiving palliative care for cancer, for example, show that while the desire to

[836] S M. Gerson, et al., 'The Relationship of Palliative Care With Assisted Dying Where Assisted Dying is Lawful: A Systematic Scoping Review of the Literature' (2020) 59 (6) Journal of Pain and Symptom Management 1287.
[837] B. Colburn, 'Disability-based arguments against assisted dying laws' (n 219) see also: T. Stainton, 'Disability, vulnerability and assisted death: commentary on Tuffrey-Wijne, Curfs, Finlay and Hollins' (2019) 20 BMC Medical Ethics 89.
[838] Stephen Duckett. (2020) (n 823).
[839] Pearl Ed Cuevas, et.al, 'Dignity Therapy for End-of-Life Care Patients: A Literature Review' (2021) 8 Journal of Patient Experience, p.2 Meaning to Patients.

receive AD is sometimes transitory, it can be enduring once firmly established.[840]

Approximately 90% of patients who request AD (in permissive States) in the US are receiving hospice or palliative care already.[841] This shows that palliative care access does not eliminate requests for AD, nor does a request for AD indicate a failure of palliative care. Instead, it shows that AD is one of several options that can safely be made available to people at the end of life. Concerns about palliative care provision suffering as a result of permissive AD laws have been proved unfounded. Instead, it has been shown that palliative and end-of-life care has generally thrived in countries that have legalised AD. A report commissioned by Palliative Care Australia, which examined AD worldwide, found "no evidence to suggest that palliative care sectors were adversely impacted by the introduction of legislation. If anything, in jurisdictions where assisted dying is available, the palliative care sector has further advanced."[842]

When evaluating the empirical evidence in *Carter v Canada* [2015] the trial judge considered how AD is operating in permissive jurisdictions and found general compliance with regulations, although there was some room for improvement. Evidence from Oregon and the Netherlands showed that a system can be designed to protect the socially vulnerable, and that "predicted abuse and disproportionate impact on vulnerable populations has not materialized" in Belgium, the Netherlands and Oregon.[843] The trial judge found that empirical researchers and practitioners are of the view that safeguards work well in protecting patients from abuse while allowing

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[840] K.G, Wilson., et al. 'Desire for euthanasia or physician-assisted suicide in palliative cancer care' (May 2007) 26 (3) Health Psychology 314.
[841] Oregon Health Authority, 'Death with Dignity Act Annual Reports' and Washington State Department of Health, 'Death with Dignity Data' consistently show this <https://www.oregon.gov/oha/PH/PROVIDERPARTNERRESOURCES/EVALUATIONRESEARCH/DEATHWITHDIGNITYACT/Pages/ar-index.aspx>; <https://www.doh.wa.gov/YouandYourFamily/IllnessandDisease/DeathwithDignityAct/DeathwithDignityData> accessed 18 Nov 2020.
[842] Assisted Dying for Terminally Ill Adults (Scotland) Bill Consultation at 2.4 'Palliative Care' (n 17).
[843] *Carter v Canada* (Attorney General), 2015 SCC 5, [2015] 1 SCR 331 paras. [852] [1242].

competent patients to choose the timing of their deaths. The judge also inferred that physicians could reliably assess patient competence in relation to life-and-death decisions, including that it was possible to detect coercion, undue influence, and ambivalence.[844]

The trial judge in *Carter* also rejected the argument that the legalisation of PAD would impede the development of palliative care in the country, finding that the effects of a permissive regime, while speculative, would "not necessarily be negative".[845] Similarly, she concluded that any changes in the physician-patient relationship following legalisation "could prove to be neutral or for the good".[846] Ultimately, she concluded that the risks of AD "can be identified and very substantially minimized through a carefully-designed system"[847] that imposes strict limits that are scrupulously monitored and enforced. Such evidence, which was not available when the Scottish Parliament previously considered proposals in 2010 and 2013, may be one reason why HCPs are moving away from a historical stance of opposition to neutrality.[848]

Hospices and palliative-care professionals are to be commended for their work, but they have undoubtedly obstructed the right to PAD. Toynbee has said:

> [T]oo often they claim all pain can be eased when that's not the case. I have seen how even the highest doses often don't ease the worst

[844] paras. 795-98, 815, 837, and 843.
[845] para. 736.
[846] para 746.
[847] para. 883.
[848] In 2020 the British Medical Association's first-ever survey of its members' views on AD found that doctors support the choice of AD. This exercise presents the largest ever survey of medical opinion on AD in the UK and ultimately led to the BMA dropping its opposition in a move to neutrality at its Annual Representative Meeting in September 2021. See: Politics.co.uk, 'BMA drops opposition to assisted dying', (14th September 2021) <https://www.politics.co.uk/opinion-former/press-release/2021/09/14/bma-drops-opposition-to-assisted-dying/> accessed 14 Dec 2021.

> agonies, but their testimony in parliament has successfully prevented right-to-die legislation.[849]

Great weight has been given to palliative care provisions with the view that more or better palliative care will nullify the need for PAD.[850] This approach lacks sound reasoning, yet it features heavily in the debate. Richard Selley, again put it eloquently:[851]

> James Mildred, of the Christian charity Care…argued that what we need is assisted living, not assisted dying. He clearly shares this view with Roseanna Cunningham, my MSP, who claimed in her recent letter to me that our priority should be palliative care, not assisted dying…Sadly, this shows a failure to understand the relationship between the two.[852]

It is true that some who oppose PAD have not themselves experienced caring for someone at the end of life or witnessed a bad death; often, when they do, their opinion will change.[853] This may be why the Royal College of Nursing – nurses being the primary carers of the sick and dying – take a

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[849] Polly Toynbee, 'A right-to-die law is the only way to prevent another Gosport', (The Guardian 2018) <https://www.theguardian.com/commentisfree/2018/jun/25/right-to-die-law-prevent-another-gosport-scandal> accessed 13 Nov 2021.

[850] For examples see: B Farsides 'Commentary: Palliative care and assisted dying are not mutually exclusive.' (2018) 360 BMJ <https://doi.org/10.1136/bmj.k544>; Zara Aziz, 'We need better palliative care, not assisted dying' (The Guardian, 9 Sept 2015) <https://www.theguardian.com/society/2015/sep/09/better-palliative-care-not-assisted-dying>; The Economist, 'Proper palliative care makes assisted dying unnecessary.' (24 Aug 2018) <https://www.economist.com/open-future/2018/08/24/proper-palliative-care-makes-assisted-dying-unnecessary> accessed 13 Feb 2022.

[851] Richard Selley, 'Assisted Dying can complement palliative care' (*The Times,* 2 Aug 2019).

[852] Ibid.

[853] Nick Boles MP, 'Why I've changed my mind on assisted dying' (*Express,* 15 June 2018) <https://www.express.co.uk/life-style/life/974558/assisted-dying-bill-nick-boles-mp> ; George Carey, Former Archbishop of Canterbury, 'Why I've changed my mind on assisted dying says a former Archbishop of Canterbury' (*Daily Mail*, 12 July 2014) <https://www.dailymail.co.uk/debate/article-2689511/Why-Ive-changed-mind-assisted-dying.html> ; Raymond Tallis, 'Why I changed my mind on assisted dying' (*The Times*, 27 Oct 2009) <https://www.thetimes.co.uk/article/why-i-changed-my-mind-on-assisted-dying-0phq6d2t7gh> accessed 13 Nov 2021.

neutral stance on the issue.[854] Those responsible for the daily hands-on care know that there is only so much that palliative care can do. A recent Office of Health Economics report showed that even if the best palliative provisions were universally available, 591 Scots per year would still die a bad death, with unbearable pain in the final months of their life. [855] Mark Jarman-Hove, a hospice CEO wrote in an open letter to colleagues in November 2019:

> Everyone involved in the assisted dying campaign shares a wish for positive action on these problems, but sadly such action would not change the fact that even if every dying person had access to the very best care some would still suffer as they die. If we subscribe to the combative narrative that we should ignore the question of assisted dying *until* we get the resources we need, then I believe we risk jeopardising our reputations as caring, compassionate and trusted leaders in our communities. It is possible and I believe optimal to give all these issues the serious attention they deserve simultaneously. [856]

Interdisciplinary care may help restore a sense of dignity to those individuals who are able to participate in rehabilitation but similarly, the choice of an assisted death for those who are at the end of life would help counter some of the negative consequences presented. This argument is supported by those jurisdictions that allow PAD, where the data shows that citizens' concerns about loss of dignity and independence are some of the fundamental motivations (alongside primarily their suffering from a terminal illness) for requesting PAD.[857] Likewise, unbearable suffering is considered an important

[854] RCN, 'RCN position statement on assisted dying', (6 Nov 2014) <https://www.rcn.org.uk/about-us/our-influencing-work/policy-briefings/pol-2314> accessed 13 Nov 2021.
[855] Dignity in Dying (2019) Scotland Report. The Inescapable Truth about dying in Scotland (n 161).
[856] Mark Jarman-Howe (2019) CEO St Helena Hospice open letter to hospice colleagues.
[857] (n 761 and 840).

motive for patients requesting PAD and is indeed a requirement in some jurisdictions before the person can avail themselves of assistance to die. [858]

6.3 Protection v Harm – a balancing act

When life is lived according to our own values, and we obtain at least some enjoyment and reward from it, it can be a precious gift. When life becomes a painful, undignified existence from which little benefit can be sought, it can be an act of respect for that very life to end it peacefully and free the individual and their family from facing unnecessary suffering. As Dworkin wrote:[859]

> People who want an early, peaceful death for themselves or their relatives are not rejecting or denigrating the sanctity of life; on the contrary, they believe that a quicker death shows more respect for life than a protracted one. Once again, both sides in the debate about euthanasia share a concern for life's sanctity; they are united by that value, and disagree only about how best to interpret and respect it.

It is important to consider the relational aspect of AD and that the prevention of suffering extends beyond the person having an assisted death to the relatives left behind. The Convention on the Rights of Persons with Disabilities (UNCRPD) has recognised that the prolongation of suffering impacts not only the individual but their family as well.[860] Harris has argued that, without the enactment of legislation, harm is being done to some people (the terminally ill who want assistance to die), whereas there is only *potential* harm to others (for example, people who might feel pressured to opt for AD in order to avoid existential distress such as being a burden on their families).[861]

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[858] For example, in Canada Bill C-7 requires unbearable suffering as part of the "grievous and irremediable medical condition". See also, EJ. Emanuel, 'Depression, euthanasia and improving end-of-life care' (2005) 23 J Clin Oncol 6456-6458.
[859] Dworkin, *Life's Dominion* 238.
[860] DS. Marquardt, 'Medical Assistance in Dying and Disability Rights' (2021) 4 Social Work & PolicyStudies 1–9.
[861] Select Committee on Assisted Dying for the Terminally Ill Bill, First Report, *Chapter 3: The Underlying Ethical principles.* para 46 <https://publications.parliament.uk/pa/ld200405/ldselect/ldasdy/86/8606.htm> accessed 13 Nov 2021.

A rebalancing exercise via law reform is overdue as the proportionality test is currently failing, with the prohibition at the expense of one group to offer absolute protection to others.[862]

Blackburn has written that "any harm to others would have to be through such an indirect and improbable chain of causation that I think it would be wrong for public policy to take any notice of it".[863] However, that is precisely the aim of public policy, to consider all those who may reasonably be affected by change. It is better to accept that it is impossible to remove harm altogether from any part of healthcare. If we do, then probable harm becomes a reason to build robust safeguards into end of life care, not a justification for limiting options.

Protecting vulnerable people, such as those with disabilities,[864] against the potential abuses of AD is the main reason cited by courts and legislators around the world for refusing to legalise the practice.[865] It has been said that while academic literature has a multitude of perspectives on the issue of AD and disability, the attitudes of disability rights scholars, activists, and, more generally, people representing disability rights groups is that AD should not be permitted for fear of negative consequences on this group of people.[866] However, when we consider the empirical evidence, such submissions are not borne out.

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[862] *MS v Sweden* (1997) 3 BHRC 248.
[863] Professor Simon Blackburn, Vice-President of the BHA, Select Committee on Assisted Dying for the Terminally Ill Bill First Report. *Chapter 3: The Underlying Ethical Principles* at para [48] <https://publications.parliament.uk/pa/ld200405/ldselect/ldasdy/86/8606.htm> accessed 13 Nov 2021.
[864] I am not stating that people with disabilities are inherently vulnerable, only that this has been frequently cited as a concern by judges, legislators and others.
[865] For example, in *Pretty v UK* ECHR 2346/02, Para. 78 where the court ruled that the interference was justified for the protection of the rights of others; also, Assisted Suicide (Scotland) Bill Stage 1 report para 78, 83, 160, 185, 186, 276, 280.
[866] C.A Riddle, 'Assisted Dying & Disability' (2017) 31 (6) Bioethics 484.

Studies by Battin et al.,[867] based on data from Oregon and the Netherlands, used subjects from 10 groups of potentially vulnerable patients. Analysis of the data indicated the rate of AD in Oregon and the Netherlands showed no evidence of heightened risk for the following groups: elderly, women, people with low educational status, the poor, the physically disabled or chronically ill, minors, people with psychiatric illnesses including depression, or racial or ethnic minorities, compared with background populations. The research concluded that where AD is already legal, there is no evidence that it will disproportionately impact patients in vulnerable groups. As noted,[868] those who did receive AD in the jurisdictions studied appeared to enjoy comparative social, economic, educational, professional and other privileges.[869]

In 2021, Colburn assessed the hypothesis that the disabled community would be negatively affected by a PAD law. Colburn systematically studied reviews over the past ten years, capturing all published data (since legalisation in each jurisdiction) on the uptake of AD amongst vulnerable people, including people with disabilities. The conclusion was that in no jurisdiction was there evidence that vulnerable people were subject to abuse, and the hypothesis that people with disabilities might be disproportionately impacted was not borne out. Colburn states that this conclusion is reinforced if we look directly at the empirical data, "These findings – that there is no evidence that assisted dying laws have a disproportionate effect on people with disabilities – are echoed in all empirical studies which examine the question."[870]

Colburn's research also highlighted a recent survey of disability rights organisations in the UK which indicated various stances and policies on

[867] M. Battin et al., 'Legal physician assisted dying in Oregon and the Netherlands: evidence concerning the impact of patients in "vulnerable" groups' [2007] 33 (10) JME 591.
[868] At section 5.1.
[869] Emanuel, Ezekiel J.; et al. (n 761).
[870] B. Colburn, 'Disability-based arguments against assisted dying laws' (n 219).

assisted dying.[871] Of 140 such organisations surveyed, a substantial majority remain silent (84%) or explicitly endorse neutrality (4%). Only 4% explicitly oppose it. For those who remain neutral, the position of Disability Rights UK is representative: “This is a complex issue on which people hold different, passionately held views. Disability Rights UK respects those different views.” [872]

Scotland needs a compassionate solution based on evidence, thoroughly considerate of human frailty and the negative consequences of the status quo alternative. It is undoubtedly safer to professionally evaluate any request for AD and provide legal assistance when there are no acceptable alternatives, and the person is making a free, competent, informed choice in the face of terminal illness.[873] If PAD were available in this way, there might be rare cases where coercion remains undetected, despite the best detection processes. However, this thesis has shown that society already accepts such risks - the same potential risk exists in patients who choose to end their lives legally today by refusing life-sustaining treatment or from those who provide medical or amateur assistance.

6.4 Conclusion

As shown by the analysis of international literature, empirical research, anecdotal evidence, case studies, and other sources in this chapter, the grave and harmful consequences[874] of forbidding PAD make its prohibition an unsustainable mechanism for preventing abuse and protecting vulnerable people. The current situation serves little purpose to either the terminally ill who want an assisted death or the vulnerable who look to the law for protection.

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[871] G Box, K. Chambaere, ‘Views of disability rights organisations on assisted dying legislation in England, Wales and Scotland: an analysis of position statements’ (2021) J Med Ethics. 2021.
[872] Disability Rights UK, ‘Our position on the proposed Assisted Dying Bill’ (2015) <https://www.disabilityrightsuk.org/news/2015/september/our-position-proposed-assisted-dying-bill> accessed 30 July 2017.
[873] As is proposed in the Assisted Dying for Terminally Ill Adults (Scotland) Bill 2021.
[874] Such as those illustrated via the case law and case studies in chapters three, four, seven and eight of this thesis.

Case studies have shown us that citizens endure considerable physical/psychological suffering and/or loss of dignity because of a lack of legal facilitation,[875] experiencing heightened anxiety as a result of their ongoing distress, reinforced by the anticipation of an unpleasant death.[876] This distress extends to those caring for them, who have to witness their loved ones suffering and being denied an end to life which aligns with their wishes and values.

The fear is often not of death itself but the way in which they will die – a 'bad' death involving suffering, disempowerment, pain and indignity. However, it does not have to be this way, and conversely, in jurisdictions that have legalised PAD, the 'emotional insurance' aspect of having the choice is well documented, with people living longer, with reduced anxiety and existential symptoms.[877] Around 35 per cent of people in Oregon, who go through the process of being approved to receive medication to end their lives, do not use it.[878] Having the choice, should they no longer be able to tolerate their suffering, allows people to continue living, and many go on to die of natural causes.[879] Scottish citizens are compelled to endure a life that lack of choice in death can bring; this could be alleviated by extending the options to include PAD.

History has taught us to be cautious of initially attractive, seemingly harmless first steps, lest they lead to unacceptable harm. Beauchamp and Childress discuss how some claims against AD seem credible in light of social discrimination based on disability, cost-cutting measures in healthcare funding and the growing number of older people with medical problems

[875] *Pretty, Purdy, Nicklinson* for example.
[876] Sue Westwood, 'Older Lesbians, Gay Men and the 'Right to Die' Debate: 'I Always Keep a Lethal Dose of Something, Because I don't Want to Become an Elderly Isolated Person' (2017) 26 (5) Social and Legal Studies 606.
[877] R. Huxtable & M. Möller, 'Setting a Principled Boundary'? Euthanasia as a Response to 'Life Fatigue' (n 785).
[878] Oregon Health Authority, Annual reports (n 841).
[879] L. Ganzini et al., 'Interest in physician-assisted suicide among Oregon cancer patients' (2006) 17 Journal of Clinical Ethics 27-38.

requiring larger proportions of the state or family financial resources.[880] However, this thesis has shown that the potential vulnerability of some members of the community is not a justification for an outright prohibition, as severe and far-reaching harm is already being done to the cohort of people who want the choice of PAD but are not legally afforded it. Policymakers need to carefully balance the relative importance of PAD and the right of the vulnerable to be protected from direct or indirect pressure. One way to do this is to build in appropriate safeguards, which are presently lacking, as I have argued throughout this work.

The next chapter will look at the second of the three identified unintended consequences; suicide.[881]

[880] Beauchamp and Childress, *Principles of Biomedical Ethics* (7th edn, OUP, 2013) p.180.
[881] As a reminder, the three are (i) Prolonged/increased avoidable suffering, disempowerment, and/or traumatic deaths without dignity (ii) Suicide, including suicide tourism. (iii) Contradictory and confusing medical practice; See page 194.

Chapter Seven: Suicide

This chapter firstly considers suicide as a response to a terminal illness diagnosis. It challenges the historical assumptions and connotations associated with suicide, and highlights the increasing phenomenon of ‘rational suicide’ due to increased life expectancy with worsening health. Again, case studies are necessary to highlight the argument that suicide (which is usually carried out in secret and sometimes in violent settings) could be reduced if PAD was an option. This would benefit the person ending their life in a safe, monitored, and dignified manner, which also extends to consideration of the person's loved ones and the effects on them.

This chapter will also consider the criminalisation of otherwise law-abiding citizens who assist suicide as a compassionate response to a persons suffering. Here, it will draw on Fuller’s rule of recognition to highlight that law and governance can break down when citizens lose respect for the law and its enforcers and instead act to follow their conscience. This has wider repercussions on law and society more generally if the shared reciprocity and respect for the law breaks down.

Failed suicide attempts and premature deaths will highlight the violent, painful, and unjust realities of restricting choice at the end of life. Lastly, the ever-present and increasing phenomena of suicide tourism, where citizens travel to other jurisdictions to access AD, will be considered using Fuller to highlight the injustice of a system that prohibits AD but tolerates its citizens accessing it elsewhere.

Choice at the end of life permeates this debate. The last section of this chapter will consider how increasing people's choices to include PAD would benefit Scottish society and be a compassionate response to counter some of the negative consequences produced because of the current prohibition.

7.0 Suicide by the terminally ill

Studies show that at least 300 terminally ill people end their lives every year in the UK.[882] The incidence of attempted suicide in palliative care patients is significant, with a 1997 survey showing that 67 per cent of UK palliative care units surveyed reported suicide attempts by patients within their care.[883] The World Health Organisation estimates that for each adult who dies from suicide, there may be up to 20 other attempts,[884] so numbers are likely to be larger in practice.

A national research study on suicide found that around a quarter of patients who die by suicide have a major physical illness. The figure rises to 44 per cent in patients aged 65 and over.[885] Exact numbers for Scotland are unknown, as the official record does not provide the information[886] and the Crown Office and Procurator Fiscal Service (COPFS) and local councils in Scotland do not specifically record this information.[887]

In Scotland, the Scottish Public Health Observatory produces an annual report on suicide,[888] which looks at contact with health services prior to death

[882] John Bingham, 'Assisted dying: more than 300 terminally ill people a year committing suicide' (*The Telegraph,* 15 Oct 2014) <https://www.telegraph.co.uk/news/uknews/assisted-dying/11163992/Assisted-dying-more-than-300-terminally-ill-people-a-year-committing-suicide.html> accessed 13 Nov 21.
[883] Grzybowska and Finlay, 'The incidence of suicide in palliative care patients' (1997) 11 (4) Palliative Medicine 313.
[884] World Health Organisation, Suicide Prevention, <https://www.who.int/health-topics/suicide#tab=tab_1> accessed August 2019.
[885] RC Psych, 'The National Confidential Inquiry into Suicide and Safety in Mental Health Safer services: A toolkit for specialist mental health services and primary care' (2018) p.23 <https://www.rcpsych.ac.uk/docs/default-source/improving-care/nccmh/suicide-prevention/safer-services_a-toolkit-for-specialist-mental-health-services_updated-nov-2018.pdf?sfvrsn=f6620787_2> see also: National confidential inquiry into suicide and homicide by people with mental illness (July 2015) <http://documents.manchester.ac.uk/display.aspx?DocID=37591> accessed 13 Nov 20.
[886] Report from the Scottish Suicide Information Database, 'A Profile of Deaths by Suicide in Scotland 2011–2017', [Dec 2018] <https://www.isdscotland.org/Health-Topics/Public-Health/Publications/2018-12-04/2018-12-04-ScotSID-Report.pdf> accessed 09 Nov 2020.
[887] FOI requests were submitted to COPFS and all local councils in Scotland in July 2017 which elicited this response.
[888] Scottish Public Health Observatory (SCOTPHO), 'Suicide: Scottish trends' (2017) <https://www.scotpho.org.uk/health-wellbeing-and-disease/suicide/data/scottish-trends/> accessed 11 May 2021.

but does not detail other diagnoses. Most of the available information is within the context of mental ill-health,[889] which does not take cognisance of 'rational' suicides, such as those in the context of a terminal illness. This makes it difficult to ascertain how many people who die by suicide each year have a terminal illness.[890]

However, an attempt has been made to estimate figures. In Scotland, approximately 680 people die by suicide each year.[891] Of this number, almost 18 per cent are people over 60, who are more likely to have poor physical health.[892] The number for England and Wales is 23 per cent.[893] A 2014 Freedom of Information request to Directors of Public Health in England found that approximately 7% of deaths recorded as suicides in England involve terminally ill people.[894] Applying this figure to Scotland suggests that over 50 people suffering from a terminal illness end their own lives every year.[895]

It is reasonable to suppose that the number of rational suicides by those seeking to escape terminal illness would likely decrease if PAD were legalised. This would have the added benefit of the death happening in a safe, controlled, and dignified manner and would help avoid situations such

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[889] Ibid where the results are compiled by the Mental health analysis team. See also: University of Manchester, HQIP, 'National confidential inquiry into suicide and homicide by people with mental illness', [July 2015] <http://documents.manchester.ac.uk/display.aspx?DocID=37591> accessed 1 June 2020.
[890] The procurator fiscal investigates all sudden deaths, and the information is sent to the Crown Office Procurator Fiscal Service (COPFS). However, COPFS does not categorise sudden deaths/suicides in this way, so exact numbers are unknown.
[891] NHS Scotland, Information Services Division, 'Suicide Statistics for Scotland' < https://www.isdscotland.org/Health-Topics/Public-Health/Publications/2018-06-27/2018-06-27-Suicide-Summary.pdf > accessed 18 Jan 2019. For more recent figures see NRS, 'Probable Suicides 2020' < https://www.nrscotland.gov.uk/files/statistics/probable-suicides/2020/suicides-20-report.pdf> accessed 22 May 2022.
[892] Ibid, see also: Age UK, 'Later Life in the United Kingdom 2019' in particular ONS (2018) factsheets < https://www.ageuk.org.uk/globalassets/age-uk/documents/reports-and-publications/later_life_uk_factsheet.pdf> accessed 19 May 2020.
[893] Ibid Office for National Statistics, 2018.
[894] *The Telegraph*, 'Assisted dying: more than 300 terminally ill people a year committing suicide' (15 Oct 2014) < https://www.telegraph.co.uk/news/uknews/assisted-dying/11163992/Assisted-dying-more-than-300-terminally-ill-people-a-year-committing-suicide.html> accessed 11 Oct 2017.
[895] Dignity in Dying, 'Inescapable Truth about Dying in Scotland', p.46.

as violent and lonely deaths. Many such deaths are reported in the local newspapers of Britain; one example of this was 56-year-old farmer Christopher Case, who shot himself after struggling to live with the deterioration inflicted upon him by MS. The coroner stated that it was "hard to criticise him for doing this...I think his motive is quite understandable" before concluding the cause of death as suicide.[896] Paul Blomfield MP has spoken about how his father connected a hosepipe from his car exhaust to die by poisoning after taking an overdose in the setting of a terminal illness.[897] [898]

Globally, statistics consistently show that suicide rates are higher amongst people over 70 years of age than in any other age group, and that those planning to die by suicide often give no warning of their intention or request help.[899] Often, in the AD debate, this is because of their fear of implicating others. In the absence of a legally viable route to a guaranteed peaceful death, people are turning to traditional methods of suicide such as hanging and drug usage,[900] to the extent that testing kits are sold online to make sure that people who are obtaining drugs will be successful in ending their life. [901] Other individuals advertise ethically questionable activities to assist people in dying.[902]

The demand for assistance has arisen partly because individuals can not receive help from a trusted physician to secure a peaceful death. It is

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[896] George Lythgoe, 'Farmer from Swarthmoor near Ulverston diagnosed with motor neurone disease shot himself - inquest told' (n 757).
[897] HC 4 July 2019. Vol 662, col 1418.
[898] Again, there are many more examples, omitted for reasons of space.
[899] World Health Organisation, 'Preventing suicide: A global imperative' (17 August 2014) <https://www.who.int/publications/i/item/9789241564779> accessed 13 Nov 2021.
[900] Rod Minchin, 'Professor killed herself with euthanasia kit bought online' (*Independent*, 22 April 2016) <https://www.independent.co.uk/news/uk/home-news/professor-avril-henry-killed-herself-with-euthanasia-kit-bought-online-assisted-suicide-a6996656.html> accessed 10 June 2021.
[901] Exit International, Nembutal sampler kit, (2021) <https://exitinternational.net/product/nembutal-sampler-kit/> accessed 13 Nov 2021.
[902] Jack Kevorkian in the United States, who turned his Volkswagen van into a machine that travelled around the country, facilitating over 100 people to die. Nicholas Jackson, 'Jack Kevorkian's Death Van and the Tech of Assisted Suicide' (*The Atlantic*, 3 June 2011) <https://www.theatlantic.com/technology/archive/2011/06/jack-kevorkians-death-van-and-the-tech-of-assisted-suicide/239897/> accessed 13 Oct 2020.

troubling that the most vulnerable people in our society, those dying of terminal illnesses, feel forced to resort to such measures. A better way to prevent this harmful behaviour would be to license and regulate PAD instead. Statistics on suicide by the terminally ill alone are not a reason to legalise PAD, but they certainly contribute to the case. The information seems to indicate that some suicides would be avoided if PAD were legal. The need by individuals to comply with a process would identify further health, social or psychological support that could make their life more tolerable.

7.1 Rational Suicide

It is ingrained in our society that suicide and mental illness are *sine qua non*.[903] In light of worsening health and a steadfast ban on PAD, geriatricians are increasingly encountering older adults expressing suicidal wishes in the absence of overt mental illness, with 'rational suicides' expected to increase in number as life expectancy increases.[904] Relating this to AD, Quill et al. have said:

> …it is not idiosyncratic, selfish or indicative of a psychiatric disorder for people with an incurable illness to want some control over how they die. The idea of a noble, dignified death, with a meaning that is deeply personal and unique is exalted in great literature, poetry, art and music'.[905]

Rational suicide in later life is a phenomenon rarely mentioned[906] in the context of debates about AD. Richards has proposed reframing the way that suicide in later life is viewed:

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[903] SL. Moore, 'Rational suicide among older adults: a cause for concern?' (1993) 7 (2) Arch Psychiatr Nurs 106; J. Richman, 'A rational approach to rational suicide' (1992) 22 (1) Suicide Life Threat Behav 130 < https://pubmed.ncbi.nlm.nih.gov/1579982/> accessed 11 July 2021.
[904] M Balasubramaniam, 'Rational Suicide in Elderly Adults A Clinician's Perspective' (2018) 66 (5) J Am Geriatr Soc 998 <https://www.ncbi.nlm.nih.gov/pubmed/29500824> accessed 11 May 2020.
[905] Timothey E. Quill, et al., 'Care of the Hopelessly Ill: Proposed Clinical Criteria for Physician-Assisted Suicide' (1992) 327 (19) New England Journal of Medicine 1380.
[906] n 904.

> ...not all suicide ideation or planning for suicide should be unquestioningly pathologised. Rather I suggest that we should acknowledge that wishing for death in later life is a normative response to nearing the end of life and to coping with the extensive challenges of "old" age. I also argue that we should accept that death is not a tragedy in every situation. Rather, it is the manner of our death—perhaps in hospital with extraordinary and invasive measures taken to try to extend our (already long) life or in a care home without the requisite pain relief which can be the real tragedy.[907]

There is a growing number of 'rational suicide' movements whereby people with mental capacity seek to end their lives as a logical, reasoned choice in response to their circumstances. Sociological research has shown that older people make up the "rank and file" of those active within the AD movement.[908] One example of 'rational suicide' is that of the retired UK academic Avril Henry, who in 2016 ended her life using an illegal 'euthanasia kit' imported from overseas.[909] Just days before Avril died, police broke down her door after receiving information from Interpol that she had imported drugs. Police failed to obtain the drugs, and Avril died a few days later with a note outlining her alternative plans to travel to Switzerland if her "solitary suicide" was not successful.[910] It is hypothesised that the trend of 'old age rational suicide' will increase - a responsible, compassionate society should respond proactively to this and consider if this could be avoided by introducing a permissive PAD law.

So, whilst AD remains illegal across the UK, prohibition does not deter it from happening; instead, people find other ways to circumvent the law. This type of

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[907] Naomi Richards, 'Old age rational suicide' (2017) 11 (3) Sociology Compass at Conclusion < https://doi.org/10.1111/soc4.12456> accessed 20 June 2021.
[908] Ibid.
[909] Rod Minchin, 'Professor killed herself with euthanasia kit bought online' (*Independent*, 22 April 2016).
[910] Ibid.

death isolates the person, who has to die alone (to avoid implicating others) rather than with loved ones around them. This point is articulated in Westwood's research by participant, Phil:

> My worry is, of course, the law. Because, if this is to work with the current legislation, you can't involve your friends. What I would like is to have a party, where there's everybody I love around, say 'OK guys, bye' [waves]…But I have to do it earlier if it's me only…And that means I will die earlier.[911]

Worryingly, these covert assisted deaths are happening without any safeguards or checks and balances, which would be included in a permissive PAD law. Another participant, Rupert, illustrated that "…to be honest, I always keep a lethal dose of something, because I don't want to become an elderly isolated person. And I certainly don't want to be a burden to other people."[912] The current regulations merely prohibit individuals from ending their life in a manner and at a time when they would wish to, and instead force them to die in a clandestine way. While the prohibition on PAD does not stop individuals from dying, it removes the comfort of dying on their own terms. It also prevents opportunities from being identified to provide better care and support for those who need it, and to detect any coercion or abuse prior to the death, therefore, failing the protective principles of law.

Unsuccessful claimants in AD cases have been left with no alternative but to die by suicide. An example is Debbie Purdy, who was too weak to travel to Switzerland and was not physically capable of ending her life – she died in a hospice, where she refused food until her death.[913] Similarly, Tony Nicklinson refused nourishment and antibiotics, which ultimately led to his death. Death by starvation/dehydration is neither pleasant nor quick, and is another way

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[911] Westwood, (n 876).
[912] Ibid p.14.
[913] Naomi Richards, 'Is the voluntary refusal of food and fluid an alternative to assisted dying? ' (*End of Life Studies*, 16 July 2015) <http://endoflifestudies.academicblogs.co.uk/voluntary-refusal-of-food-and-fluid-as-alternative-to-assisted-dying/> accessed 08 May 2021.

the prohibition on PAD causes suffering. Although the dying process is generally reported to be peaceful, symptoms such as thirst, pain, insomnia, anxiety, and delirium can be present. [914]

If PAD were legalised, the result would remain unchanged – the person making the choice would die. However, controlled PAD would avoid a lengthy, painful, or undignified disease trajectory, perhaps including starvation/dehydration or a clandestine DIY death. The status quo is unacceptable compared with a system where built-in legal and medical safeguards are present, followed by a swift and peaceful death on the patient's own terms. The consequences of failure that so concerned Fuller are starkly illustrated at the expense of those individuals who see no other option but to take matters into their own hands. The status quo is unjust, lacks compassion, and fundamentally fails to afford equal care, protection, and respect to individuals who need the choice of PAD to secure an autonomous, peaceful death.[915]

7.2 Criminalisation of citizens assisting suicide

Doctors and other healthcare professionals are prohibited from assisting with suicide, meaning that the onus to assist falls to friends and family members. These well-meaning assisters risk prosecution in order to help their loved ones die peacefully. As detailed in chapter two, in Scotland, there is the potential for life imprisonment by virtue of a homicide conviction, and prosecution in England and Wales can result in 14 years imprisonment. AD by amateur assisters could likely increase if the law is not reformed, however, 'killing oneself is extremely difficult', and amateur assisters may not have the knowledge or emotional resources required to fulfil this role.[916] They do not have the requisite medical or ethical training to draw upon to make sure that

[914] R.J. Jox, et al. 'Voluntary stopping of eating and drinking: is medical support ethically justified?' (2017) 15 (186) BMC Med <https://doi.org/10.1186/s12916-017-0950-1> accessed 11 June 2018.
[915] *The Morality of Law,* The consequences of failure, p.38.
[916] Demos, The Commission on Assisted Dying, '"The current legal status of assisted dying is inadequate and incoherent..."' (2011) p. 98 <https://demosuk.wpengine.com/files/476_CoAD_FinalReport_158x240_I_web_single-NEW_.pdf?1328113363> accessed 11 March 2022.

the assisted death is the person's autonomous and capacitous choice or to ensure that the AD is carried out safely. In countries with permissive AD laws, HCPs undertake training and can specialise in PAD to ensure compliance with the law's criteria. Typically their role includes the diagnosis and prognosis of the person's illness/condition, capacity assessments, and exploration of alternative treatments *inter alia*. Ordinary citizens do not typically possess such qualifications, skills and expertise and are thus not equipped to undertake AD for concerns around safeguarding, compliance with legal regulations, and medical competency reasons.

Whilst concerns about legalising PAD have focused on relatives putting pressure on the person to die, case law and anecdotal examples have shown us that the patient is more likely to encourage the relative to assist them.[917] Again, we must look to England and Wales for extrapolation and context due to the lack of regulation (and thus record-keeping) in Scotland. From 1 April 2009 (the year the DPP in England and Wales published offence-specific guidelines) up to 31 March 2022, 174 cases of assisted suicide had been referred to the CPS by the police. Of these 174 cases, 115 were not proceeded with by the CPS, and the police withdrew 33. Despite police probes where the family admit their actions, only 4 encouraging or assisting suicide cases have been successfully prosecuted.[918]

Across the UK, there are numerous instances where the accused has admitted their actions and that their intention was to end life to relieve suffering, but despite the law on paper saying one thing, the law in action approaches AD with compassion and leniency.

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[917] *The Guardian,* 'Medical profession's views on the assisted dying bill' (8 Sept 2015) <https://www.theguardian.com/society/2015/sep/08/medical-profession-views-on-assisted-dying-bill> accessed 14 Nov 21 ; Cathriona Russell., 'Care, Coercion and Dignity at the End of Life.' (2019) 32 (1) Studies in Christian Ethics 36 <https://doi.org/10.1177/0953946818807463.> accessed 11 May 2021.

[918] CPS, Latest Assisted Suicide Figures (n 544). There are currently 8 ongoing cases. One case of assisted suicide was charged and acquitted after trial in May 2015 and eight cases were referred onwards for prosecution for homicide or other serious crime.

One such case was that of Mavis Eccleston. In 2019, 80-year-old Mavis Eccleston and her 81-year-old husband formed a pact to end their lives together. They had been married for 60 years when Mavis gave her terminally ill husband a fatal dose of medicine, which he took himself so that he could end his life. Mavis also took the medication but was found at their home, given an antidote and taken to the hospital. She was initially charged with murder and manslaughter but cleared of murder. This case prompted further calls to reform the law on AD in England and Wales. [919]

As mentioned at 2.2, in Scotland, *HMA v Ian Gordon* 2018 was a judgement of the High Court of Glasgow. Mr Gordon was initially charged with murdering his terminally ill wife after admitting smothering her with a pillow when the drugs she had taken failed to work. Later the Crown accepted a plea of culpable homicide on the basis of diminished responsibility. Mr Gordon was sentenced to 40 months' imprisonment in October 2017. [920] On appeal in January 2018, Lord Brodie, sitting with Lord Turnbull in the Criminal Appeal Court in Edinburgh, overturned the sentencing decision and admonished Mr Gordon for the culpable homicide of his wife, with Mr Gordon's actions described as the 'final act of love'.[921]

This derogation between the law as stated and practised poses problems for compliance with Fuller's criteria on constancy and congruence between official action and declared rule.[922] If society and legal authority can accept circumstances where AD is justifiable, then the principles underlying a PAD law cannot be denied. Illegality is, of course, also a form of regulation, but, as the evidence demonstrates, it can be a singularly ineffective approach. [923]

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[919] Vikram Dodd, 'Woman, 80, cleared of murdering terminally ill husband in suicide pact' (*The Guardian*, 2019) <https://www.theguardian.com/society/2019/sep/18/woman-80-cleared-of-murdering-terminally-ill-husband-in-suicide-pact> accessed 04 Nov 21.
[920] *Ian Gordon* at [31].
[921] *Ian Gordon* at [30].
[922] *The Morality of Law* 79-91.
[923] Graeme Laurie, 'Physician Assisted Suicide in Europe: Some Lessons and Trends' (2005) 12 European Journal of Health Law 8.

Regarding the rule of recognition, Fuller believes that abiding by the rules as they are articulated and laid down will only happen so long as there is a shared commitment to governing our conduct in that way. When a sense develops that the constitutional order governing a community is unnecessarily restraining, or is an impediment to pursuing important purposes, there can be a critical breakdown of recognition of the need to restrain and govern conduct.[924] Rundle articulates how at the heart of Fuller's 'internal morality of law' there is an idea of reciprocity and how this concept arises initially in response to, or in anticipation of, a corresponding effort from the lawgiver.[925] Rundle explains that there is a root social fact in the perception that the status quo is worth preserving, and in continuing with the constitutional order. In Fuller's eyes, 'Law' then is an enterprise that relies for its very existence on 'a cooperative effort – an effective and responsible interaction – between lawgiver and subject'.[926] The theme of reciprocity that is sustained throughout Fuller's writings has been amplified by legal philosophers and scholars alike.[927] [928]

Applying this to the practical issue of AD, there is a clear signal from those breaking the law that the law is not reflective of their own and wider society's morals and that the current prohibition is not worthy of steadfast preservation. The law breaks down or can break down when either party (lawmakers or legal subjects) opts out. The way AD is governed at present misses the social reality that if citizens refuse to abide by what lawmakers say, they can render futile the actions and efforts of law enforcement officials. At a certain

[924] Lon L. Fuller, 'Human interaction and the law' (1969) 14 (1) American Journal of Jurisprudence 1-36 < https://doi.org/10.1093/ajj/14.1.1> accessed 1 May 2022.
[925] Rundle, 'Fuller's Internal Morality of Law' p.500 (n 72).
[926] *The Morality of Law* 216.
[927] Witteveen, Willem and Wibren van der Burg, eds. *Rediscovering Fuller: Essays on Implicit Law and Institutional Design* (Amsterdam University Press 1999); Mark D. Walters, 'The Morality of Aboriginal Law.' (2006) 31 Queen's Law Journal 470; Brunnée, Jutta and Stephen J. Toope. *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge University Press 2010).
[928] Jonathan Crowe, 'Between Morality and Efficacy: Reclaiming the Natural Law Theory of Lon Fuller.' (2014) 5 Jurisprudence 109; H. Pauer-Studer, 'Law and Morality under Evil Conditions: The SS Judge Konrad Morgen.' (2012) 3 Jurisprudence 367.; C. Hanisch, 'The Legality of Self-Constitution.' (2015) 28 Ratio Juris 45.

point, gross failure in the realisation of either of these anticipations (of government towards citizens or citizens towards government) can result in the most carefully drafted code failing to become a functioning system of law. This point connects back to Fuller's criteria for law and, in particular, my revised way of understanding this as normative criteria for *good law* rather than an analytic criterion for *being law at all.*[929]

One issue of Scotland dealing with AD as we do now (leaving it to be governed by common law and generic guidelines) is that there is insufficient detail in the process, with inadequate direction for legal/medical professionals and an absence of data gathering thereafter. This leads to discrepancies in the way law is applied. For example, in his first Reith Lecture, Lord Sumption gave his view that the current law on AD works on the whole as a deterrent but that it is morally acceptable for people to break that law.[930] To Fuller, the willingness I have as a legal subject to restrain my conduct in ways that law demands diminishes if officials are not willing to restrain their own conduct in the way that law demands. Whilst Lord Sumption is not saying that he himself would take part in AD, he is essentially condoning its morality in some circumstances.

So, if citizens hear from enforcers of the law that it is permissible to break the law in some circumstances, and we know that HCPs and others are already doing so,[931] then there is little incentive to abide by what the rules say. Over time, this will erode the rule of law further, with potentially more people taking matters into their own hands – something unwelcome given the argument for an AD law to include robust safeguards, procedures and protocols. We must

[929] *The Morality of Law* p.39, "A total failure in any one of these eight directions does not simply result in a bad system of law; it results in something that is not properly called a legal system at all...".
[930] J. Ames, 'Assisted suicide law should be broken, says Lord Sumption' (*Times,* 18 April 2019) <https://www.thetimes.co.uk/article/suicide-law-is-there-to-be-broken-says-former-supreme-court-judge-vr5tlv8mj> accessed on 30 Nov 2021.
[931] Dr Iain Kerr for example as outlined at 3.0. See also, C. Seale, 'National survey of end-of-life decisions made by UK medical practitioners.' (2006) 20 (1) Palliative Medicine 3-10; C. Seale, 'End-of-Life Decisions in the UK Involving Medical Practitioners' (2009) 23 Palliative Medicine 198.

either accept that the law as it is, across the whole of the UK, is appropriate in its prohibition, or seek to quantify in what circumstances AD is justifiable and legislate to cover those. Leaving it to individual HCPs, the courts, and the prosecutor to distinguish the moral permissibility of something legally prohibited is unjust and illogical and fails Fuller's criteria in a multitude of ways.

There is a grounded reciprocity for citizens not to break the law but also for legal institutions to do what they say they are going to do. With AD, the countervailing considerations for disobeying the law are founded not only in an attempt to bring the law more in line with justice, but on disobedience based on compassion for the person's suffering. Fuller theorises that systematically adhering to the rule of law requirements will push in the direction of justice, and the transparency and openness will constrain certain gross forms of injustice, but it is no guarantee that all forms of injustice will be avoided. Thus, the citizen is faced with a genuine moral dilemma of what one does when torn between obeying the law and alleviating a person's suffering.

Austin and Bentham were convinced that if laws reached a certain degree of iniquity, there would be a plain moral obligation to resist them and withhold obedience.[932] Historically, theorists were considering this possibility in light of the apartheid laws of South Africa or the Nazi laws of Germany and not present-day PAD. However, Fuller's emphasis and interest in the social reality of law is in looking at the social consequence of flouting the mutual commitment, one consequence being that it erodes trust. When there is no match between what declared rules say and what is happening in practice, it is not surprising that distrust develops because it is no longer reasonable for

[932] John Austin, *The Province of Jurisprudence Determined and the Uses of the Study of Jurisprudence* (London: Weidenfeld & Nicolson 1954); Jeremy Bentham, *A Fragment of Government* (London 1823); Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (1781); for discussion see H.L.A., Hart, 'Positivism and the Separation of Law and Morals' (n 57).

officials who see the gap between declared rule and law to ignore it,[933] rather than to seek to address it by legislation or other means.

Furthermore, these violations produce frustration and resentment because if I cannot form reliable expectations because of the lack of congruence or because of the vagueness regarding what it is that is prohibited, then resentment is a product of the wrongs being done in terms of judging my conduct according to a standard I had no opportunity to meet.[934] That is compounded when officials continue to refuse to pass laws allowing the practice and instead continue to demand obedience of citizens. It is fundamentally unjust to command and continue to insist that citizens refrain from doing something which, on the whole, is tolerated, as recognised by The Supreme Court in *Nicklinson,* in practice.[935] Violations of the rule of law, including vagueness and arbitrary exercising of the rules, can lead to uncertainty and frustration. It means that the law does not enable people to foresee or form reliable expectations, restricting people's ability to plan for their future.

It is not uncommon in cases of AD for the family to wish clemency for the accused (*Dr Kerr, Brady, Ian Gordon, Mavis Ecclestone*).[936] In the UK, the ability to apply lenient sentences or the far-reaching ‘not in the public interest’ justification allows the Crown leeway to balance competing public interests in respecting the wishes and interests of the deceased family who, despite knowing that the taking of life was entirely deliberate, wish compassion to be shown.[937] There should be a mechanism to allow people who are suffering (in the way in which the victims of these cases were) to end their lives safely and peacefully, without having to rely on the assistance of well-meaning but amateur helpers, and to hope for the clemency of the courts towards their assisters thereafter. Allowing PAD would be an altogether more

[933] *The Morality of Law* 81.
[934] Ibid 70.
[935] *Nicklinson* [108] [314-319].
[936] See earlier discussion at 3.0.
[937] *Boyle v HM Advocate* 1976 JC 32, 37 (Lord Cameron).

compassionate approach both to the person seeking an assisted death but also to the relatives who can then legally support a loved one through the process without risking severe consequences for themselves. Increasingly, jurisdictions are approaching this proactively, in light of ageing populations with worsening health, and legalising PAD, removing or minimising the need for amateur assistance.

7.3 Failed Suicide attempts

As has been noted, people living with disease and illness have an increased likelihood of attempting suicide.[938] Covert 'at home' assisted death is, however, not fool-proof. Some people attempt to end their lives and fail to do so, worsening their quality of life. Studies have shown that terminal patients use means such as shooting themselves, overdosing on drugs, and jumping out of windows to end their lives.[939] In contrast, PAD involves a meticulous examination of the patient's medicinal needs before making a compound of medicine that will swiftly and peacefully end their life with the time to death usually taking between five and thirty minutes.[940]

Instances of unsuccessful attempts in the UK include the cases of Daniel James, Omid T and Simon Binner. Daniel James attempted to die by suicide on three occasions before travelling to Dignitas.[941] Omid T tried to end his life in March 2015 unsuccessfully; he could not countenance a second botched attempt and died at Life Circle in Switzerland in 2018.[942] Simon Binner was a fifty-seven-year-old man who was diagnosed with Motor Neurone Disease (MND) and deteriorated rapidly. Deborah Binner, Simon's wife, describes vividly how on one occasion, Simon locked his family in their home and made his way to the garden to hang himself from the children's swing:

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[938] R. Goodwin, et.al., 'Suicide attempts in the United States: the role of physical illness.' (2003) 56 (8) Social Science & Medicine 1783.
[939] Antonio Filiberti., et.al., 'Characteristics of Terminal Cancer Patients Who Committed Suicide During a Home Palliative Care Program' (2001) 22 (1) Journal of Pain and Symptom Management 544.
[940] There have been nearly 2,000 assisted deaths in Oregon, the average time to unconsciousness is 5 minutes, the average time to death is 30 minutes (n 841).
[941] n 623.
[942] n 830.

> Simon, who at this point could hardly shuffle let alone walk, had somehow got himself to the end of the garden…He'd taken the swing rope and wedged it around his neck. As impossible as it seemed he'd dragged a step ladder out too. My husband, the loving family man, was about to hang himself on our children's swing. [943]

Following this failed attempt, Simon later tried to jump out of a window to end his life. Deborah describes how these actions were out of character for her husband and that the utter desperation of his plight and terrible bleakness of the illness had driven him to these decisions. Simon died at Eternal Spirit in Basel in October 2015.[944]

Other harrowing examples feature in a 2014 Dignity in Dying report and include Duncan McArthur, who ended his own life in October 2009 with medication he had stockpiled, having been diagnosed with MND in 2006. His wife Susan was the subject of a police inquiry. There was no prosecution, but the inquiry meant a funeral could not take place until December 2009, and an inquest was not held until almost a year later. [945]

A failed suicide attempt can result in the person having to live with both physiological issues associated with the failed attempt but also physical injuries such as tracheal rupture (hanging),[946] spinal cord injuries (falls)[947] and

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[943] Deborah Binner, *Yet Here I Am: One Woman's Story of Life After Death* (Splendid publications 2018).
[944] Kashmira Gander, 'Simon Binner Dies' (*Independent*, 19 October 2015) <https://www.independent.co.uk/life-style/health-and-families/simon-binner-dies-tributes-to-businessman-who-announced-assisted-suicide-date-on-linkedin-a6700536.html> accessed 14 March 2022.
[945] Dignity in Dying, 'A Hidden Problem: Suicide by terminally ill people.' (2014) < https://cdn.dignityindying.org.uk/wp-content/uploads/Research_FOI_Suicides.pdf> accessed 11 Jan 2016.
[946] Victor S Costache MD; et. al., 'Complete tracheal rupture after a failed suicide attempt.' (2004) 77 (4) The Annals of Thoracic Surgery 1422.
[947] P. Kennedy, et al., 'Spinal cord injuries and attempted suicide: a retrospective review.' (1999) 37 Spinal Cord 847 <https://doi.org/10.1038/sj.sc.3100932> accessed 11 May 2019.

other debilitating conditions such as irreversible brain damage.[948] [949] Legalising PAD would allow those who wish to end their life at home in the UK to do so, with certainty, without the risk of a failed attempt resulting in injury. Therefore, the prohibition on PAD produces further harm, with the inability to procure assistance to die, resulting in potential physical or psychological harm, not only to the individual but to relatives who also must bear witness. Again, it is apparent that a permissive PAD law would act as a protective measure against such harmful consequences.

7.4 Premature deaths

The consequences discussed thus far mean that individuals are forced to decide to end their life prematurely while living in fear that should they wait, their condition may impact their ability to end their own life. Westwood's (2017) research concluded that:

> Several made it clear that they felt they would have to end their lives sooner than they might wish to, in order to make sure that they are still physically and/or mentally capable of doing so: 'one is forced to give up what may be some good years of life in order to ensure that one can die with dignity'…This, ironically, could mean that denial of lawful assisted dying (to protect the sanctity of life) can lead some older people to end their lives prematurely.[950]

Westwood's research shows that individuals are forced to predict or project the trajectory of their condition to allow them to choose an appropriate time to end their life. For some people in this position, this may be as their condition deteriorates or they begin to experience certain symptoms. Davis considers this phenomenon around patients diagnosed with dementia, defining the premature death as one whereby an individual ends their own life before their

[948] Ciara Higgins, et.al., 'Attempted suicide leading to acquired brain injury: a scoping review' (2020) 34 (2) Brain Injury 160 <10.1080/02699052.2019.1686771> accessed 1 Dec 2021.
[949] Jawaid MT, et.al., 'Neurological Outcomes Following Suicidal Hanging: A Prospective Study of 101 Patients' (2017) 20 (2) Ann Indian Acad Neurol 106 <doi:10.4103/0972-2327.205773> accessed 1 June 2018.
[950] Westwood, (n 876) p.18.

illness progresses to a loss of capacity.[951] As a direct result of being unable to choose PAD, this premature death potentially robs individuals of months or years of life.

Davis describes how suicide is a reasonable response to impending dementia, but that a major barrier has been the difficulty of pinpointing a time to act, "not so early as to lose many good years, but not so late that the subtle onset of dementia robs one of the ability to appreciate the situation and to act in accordance with one's goal."[952] Dementia is used as an example because of the difficulties engendered by the 'predictive challenge'. Prediction is crucial for dementing diseases because, unlike other diseases such as cancer, a person cannot wait until the disease takes hold to decide to end their life; in the context of PAD, once the disease holds sway, it is already too late to act as PAD laws require the person to have capacity at the time of the assisted death.

Whilst opposition to AD focuses on the sanctity of life and that cutting life short (premature death) is wrong, a corollary is that premature deaths are happening anyway, with people taking matters into their own hands. The consequence of allowing AD is not condoning premature death but avoiding what Noel Conway described as a "traumatic, drawn-out death" with "unbearable suffering":

> I am told the only option I currently have is to effectively suffocate to death by choosing to remove my ventilator, which I am now dependent on to breathe for up to 22 hours a day. There is no way of knowing how long it would take me to die if I did this, or whether my suffering could be fully relieved. To me, this is not choice – this is cruelty.[953]

[951] D.S., Davis. 'Alzheimer disease and pre-emptive suicide' (2014) 40 J Med Ethics 543.
[952] Ibid 543.
[953] Kevin Rawlinson, 'Terminally ill man loses high court fight to end his life' (*The Guardian,* 5 Oct 2017) <https://www.theguardian.com/society/2017/oct/05/entombed-man-noel-conway-loses-high-court-fight-end-life> accessed 14 Nov 2018.

A persuasive argument for reform cannot leave itself open to the charge of apology (people do this anyway, so we should change the law to reflect that fact) - it requires normative force. At the same time, a persuasive argument cannot leave itself open to the charge of utopia (we should do this regardless of the practical, moral/ethical, social, and political realities).[954] Instead, this thesis deploys both normative and practical arguments which combine against these charges to create a statable case for reform. We should not legalise PAD simply because it is already happening – we should legalise it because it is happening in an unsafe and unregulated manner (*inter alia*) and because the consequences of inaction are significant and include avoidable suffering, disempowerment, traumatic deaths, and indignity, as articulated by case studies such as Mr Conway's. This thesis combines two key themes – making AD law consistent with Fuller's criteria and building on Scotland's culturally accepted value of compassion – to provide a distinctive approach to balance these challenges and solve the conundrum.

Deciding to end your own life is a profound matter to contemplate. When the iniquity of the current prohibition compounds this enormity, it means that people are losing time that they would otherwise have if they had access to PAD; this is most starkly demonstrated in the practice of suicide tourism, to which I will now turn.

7.5 Suicide tourism

'Suicide tourism' is a phrase to describe travel of non-residents to a country that facilitates AD, most usually Switzerland, where organisations such as Dignitas assist foreign nationals.[955] The phrase "going to Switzerland" has become a euphemism for travelling to Switzerland to be assisted to die,[956] suggesting normalisation and acceptance of the practice. As of March 2019, there are 1476 UK members of Swiss clinics that offer AD and 418 UK

[954] M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument*. (Cambridge University Press 2006).
[955] Saskia Gauthier, et al. 'Suicide Tourism: A Pilot Study on the Swiss Phenomenon.' (2015) 41 (8) BMJ 611.
[956] Ibid.

citizens who have had an assisted death abroad. As of May 2022, at least 25 Scots had travelled to Switzerland to have an assisted death.[957]

Suicide tourism's profile was raised in 2008 when the case of *Daniel James* was highly publicised in the UK media. Daniel James was twenty-three years old when he was paralysed from the chest down following the collapse of a rugby scrum in March 2007. To his consultant psychiatrist, he described himself as a "dynamic, active, sporty young man who loved travel and being independent" and that "he could not envisage a worthwhile future for himself now". Daniel frequently stated his wish that he had died of his injuries on the rugby field and that he was determined to end his own life. He made several attempts to do so.[958]

Daniel was accompanied by his parents to end his life in Switzerland. Upon returning to the UK, both parents and a family friend were subject to a police investigation into aiding and abetting suicide, as per s.2 (1) Suicide Act 1961, but were not prosecuted. Following the investigations, the Director of Public Prosecutions (DPP) set out his reasons for not proceeding with the charge of assisting suicide whilst accepting that there were sufficient grounds for a prosecution.

The grounds in favour of prosecution were in relation to Daniel's parents' participation by sending documents to Dignitas, arranging travel, and accompanying Daniel to Switzerland. Factors against prosecution included that Daniel maintained mental capacity, and had shown a desire over a period of time to end his life, including repeated suicide attempts and making the initial contact with Dignitas himself. Although it was clear that Daniel's parents and the family friend did assist, the DPP considered that the factors against

[957] n 466.
[958] Keir Starmer QC, 'Decision on Prosecution: The Death by Suicide of Daniel James (2008) (n 627).

prosecution outweighed those in favour, and as such, it was not in the public interest to prosecute.[959]

In the Scottish context, as noted earlier,[960] the *obiter dicta* by Lord Carloway in *Ross* that suicide tourism is not illegal cannot be relied upon. The uncertainty that the current context creates causes distress to the person seeking an assisted death and places that individual's family, friends, and caregivers under significant pressure, at an already extremely difficult and emotional time. For example, Daniel James' parents described being 'completely terrified' and 'shook to the core'.[961]

7.5.1 Injustice

The inherent injustice in this system of prohibition on paper, but tolerance in practice, again presents itself here. Suicide tourism is not available to all. Assistance to die at Dignitas costs approximately £10,000.[962] Travelling to Switzerland is a demanding process for those already living with a terminal illness, and most people need someone to accompany them, which then presents potential legal liability for the accompaniers. Furthermore, this option requires extensive and complex paperwork to be completed, including dental records, birth/marriage certificates and medical reports. Regarding the medical reports, the current guidance provided is unclear on what UK doctors can and cannot do and leads to confusion and distress for the person trying to navigate the process secretly.[963]

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[959] Ibid.
[960] p.164.
[961] Jeremy Lawrence, 'Agony of helping a son to kill himself' (*Independent,* 23 Oct 2011).
[962] The organisations providing this assistance operate as not for profit and do, on occasion, support people with fee waivers etc. Dignity in Dying, *The True Cost of Dignitas,* (n 494).
[963] GMC, 'Guidance for the Investigation Committee and case examiners when considering allegations about a doctor's involvement in encouraging or assisting suicide' (March, 2013) covers matters such as subject access requests under data protection law, writing reports, and compassionate actions by doctors who are patients' family members <https://www.gmc-uk.org//media/documents/DC4317_Guidance_for_FTP_decision_makers_on_assisting_suicide_51026940.pdf> accessed 14 Nov 21.

The financial and emotional cost is not the only barrier to overcome. Prior to his AD, Richard Selley released a video detailing the process he had to go through to secure an assisted death, including proving his terminal illness with vast swathes of paperwork and specialist reports, outlining how arduous a process it is. The procedures in place are not easily navigable and show that suicide tourism is not an easy option and, more importantly, for distributive justice concerns, one which is only available to a small cohort of people. The accessibility of suicide tourism offers an option to a specific cohort of people – those who have retained their mental and physical capacity, are able to navigate the complex process and can afford the costs. Richard Selley said that he would not have considered travelling to Switzerland if the ability to obtain PAD in Scotland was available. For Richard and his family (and all other Scots who have had an AD abroad), additional risk and uncertainty are present because of the lack of a suitable and comprehensible legal framework in Scotland.

Although no one in the UK has been convicted under Section 2 for taking part in suicide tourism, there is still an overhanging risk that prosecution may occur, which adds to the angst for all involved. The prospect of criminal sanctions when already faced with a loved one ending their life away from home heightens the distress for family and friends. Discretion and generality in the law are generally favourable features of a well-established legal order. Problems arise when a particular area of law is not well established, and administrative discretion is the fall-back. Citizens should not have to disentangle the various sources of scant information and trust or assert blindly that those decisions can guide their future actions.[964] Many considering AD indeed turn to campaign groups for advice and information on how to access AD at home and abroad; such individuals should be able to receive impartial advice and information of their own accord without having to consult organisations advocating for AD, who in any case cannot provide

[964] Raz, *The Rule of Law* (n 2) p. 222.

such information for fear of the legal repercussions, leaving people with nowhere reliable to turn.

While, on the face of it, suicide tourism may offer some comfort to those who fear a bad death, it undoubtedly produces negative consequences. Gauthier comments that Swiss medical and legal experts are faced with cases of suicide tourism daily[965] - it is no longer novel, controversial and taboo, but a firmly solidified end of life option for the privileged few. As long as prohibitions remain in countries of residence, rates of suicide tourism will likely increase.

Refusing to legalise AD but essentially allowing it in practice results in plausible deniability for the state's injustice. If we had an AD law, i.e. declared rules defining the practices people are engaging in, this would expose Scotland to a higher level of scrutiny. It also creates transparency that invites constructive criticism on the basis of the injustice of what is happening. At present, the injustice is being pushed underground and plausibly denied because that is not what the state is doing as a matter of official policy. Fuller builds a very broad definition of justice that focuses on these informal aspects of governance.[966] The law must provide shared baselines for self-directed action and interaction, and at present, it is not giving all citizens a level playing field, because of this situation of tangential and surreptitious facilitation.

Fuller asserts that governing by law constrains the pursuit of substantive injustice and that the transparency and openness it mandates have a constraining effect on the kind of substantive injustice written into law.[967] Any system that relies on broadly defined rights and a court of human judges to interpret them will be imperfect. The basic presupposition is that the law states clear rules that serve as direct action guides for citizens and that are enforced by the state's coercive apparatus. This is the old model of law as a system of rules backed by sanctions. Our laws on AD express how we as a

[965] Gauthier, 'Suicide Tourism: A Pilot Study on the Swiss Phenomenon.' p.611 (n 955).
[966] *The Morality of Law* 157-159.
[967] Murphy, 'Lon Fuller and the Moral Value of the Rule of Law' (n 89).

society look at human life and the value we attribute to it. Likewise, the law or lack of it, has a symbolic meaning.[968]

Rather than relying on police, prosecutors and judges interpreting written and unwritten policy to deal with unclear cases, a mature legal system should strive toward (even if never reached, as no law operates perfectly) certainty and predictability. Fuller's most prominent dissenter, Hart, believed that stretching the rules to deal with unclear cases would work but also admitted that the more rules are stretched, the more artificial their application becomes, leading to injustice.[969]

It is quite clear that the current prohibitive approach fails to protect public safety because vulnerable people are at risk by virtue of a policy that unofficially tolerates AD. Particularly where the services of Swiss organisations are concerned, it seems that the option of AD is increasingly viewed as an end-of-life possibility. Moreover, if the state condones this option by failing to prevent or even discourage it, a Swiss suicide will become normalised among end-of-life choices; arguably, it already has. [970]

The added dimension in the AD context is that much of the activity takes place in a private setting, shielded from the state intervention that would apply in medical settings.[971] In a world where people increasingly decide for themselves which morality they wish to follow, more and more will decide whether to obey the law or not and as we have seen, an increasing number of individuals have taken steps to circumvent the law. The access to AD for some but not all is unjust - the law should be the same for everyone so that

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[968] Jochen von Bernstorff, 'The Changing Fortunes of the Universal Declaration of Human Rights: Genesis and Symbolic Dimensions of the Turn to Rights in International Law' (2008) 19 (5) European Journal of International 903 <https://doi.org/10.1093/ejil/chn069> accessed 11 July 2014.
[969] Hart, *The Concept of Law*, p.126-7 (n 62).
[970] A. Mullock. Compromising on Assisted Suicide: Is Turning a Blind Eye Ethical? (n 718).
[971] J.Griffiths, A. Bood and H. Weyers, *Euthanasia and Law in the Netherlands,* (Amsterdam University Press 1998).

no one is above the law and everyone, citizens and HCPs alike, have access to its protection.

7.5.2 Choice

A just society equips its members universally with a full and equal opportunity to realise whatever seems to them, consistent with others having the same opportunity, to constitute their best life plan.[972] Colburn has considered AD in relation to Melanie Reid, the Times columnist who was paralysed after a horse-riding accident in 2010. Reid has said:

> You want the voice from the coalface? You don't just want an opinion from some able-bodied moralist who presumes to know what's best for me? I will be very blunt. Most mornings I contemplate suicide, briefly examining the concept in a detached, intellectual way. It's always during the hour when I am sitting on my shower chair over the loo, leaning forward over my purple, paralysed feet, fighting nausea and light-headedness, sore bones and paralysed bowels…

She goes on:

> And every day I stare at my toes and say to myself: "Nope, got to keep going, got to keep fighting." Because I choose, fiercely, to live for the people who love me; and will continue to do so until such point as they understand I cannot carry on. I hope that moment, if or when it comes, is many years away…Knowing that I have a choice is a huge comfort to me; it sustains me on the days when I make the mistake of looking too far in the future. But the point is, I am blessed precisely because I have a choice. [973]

[972] UK Government, The Equality Strategy – Building a Fairer Britain (Dec, 2010) <equality-strategy.pdf (publishing.service.gov.uk)> accessed 11 Nov 2021.
[973] Melanie Reid, 'I choose, fiercely, to live – but only for now' (*The Times, 2012*) <https://www.thetimes.co.uk/article/i-choose-fiercely-to-live-but-only-for-now-stk2b8hxx8v?ni-statuscode=acsaz-307> accessed on 16 July 2019.

Colburn considers the choice that Reid refers to - the choice of travelling to Switzerland to have an assisted death – and rightly states that this choice is only available to her because she can afford the associated fees,[974] is well educated enough to navigate the process and still has some movement left in her hands, which would allow her to die by her own hand, avoiding implicating others.[975]

Colburn considers how Reid's account illustrates that when people's choice set is expanded, it allows them to live, reinforcing the emotional insurance aspect of AD. Importantly this additional choice is a stark illustration of comparative justice and illustrates how having the option is transformative to Reid, as it allows her to exercise her autonomy in a way that is restricted for others.[976]

If the current law turns a blind eye to unregulated AD happening in communities across the UK, then there is an argument that it should provide equal access to AD in a regulated way. The inequity currently present at the end of life, i.e. that only affluent, well-educated, and able-bodied people can access it – or those lucky enough to be connected to a compassionate doctor willing to break the law, is another reason to change the law. To reaffirm, the driving argument in this thesis is not law reform on AD based on autonomy or choice but on clarity and compassion. This argument is simply an acknowledgement that choice is also beneficial as it contributes to the relief of suffering (via the emotional insurance aspect *inter alia*) and thus greater compassion being shown to those at the end of life.

Colburn considers that in a just society, all persons should have broadly equal access to the material and social means necessary to live a flourishing life.[977] In a free, democratic society, egalitarian principles should govern our

[974] Dignity in Dying, 'The True Cost report', (n 500).
[975] B. Colburn, 'Autonomy, voluntariness and assisted dying' (2020) 46 JME 316 < http://dx.doi.org/10.1136/medethics-2019-105720> accessed 11 June 2021.
[976] Ibid.
[977] B. Colburn, *Autonomy and Liberalism,* (Routledge, 2010).

healthcare systems. By legally allowing PAD, principles of justice, equality, and compassion are prioritised over concerns about potential abuse, concerns that other jurisdictions have empirically disproved with decades of rebuttal data.[978]

Colburn asserts that when people are vulnerable at any stage of life, we do our best to equip them with various choices to meet their needs and help them manage and navigate their predicament.[979] This is a novel insight that can be applied in other healthcare contexts. I offer pregnancy as an example, a circumstance in which the pregnant person can be described as vulnerable. We offer the person choices; home, hospital, or birth centre; vaginal or caesarean-section delivery; pain relief or not; who is to be present etc. This gives the person control over their situation and empowers them to come to a best worst-case. That is, giving birth is rarely going to be a pleasant experience, so let us do what we can to make it less hideous. Prohibiting PAD for those who wish to utilise the option does the opposite; it restricts people's options and disempowers them from living out the final chapter of their lives in an acceptable way.

When diagnosed with a terminal illness, people often speak of the systemic disempowerment they feel; allowing PAD will not nullify all the unpleasant consequences of the dying process, but it can at least remove people from this entrapment, liberating them to regain what Raz calls 'self-authorship'. [980] Furthermore, the impact of a bad death on family, friends and relatives left behind cannot be understated.[981] This then feeds into a cycle where other people are afraid of dying, having witnessed profound suffering and distress

[978] Colburn (n 219); Battin (n 219); See also the research undertaken by the court in *Carter v Canada* (Attorney General), 2015 SCC 5, [2015] 1 SCR 331 at paras. 795-98, 815, 837, 843, 852 and 1242.
[979] Colburn, 'Autonomy, voluntariness and assisted dying' (n 247).
[980] J. Raz, *The Morality of Freedom (*Clarendon Press. Oxford, 1986).
[981] Marquardt DS. (n 1016), also evidenced by various case studies explored in this thesis including that of Daniel James' parents at 7.5.

in loved-ones experiences. In contrast, PAD can be a peaceful event, where safeguards and support are central, often articulated as a 'good death'.[982]

7.6 Conclusion

This chapter has illustrated how a significant consequence of a ban on AD is that people with terminal conditions continue to live in situations that inflict pain, suffering and indignity on them and that they are forced to endure a life that they find intolerable. Whilst it has been recognised that the State itself is not inflicting these consequences on people,[983] it is argued that a lack of recognition for the suffering of the terminally ill, partnered with a lack of legal facilitation, means the state is indirectly perpetrating harm. Here Fuller talks about an affinity between legality and justice and writes:

> It has been said that most of the world's injustices are inflicted, not with the fists, but with the elbows. When we use our fists, we use them for a definite purpose, and we are answerable to others and to ourselves for that purpose. Our elbows, we may comfortably suppose, trace a random pattern for which we are not responsible, even though our neighbour may be painfully aware that he is being systematically pushed from his seat. A strong commitment to the principles of legality compels a ruler to answer to himself, not only for his fists, but for his elbows as well.[984]

In British Columbia, in the course of his judgement in *Rodriguez*, Sopinka J said:

> As a threshold issue, I do not accept the submission that the appellant's problems are due to her physical disabilities caused by her terminal illness, and not by governmental action. There is no doubt that the prohibition in section 241(b) will contribute to the appellant's

[982] D. Harris, et.al., 'Assisted dying: the ongoing debate' (2006) 82 Postgraduate Medical Journal 479; Lauren Vogel, 'Dying a "good death"', (2011) 183 (18) CMAJ 2089-2090 <https://doi.org/10.1503/cmaj.109-4059> accessed 11 Nov 2021.
[983] Jonathan Crow acting for the Government in *Pretty v United Kingdom* 2002.
[984] *The Morality of Law* 159.

> distress if she is prevented from managing her death in the circumstances which she fears will occur.[985]

The current approach to AD in the UK means that the 'elbows' described by Fuller are sources of injustice that arise from the informal practices occurring but are not sanctioned by declared rules. Here, the 'elbows' are the legal institutions that refuse to implement permissive PAD laws. Whilst *Pretty* ruled that it is not the state inflicting harm on people,[986] this thesis has shown that the current approach *does* indirectly produce harm, and there is little doubt that individuals are suffering as a result of the prohibition.[987]

The requirements of law demand that official conduct be governed and constrained by known and declared rules so that what officials are doing in practice is reflected in, and knowable by looking at, what declared rules say. In this way, society can recognise and appraise the justice of the law. Part of that is understanding and knowing what the rules governing conduct are, but further to that is being able to predict how legal institutions will act. In the UK, there is essentially a regime for AD perpetrated by a *lack* of official action and a policy of non-prosecutions. Harm is being indirectly inflicted on the terminally ill whose choice set is unnecessarily limited, whilst those who are fortunate enough to have a compassionate HCP or relative to assist them, or who can travel to Switzerland to access AD, can die in a way that meets their needs.

Justice is a primary facet of any law. As far back as Plato (who believed that only laws that pursue the ideal of justice could be considered right)[988] and Aquinas (a government which enacts laws which are unjust – i.e. unreasonable or against the common good - forfeits its right to be obeyed

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[985] Sopinka J ([1994] 2 LRC 136 at 175).
[986] *Pretty* [53].
[987] n Part II and III.
[988] Eric Brown, "Plato's Ethics and Politics in The Republic", *Stanford Encyclopedia of Philosophy* (Fall 2017 Edn), Edward N. Zalta (ed.), <https://plato.stanford.edu/archives/fall2017/entries/plato-ethics-politics/> accessed 16 Jan 2022.

because it lacks moral authority)[989] the ideal of governance for the pursuit of justice permeates law the world over. It is clear that laws on AD are not being obeyed by some members of the public, the professions, or by legal institutions in the UK. Cases show us that the courts are perhaps applying the public's spirit of feeling around AD, founded in compassion, as opposed to the law's letter. They are taking part in a process of constructive interpretation to apply the law more leniently. However, over time this risks the erosion of respect for governance more generally and is a deeply unsatisfactory approach to this fundamental aspect of human existence. The next chapter will address the final unintended consequence highlighted by Part III; contradictory and confusing medical practice.

[989] Aquinas calls any such law a 'corruption of law'. Aquinas, T. The Summa Theologica (Christian Classics Ethereal Library 1265 – 1274).

Chapter Eight: Contradictory and confusing medical practice

This chapter will explore the current end of life practices happening in modern healthcare and their relevance to the AD debate. It will highlight inconsistencies in medicine and law, namely that interventions (and omissions) to end life already occur daily within the National Health Service (NHS). It will reaffirm the problem with the reliance on common law, incapability of the current system to report and monitor, and subsequent lack of data. The majority of end-of-life care is carried out at a UK-wide level with governance via the common law and professional practice, which is why the discussion here is primarily UK-focused.

I will show that, as it stands, the law tolerates suicide and allows competent adults to refuse life-sustaining treatment. However, patients who wish to die but are neither physically able to die by suicide,[990] nor receive life-prolonging treatment that they can refuse, cannot ask for help. The only legal choice available to them is to die by refusing food and fluid (starvation/dehydration) - often a protracted exercise, potentially involving considerable pain and distress.[991]

Additionally, doctors are permitted to withhold and withdraw futile life-prolonging treatment from patients who cannot express an opinion (for example, patients in a permanent vegetative state), thus allowing decisions that will end life to be made *unto* people who lack capacity. Likewise, practices such as double effect, palliative sedation and euthanasia are all commonplace in the current system. Yet, quite inconsistently, we have a different set of rules for the capable person who competently requests assistance to die. Dworkin wrote:

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[990] Due to their physicial disabilities preventing this or a belief that this route is inhumane.
[991] R.J Jox *et al.*, 'Voluntary stopping of eating and drinking: is medical support ethically justified?' (2017) 15 186 *BMC Med* <https://doi.org/10.1186/s12916-017-0950-1> accessed 10 May 2020.

> So, the law produces the apparently irrational result that people can choose to die lingering deaths by refusing to eat, by refusing treatment that keeps them alive, or by being disconnected from respirators and suffocating, but they cannot choose a quick, painless death that their doctors could easily provide.[992]

There is an apparent contradiction in existing medical practice, where the law does not explicitly allow PAD practices but arguably does not outright prohibit it either. It will be shown that the absence of legal *patient-requested* PAD entrenches the medicalisation of death and the power of medical practitioners over patients.[993] The chapter does not offer a general comprehensive healthcare reform framework but will show that the current framework is underpinned by compassion toward patient's suffering. This allows us to explore extending the current end-of-life choices to include PAD for compassionate reasons.

Firstly, the assumption is that the vast majority of HCPs do act within the current law, and those who go beyond this primarily do so for reasons of compassion, to alleviate their patients suffering. The argument here is not that existing medical practice is wrong, but that assistance in death happens in an unnecessarily complex and convoluted way (because PAD remains illegal), and that well-meaning practitioners are forced to make unnecessarily difficult choices. The current end of life practices happening in modern healthcare will now be explored.

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[992] R. Dworkin, *Life's Dominion,* p.184 (n 572).

[993] There is not scope in the word count to delve deeper into issues of paternalism in the AD debate but other scholars have explored this in depth and it is necessary to note that a shift in paternalism toward patient autonomy has happened. Trends have been identified to understand why this has occurred and include an aging population; disillusionment with end-of-life care; a rise in individualism and a decline in religious belief. Further, the advances of medical science which have increased the capacity to sustain life have made it 'necessary to make decisions about when to stop doing so'. This inevitably involves clinicians and institutions whose primary responsibility has been health care, in situations that create challenges to professional principles, and social and legal prohibitions. Anne Mullens, *Assisted Suicide: Canadian Perspectives*, Preface and Introduction ed. by CG Prado (Ottawa: University of Ottawa Press 2000) p.1-14.

8.0 Withdrawing/Withholding treatment

It has been said that over half of all deaths result from a specific medical decision, either to administer drugs or to withhold or withdraw life-prolonging treatment.[994] Withdrawing or withholding treatment (WWT) occurs where, for example, chemotherapy is discontinued, or a decision is made not to start intravenous antibiotics.[995] It also covers removing clinically assisted artificial nutrition and hydration (CANH) or life support machines, such as assisted breathing technology. WWT will only hasten death for those individuals who could be or are being sustained by technology. Many other individuals, including those with the most common illness, cancer, face a potentially protracted period of dying when respirators and other life-preserving technology are not utilised. [996]

We will now explore the fact that the state allows assistance to die in the form of WWT to be given *to* people who lack capacity, such as those in a persistent vegetative state (PVS), whose treatment can be withdrawn without their explicit consent. Yet, quite inconsistently, we have a different set of rules for the capable person who is already in the process of dying and competently requests to end their life, circumstances that have been envisaged with previous and contemporary attempts to reform the law in Scotland.

After suffering life-changing injuries at the Hillsborough football disaster, *Tony Bland* was in a permanent vegetative state.[997] The courts clarified that the removal of CANH would constitute an omission (because clinicians would be omitting to feed Mr Bland) and would therefore be lawful, providing its

[994] Treatment encompasses the cessation of artificial nutrition and hydration, as outlined in Airedale *NHS Trust v. Bland* 1993. Simon Jenkins, 'Deciding How to End one's Life Should Be the Ultimate Human Right', (*The Guardian*, 2018) <https://www.theguardian.com/commentisfree/2019/mar/22/death-human-right-assisted-dying> accessed 13 Nov 21.
[995] D.S. Howard and T.M. Pawlik, 'Withdrawing medically futile treatment." (2009) 5 (4) *Journal of oncology practice* 193-5 <doi:10.1200/JOP.0948501> accessed 21 March 2021.
[996] Beauchamp and Childress (n 880) p.178.
[997] *Airedale NHS Trust v Bland* [1993] 1 All ER 821.

continuance was no longer in the patient's best interests.[998] The CANH was deemed medical treatment (and not basic care), so if there no longer existed a duty to treat (which there did not if treatment was no longer in the patient's best interests), the omission would not lead to liability on the part of the doctors.[999]

Some are not convinced by the argument in *Bland* that CANH is not 'basic care' but medical treatment.[1000] I agree that this is an example of philosophical sophistry, blurring the line between legality and morality to prevent the perception that HCPs' actions can end life.[1001] [1002] The act/omission distinction made in *Bland* seems to aim for a balance of sorts in these difficult circumstances.[1003] However, it has been argued that, since it is inappropriate outside medicine to consider something physical as an omission, it should not, therefore, be considered as such within medicine. Kennedy has said, "… to describe turning off the machine as an omission does some considerable violence to the ordinary English usage. It represents an attempt to solve the problem by logic chopping."[1004] McCall Smith refers to "the moral intuitions of ordinary people, who see a distinction between acts

[998] *Bland* [867]. Lord Goff said: "… if the justification for treating a patient who lacks the capacity to consent lies in the fact that the treatment is provided in his best interests, it must follow that the treatment may, and indeed ultimately should, be discontinued where it is no longer in his best interests to provide it.".
[999] P. Ferguson, 'Causing Death or Allowing to Die? Developments in the Law' p. 370 (n 420).
[1000] P. Saunders, 'New BMA guidance on CANH: the devil is in the detail', (2018) Christian Medical Fellowship <https://www.cmf.org.uk/resources/publications/content/?context=article&id=26873> accessed 13 Nov 2020.
[1001] How legal obligation differs from, and is related to, moral obligation has been the subject of debate for centuries, most notably by H. L. A. Hart, (1994) *The Concept of Law* (n 61) 13.
[1002] This thesis does not provide an in-depth discussion of the intricacies of the basic care/medical treatment argument, but there is a well-established body of commentary to refer to. See, for example, J. K. Mason and R. A. McCall Smith, *Law and Medical Ethics*, (5th edn, Butterworths 1999) chapter 16; Sheila McLean, 'Letting Die or Assisting Death: How Should the Law Respond to the Patient in the Persistent Vegetative State?' in K. Petersen, ed. *Law and medicine* (La Trobe University Press 1994) p.3; Sheila A M McLean, 'Permanent Vegetative State and the Law' [2001] 71 Journal of Neurology, Neurosurgery & Psychiatry.
[1003] In fact, with CANH there need not be a physical 'act': the feeding tube can be left in place and HCPs can simply omit to put formula in it.
[1004] I. Kennedy, *Treat Me Right: Essays in Medical Law and Ethics* (Clarendon Press, 1988) 351.

and omissions".[1005] This also touches on the criminal laws' general reluctance to punish omissions and its far greater willingness to punish acts.

The legal reasoning in *Bland* has been questioned, with some believing this was a case involving euthanasia and not medical treatment:

> By upholding the impermissibility of euthanasia, whilst at the same time permitting 'euthanasia' under the guise of 'withdrawing futile treatment', it is argued that the court (logically) allowed (withdrawing futile treatment and euthanasia) … Legislation is proposed in order to redress the ambiguity that arose when moral decisions about 'euthanasia' were translated into medical decisions about 'treatment'.[1006]

The judges themselves expressed reservations about why it was permissible to allow death this way[1007] but not to administer a lethal injection.[1008] This area of law turns criminal law on its head by allowing an omission that causes death and refusing to allow a positive act that would cause the same result.

It also leads to confusion and misunderstanding. Consider, in comparison to *Bland*, the case of *W Health Care NHS Trust v H & Another* 2005.[1009] The patient, suffering from multiple sclerosis for over 30 years and in the 'process of dying', was conscious and sentient but unable to communicate. She had been artificially fed for five years, and the decision of whether her disconnected (PEG) feeding tube should be reconnected came before the

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[1005] Alexander McCall Smith, 'Euthanasia: The Strengths of the Middle Ground' (1999) 7 MLR 194–207.
[1006] Gwen Sayers, 'Non-Voluntary Passive Euthanasia: The Social Consequences of Euphemisms' (2007) 14 (3) European Journal of Health Law. See also: G. Sayers, 'Non-Voluntary Passive Euthanasia, Euphemisms, and the Consequences' Chapter Four: Towards legislation. (M.Phil thesis, University of Glasgow 2005).
[1007] WWT resulting in dehydration/starvation and subsequent organ failure.
[1008] Lord Goff of Chieveley.
[1009] *W Health Care NHS Trust v H & Another* (2005) 1 WLR 834.

court. Whilst her medical carers wished to reconnect the PEG, her family wished her to be allowed to die. Only intolerability of living, it was considered, could justify an act that would hasten a person's death.[1010] However, such a death would not be fast, as it would involve starvation.[1011] The result was that her feeding tube was replaced, as the court held that a 'death by starvation' in the patient's sentient state would not be in her best interests.[1012] Lord Justice Brooke on appeal stated:

> The way that the judge came to the conclusion was that in KH's present state she was unable to say that life-prolonging treatment would provide no benefit, and that death by, in effect, starvation would be even less dignified than the death which she will face in due course if kept artificially alive for more weeks or months or possibly years.[1013] [1014]

These types of cases are very fact-sensitive, and one can sympathise with the judge's intentions to avoid KH's potentially torturous death by starvation. However, given the family's testimony that KH would not wish to be kept alive in her present condition, it is difficult to comprehend how continuing an existence in which the person is 'in the process of dying' or in a vegetative state and not living a 'full' life, is of benefit, or in the person's best interests,

[1010] Ibid. at [25] Munby J said, after referring to that guidance (British Medical Association's Guidance for Decision Making), the test which the law applies is 'best interests.' The touchstone of best interests in this context is intolerability. Munby J came to that conclusion after reciting, in particular, the judgments in *Re J (a Minor) (Wardship: Medical Treatment*) [1991] Fam 33, [1990] 3 All ER 930. No doubt, Munby J had in mind what Taylor LJ said at p 55: "Despite the court's inability to compare life affected by the most severe disability with death, the unknown, I am of the view that there must be extreme cases in which the court is entitled to say life that this treatment would prolong would be so cruel as to be intolerable."
[1011] Ibid [20].
[1012] On appeal [2005] 1 WLR 834, [2004] EWCA Civ 1324, [2005] WLR 834 at [27].
[1013] Ibid.
[1014] It is important to note that some peoples' experience of this equals a 'peaceful death'. See: J. Kitzinger and C. Kitzinger 'Deaths after feeding-tube withdrawal from patients in vegetative and minimally conscious states: A qualitative study of family experience.' (2018) 32 (7) Palliat Med 1180-1188 <doi: 10.1177/0269216318766430> accessed 1 June 2019.

especially when the person has prior stated wishes that they would not wish to be kept alive in such a condition.[1015]

It was only recently confirmed in England and Wales in *NHS Trust v Y* [2018] UKSC that it is not necessary to apply to the Court of Protection[1016] for a decision to withdraw treatment when the doctors and the family[1017] agree that continuing treatment is not in the patient's best interests.[1018] This was a ruling with profound implications, as, for many years following the *Bland* case, families and health boards had spent vast sums of money (approx. £122,000 per patient)[1019] and waited some years[1020] for decisions on WWT to reach the court.[1021]

As discussed earlier, there is a dearth of case law in Scotland around end-of-life decisions, and much guidance is taken from the courts of England and Wales despite Scottish court procedures differing materially from those in England in the medico-legal context.[1022] The House of Lords authorised the withdrawal of feeding in *Bland*, and this was then applied in the only reported

[1015] For a detailed discussion, see: J. Kitzinger, C. Kitzinger and J. Cowley, 'When "Sanctity of Life" and "Self-Determination" clash: Briggs versus Briggs [2016] EWCOP 53 - implications for policy and practice', (2017) 43 JME 446–49.
[1016] There is no equivalent in Scotland to the English Court of Protection Practice Direction (9E) requiring all cases to be brought before the courts. Indeed, the only reported case is *Law Hospital NHS Trust v Lord Advocate* 1996 SLT 848.
[1017] And more generally those caring for the patient or interested in her welfare.
[1018] *NHS Trust v Y* [2018] UKSC 46.
[1019] A. Formby, et. al., 'Cost Analysis of the Legal Declaratory Relief Requirement for Withdrawing Clinically Assisted Nutrition and Hydration (CANH) from Patients in the Permanent Vegetative State (PVS) in England and Wales.' (2015) CHE Research Paper 108, University of York.
[1020] *Cumbria NHS Clinical Commissioning Group v Miss S and Ors* [2016] EWCOP 32 took 4 years to be decided. For discussion on this see: J. Kitzinger, C. Kitzinger 'Causes and consequences of delays in treatment-withdrawal from PVS patients: a case study of *Cumbria NHS Clinical Commissioning Group v Miss S and Ors* [2016] EWCOP 32' (2017) 43 JME 459-468.
[1021] C. Kitzinger, J. Kitzinger, 'Court applications for withdrawal of artificial nutrition and hydration from patients in a permanent vegetative state: family experiences.' (2016) 42 JME 11-17.
[1022] Brown and Christie, '*Pater* Knows best Withdrawal of Medical Treatment from Infants in Scotland.' (2020) OJLS.

Scottish treatment withdrawal case, the case of *Law Hospital NHS Trust v Lord Advocate* 1995,[1023] which is analysed in detail in the next section.

8.1 *Law Hospital NHS Trust v Lord Advocate* [1995]

The *Law Hospital* case produced a legally anomalous position regarding decisions about death and dying in Scotland. The patient, Janet Johnstone, permanently insensate after falling into a persistent vegetative state in 1992, remained alive only because artificial nutrition and hydration (ANH) was provided to her and because of the nursing care she received. Johnstone was unable to consent to treatment withdrawal, but her family agreed with the experts that life-sustaining treatment should stop. The hospital raised an action for declarator that the proposed course of terminating nutrition and hydration and all other life-sustaining treatment to the patient would not be unlawful.

It was held that treatment of an insensate patient might be withdrawn where it was not in the patient's interests.[1024] Lord Hope went on to say:

> Medical science has now advanced to such a degree that many techniques are now possible which only a generation ago would have been unthinkable. The ability to prolong life by artificial means has reached such a stage that it is possible to nourish the body and preserve it from disease so that life in the clinical sense may be continued indefinitely.[1025]

He evoked the right of self-determination for a capable adult and then said: "I can see no relevant distinction between the way in which the underlying principle was applied (in *Bland*) and the question which has to be decided

[1023] *Law Hospital NHS Trust v Lord Advocate* 1996 SLT 848. See also the Irish case *In the Matter of a Ward* (1995) 2 I L R M 401.
[1024] The Lord President, Lord Hope, *Law Hospital NHS Trust v Lord Advocate and Another* 1996 SLT, 848; 1996 SC 301.
[1025] S.McLean, 'Giving Up or Letting Go *Law Hospital NHS Trust v Lord Advocate'* Chapter 8 in J.P. Grant and E.E. Sutherland (eds) *Scots Law Tales (*Edinburgh University Press 2012).

here in the case of Mrs Johnstone."[1026] He added that "existence in a vegetative state with no prospect of recovery is by a large body of informed responsible medical opinion regarded as not being of benefit".[1027]

It has been established that, provided the patient is unaware of pain or suffering, there is no breach of Article 3 (the right to freedom from cruel, inhuman, or degrading treatment) if treatment is withdrawn.[1028] On the contrary, removing treatment is acceptable precisely because it may have become burdensome, produces negative consequences and is no longer in the person's best interests. Nonetheless, reservations were expressed over how Johnstone's life finally ended.[1029] While supporting the view that Johnstone's life was of no value to her, it could be argued that, once the decision had been made to bring life to an end, that result should have been achieved with as little delay as possible.[1030] Even if it was certain that the patient herself was completely oblivious to what was happening, which is questionable,[1031] the point was made that a prolonged death through starvation/dehydration would have added to the distress of relatives and carers. This thesis does not advocate for PAD in these circumstances, as that would amount to euthanasia; the discussion here is simply to highlight the inconsistencies in medical and judicial principles that underpin this area of healthcare.

Following *Law Hospital*, McLean argued that inconsistencies in the law followed: "What our law does, therefore, is to endorse decisions which will result in the deaths of certain patients (most notably those who cannot

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[1026] at 859F.
[1027] Ibid 852L.
[1028] *NHS Trust A v M*; *NHS Trust B v H* (2001) Fam 348.
[1029] Colin Gavaghan, 'When the Thread Finally Breaks', [date unknown] <http://www.euthanasia.cc/jj.html> accessed 13 Nov 2021.
[1030] Law hospital's medical director Dr John Browning said that, once feeding was withdrawn, Janet would die within 10 to 14 days. See: *The Herald*, 'Emotions run high after legal judgment on patient in coma. Catholic dismay at death decision', <https://www.heraldscotland.com/news/12044469.emotions-run-high-after-legal-judgment-on-patient-in-coma-catholic-dismay-at-death-decision/> accessed 13 Nov 2021.
[1031] It has been shown that people in PVS do feel pain and distress, see Lord Justice Brook in *W Health Care NHS Trust v H & Another* 2005 at [11].

express a preference) but not those who are competent to ask for aid in dying." [1032] McLean believes that PAD puts people who require active assistance on par with those who have a treatment that they could otherwise refuse. McLean has also said that the current legal position is "untenable" and "profoundly inconsistent". She refers to a theoretical adherence to the sanctity of life in the law but derogation in some circumstances, such as patients in PVS or near PVS, and that the current approach does "not provide a transparent and consistent ethical basis for permitting death in some circumstances and not in others".[1033] Blackburn takes a similar view stating that "it is surely discriminatory and unjust to allow deliberate omissions…but to forbid commissions." [1034]

8.1.1 Acts/Omissions distinction in healthcare

The distinction between acts and omissions is well known in Scottish criminal law, and it is worth noting that, in some limited circumstances, even omissions can create criminal liability.[1035] In this healthcare context, the omission (WWT) inevitably concludes with the person's foreseeable death. If this is acceptable – legally and morally – then there is an argument that PAD is too, since both circumstances are carried out in the healthcare setting, have foreseeable death as the outcome, and the prevention of further suffering as the motivator. Moreover, in cases of WWT, the patient may be incompetent and unconscious, whereas, in cases of regulated PAD, facilitation must always follow a competent request. Again, in this context, it

[1032] Scottish Parliament, Debate on motion S3M-1452 Jeremy Purvis Terminal Illness (Patient Choice) Official Report, 26 March 2008 <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=4785&i=39955> accessed 13 Nov 2021.
[1033] Jeremy Purvis, Dying with Dignity consultation, (2003) p.39 < https://archive2021.parliament.scot/S2_MembersBills/Draft%20proposals/Dying%20with%20Dignity%20Consultation%20paper.pdf> accessed 2 Feb 2019.
[1034] Professor Simon Blackburn, Vice-President of the BHA, Select Committee on Assisted Dying for the Terminally Ill Bill First Report. *Chapter 3: The Underlying Ethical Principles* at para [48] <https://publications.parliament.uk/pa/ld200405/ldselect/ldasdy/86/8606.htm> accessed 13 Nov 2021.
[1035] G. H. Gordon, *The Criminal Law of Scotland* (3rd edn, vol. 1, W. Green 2000) p. 82 and *Paterson v Lees* 1999 JC 159, per Lord Justice General (Rodger) at 161H. See also T. H. Jones and M. G. A. Christie, *Criminal Law*, (3rd edn, Thomson and Green 2003) pp.52–55 and S. Christie, *Introduction to Scots Criminal Law* (Pearson Education 2003).

is clear why a permissive PAD framework also acts as a protective and safeguarding measure when compared against the current situation.[1036]

The distinction between acts and omissions is not simply a philosophical argument based on intuition but is a doctrine that is accepted by healthcare professionals working in the field.[1037] One UK survey of medical practitioners showed that 75 per cent accept a distinction between active and passive euthanasia as of important moral significance.[1038] There is, of course, an important and obvious distinction to be made between positive steps to end life and allowing nature to take its course. McCall Smith comments on how we "instinctively" feel that a deliberate act to end life is worse than "letting them die".[1039] He states: "The prohibition against killing has to be absolute because the making of any exception to it will destabilise the value we currently accord to human life."[1040] If we accept that a competent request for PAD is not 'killing' (perhaps by contrast with euthanasia because it involves no third party administration), then there is no basis to argue that PAD is not letting nature take its course. In the setting of a terminal illness, the person is still dying; we cannot halt the progressive terminal illness, only alter its pace and impact by expediting the inevitable. Looking at it from this angle allows us to consider PAD as an exercise in shortening death, not shortening life.

During consideration of the 2013 Bill, it was noted that refusing treatment is a way of letting the underlying disease run its course, freeing the person from burdensome treatment; this was not the same as saying 'I wish to die'.[1041] Similarly, a range of studies has found that dying people who report wishing to hasten death do not see death as an aim in itself but as a side-effect of

[1036] See 5.1 Protective Function of the Law.
[1037] Imogen Goold, Jonathan Herring, *Great Debates in Medical Law* (London Palgrave, 2014) Chapter 10, Ending Life p.234.
[1038] J. Coulson, 'Till death us do part' (1996) BMA News Reviews 23.
[1039] In E. Jackson, *Medical Law Text and Materials*, (2009) 932.
[1040] Ibid.
[1041] Robert Preston. Health and Sport Committee. Official Report, 20 January 2015, Col 16.

pursuing the only available option of escaping suffering.[1042] Nevertheless, not infrequently do people knowingly decide to refuse treatment in the full knowledge that the outcome will result in their death. So, the acts/omission argument only stands as a general argument against the legalisation of PAD if one believes the difference in means makes a fundamental *moral* difference. Rather than focusing on the means/avenue to death, it is better to take a person-centred approach and focus on the benefit or otherwise to the person. With both existing medical practice and PAD the objective is to relieve suffering. Thus, legal, and moral sophistry aside, extending the options available to include PAD would be well-fitting with existing practice in a practical sense.

There are several relevant legal and ethical differences between PAD and refusing/withdrawing life-sustaining treatment. One primary consideration is consent. Where a patient has capacity, interventions must be consensual. The law respects patients' refusals of life-sustaining treatment not because it endorses their judgments about the quality of their lives, and not because it regards them as having the right to end their lives, but because it does not permit the treatment of competent patients without their consent.[1043] Consent and capacity are cornerstones of the debate around PAD, namely that they act as safeguards against non-consensual interventions. This again illustrates the importance of the autonomy aspect of PAD and that any request for an assisted death must come from the patient.

To summarise, we allow the *removal* of treatment from incompetent patients if it can be demonstrated that it is not in their best interests and the *withholding* of further invasive treatment if it is seen as futile or not in the patient's best interests. This means that the current framework allows people

[1042] Lavery et al., 'Origins of the desire for euthanasia and assisted suicide in people with HIV-1 or AIDS: a qualitative study', (2001) The Lancet; Nissim et al., 'The desire for hastened death in individuals with advanced cancer: a longitudinal qualitative study', (July 2009) 69 (2) Social Science & Medicine 165 < doi: 10.1016/j.socscimed.2009.04.021.> accessed 11 June 2021.
[1043] H&S Committee, Stage 1 Report on AS (Scot) Bill p.17 (n 1041).

the option to die and facilitates this, not expressly legislatively[1044] but through court decisions and accepted medical practice. These procedures are regulated only by guidelines[1045] and common law. This means that there is a significant risk of failing Fuller's criteria, given his insistence on explicit promulgation.[1046]

8.2 Double effect

Where a physician has directly caused death to alleviate suffering (euthanasia), the *actus reus* of murder or culpable homicide is seldom in doubt.[1047] Whether it is murder or culpable homicide depends on the accused's *mens rea*. Those who hasten death in this way can generally be said to have intended to kill, but their actions are not susceptible to the law of murder in Scotland because their intentions were not wicked. However, a more complex scenario is not one of direct euthanasia but that of double effect, where a physician increasingly administers drugs to the patient to relieve suffering, knowing that their actions may result in the patient's death, although that is not the intent.

Prior to *Drury*, the second edition of Gordon's *Criminal Law* suggested why criminal liability would not result:

> … for the case of the doctor who prescribes pain-killing drugs in the knowledge that they will shorten life, provided they are given with the *intention of easing pain* and not a measure of euthanasia. This exception has no legal basis but is an example of the law turning a

[1044] In that we do not allow the explicit termination of life. The MCA requires that treatment is given in P's best interests, if it's not, the HCP has no s.5 defence (against assault, battery, civil trespass etc.).
[1045] Where practitioners consider withholding any care or treatment that might prolong life, they must do so in accordance with the professional guidance produced by the British Medical Association (BMA), Royal College of Physicians (RCP) and General Medical Council. In the event that AD was legalised, similar guidance would be required. Guidelines rely heavily on the Adults with Incapacity (Scot) Act and the MCA 2005.
[1046] *The Morality of Law,* p. 49.
[1047] P. Ferguson and C.McDiarmid, *Scots Criminal Law: A Critical Analysis* (2nd edn Edinburgh University Press 2015) at 90.20.2.

> blind eye for *sympathetic reasons*. It does not extend to acts intended to accelerate death" [1048] (emphasis added).

This statement covers the 'doctrine of double effect', which provides that physicians who act with honourable intentions, namely the primary purpose of relieving pain and distress, are not to be regarded as causing death even though death would occur earlier than otherwise. The law characterises the patient's death as a 'side effect' – the double effect – of the use of drugs to relieve pain and suffering:

> ... the established rule [is] that a doctor may, when caring for a patient who is, for example, dying of cancer, lawfully administer painkilling drugs despite the fact that he knows that an incidental effect of that application will be to abbreviate the patient's life. Such a decision may properly be made as part of the care of the living patient, in his best interests; and, on this basis, the treatment will be lawful.[1049]

The European Association for Palliative Care has stated that 'some physicians administer doses of medication, ostensibly to relieve symptoms, but with a covert intention to hasten death.'[1050] While we cannot be sure whether a physician intends to end life or not, it highlights a lack of transparency about treatment decisions at the end of life, which can be disempowering and disorienting for those left behind.[1051] To reiterate, the principles underlying such decisions taken by HCPs ordinarily do not come from a place of malice or abuse but from a desire to relieve suffering and show compassion to their patients.

[1048] G. H. Gordon, *Criminal Law* (1978) p.728 in P. Ferguson and C.McDiarmid, *Scots Criminal Law: A Critical Analysis* (2edn, Edinburgh University Press 2014) 9.20.2.
[1049] *Airedale NHS Trust v. Bland* [1993] 2 WLR 316 at [370] per Lord Goff.
[1050] C.Radbruch and L.Radbruch, 'European Association for Palliative Care (EAPC) recommended framework for the use of sedation in palliative care.' (2009) 23 (7) Palliat Med 581-93.
[1051] Dignity in Dying, 'Dying in Scotland: A Feminist Issue' (2021) p.11 <https://features.dignityindying.org.uk/dying-in-scotland/> accessed 13 Nov 2021.

However, double effect provides no specific deterrent to prevent malicious physicians[1052] (who *had* intended to cause death) from asserting the defence of double effect to cover their actions. These practices happen without legal regulation, support, transparency or accountability, or due process to protect vulnerable people. In this unregulated system, physicians' actions are examined only *after the fact*, through post-mortem examinations.[1053] This cannot be safer than a system where strict regulations guide such actions and clinicians are held accountable by law.

First defended by Aquinas, the double effect principle was first appealed in an end of life case in the trial of Dr John Bodkin Adams in 1957, where Lord Devlin stated:

> If the purpose of medicine – the restoration of health – can no longer be achieved, there is still much for a doctor to do, and he is entitled to do all that is proper and necessary to relieve pain and suffering, even if measures he takes may incidentally shorten life.[1054]

Dr Bodkin Adams was charged with the murder of one of his patients by administration of morphine.[1055] The patient was an older woman who had suffered a stroke. Dr Adams had administered increasing doses of opiates to "relieve her sensation of pain"[1056] , and the jury acquitted him.

This contrasts with the situation in *R v Cox* (1992),[1057] where a physician was found guilty of attempted murder.[1058] Dr Cox could not rely on the doctrine of

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[1052] Of course, 'intending to cause death' itself is not necessarily malicious.
[1053] Although some practitioners do believe that scrutiny and audit has increased since the case of Harold Shipman.
[1054] A detailed account of the trial is given by Lord Devlin in P.Devlin., *Easing the passing: the trial of Dr John Bodkin Adams* (London: Faber and Faber Ltd, 1986).
[1055] *R v Adams* ([1957] Crim LR 365).
[1056] Ibid.
[1057] *R v Cox* ([1992] 12 BMLR 38.
[1058] Dr Cox, treating a patient who was "…terminally ill with rheumatoid arthritis, in considerable pain, if not agony …" had administered two ampoules of intravenous undiluted potassium chloride a minute or so before she died. During his trial for her homicide, the judge told the jury that it was plainly the doctor's duty to do all that was medically possible to

double effect because the drug he used, potassium chloride, had no pain-killing purpose.[1059] The usual opiates used for double effect no longer worked – it is often the case that those who are terminally ill build up a tolerance to these drugs negating their effectiveness.[1060] Dr Cox did not attempt to cover up his actions or mislead, but to be honest and truthful instead of looking for a way out in an appeal to double effect. However, the law does not currently allow such transparency, and the defence failed to convince the jury that Dr Cox's intention had *solely* been to relieve his patient's suffering. That, of course, may be true, but the conviction implies that they believed he intended to kill her, which he did. Other doctors, however, do the same thing (act) and avoid prosecution by using analgesia, not admitting their real intentions and appealing to the principle of double effect.[1061] Many doctors genuinely end lives as a *side effect* of pain relief, but there is a possibility that others do so *intending to end life* for compassionate reasons but without the honesty of Dr Cox. [1062]

Necessary for the rule of law is that, for some, double effect could potentially be no more than a moral manoeuvre to justify the otherwise absolute prohibition on killing innocent people[1063] and thus avoid the legal consequences that unfold. Therefore, the core legal requirement of the doctrine of double effect is the absence of an intention to kill.[1064] If such an

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alleviate pain and suffering. His defence asserted that this was an unorthodox method of relieving pain and suffering, which the patient's suffering fully justified.

[1059] P. Ferguson, (1997) 'Causing Death or Allowing to Die? Developments in the Law' (n 420).

[1060] RL. Fine, 'Ethical and practical issues with opioids in life-limiting illness' (2007) 20 (1) Proc Bayl Univ Med Cent 5-12 <doi:10.1080/08998280.2007.11928223> accessed 14 Jan 2020.

[1061] In July 1997 Dr. Michael Irwin and Dr.David Moor publicly announced that they had practiced euthanasia many times during their careers. They wanted to "highlight the hypocrisy surrounding euthanasia" and believed that the doctrine of double effect was in reality a slow way to commit euthanasia. See: Jennifer M. Scherer, Rita James Simon, *Euthanasia and the Right to Die: A Comparative View* (Rowman & Littlefield 1999) 65.

[1062] AM Begley, 'Acts, omissions, intentions and motives: a philosophical examination of the moral distinction between killing and letting die.' (1998) 28 J Adv Nurs 442.

[1063] Ibid

[1064] NHS University Hospital Southampton, 'Doctrine of Double Effect' <https://www.uhs.nhs.uk/HealthProfessionals/Clinical-law-updates/Doctrineofdoubleeffect.aspx#:~:text=It%20is%20inevitable%20that%20we,with%20t

intention is present, the motivation of the physician to relieve suffering is irrelevant, washed away by the law's insistence that a person who carries out an intention to kill (outside the lawful excuses) must face the charge of homicide.

Whether a HCP has acted with intent to kill and/or wickedly is extremely difficult to assess. Black argues that, at present, cases of suspected physician-assisted dying may be difficult for prosecutors because physicians benefit from a high degree of public confidence.[1065] Thus, even though the prosecutor might suspect the physician's explanation as not objectively credible, it may be necessary to factor in the accused's professional credibility and the likelihood that the defence will adduce evidence of the accused's good standing at trial. This, in turn, may undermine the prospect of conviction because the judge (knowingly or unknowingly) sums up the case in a way that is favourable to the accused and/or because the jury (knowingly or unknowingly) looks favourably on the accused's version of events, perhaps even to the extent that jury equity – acquittal notwithstanding a direction in law that should, the facts properly applied, result in a guilty verdict – comes into play. [1066]

With double effect, the presumption is that the HCP is increasing analgesia to ease pain, but it is quite clear that the death is foreseeable. McLean has said that (legally speaking) when something is so foreseeable that it is inevitable, it is the same as intention.[1067] There is a significant amount of academic literature on this point, much of which argues that it is practically impossible to distinguish between foresight and intent.[1068] Whilst there may be a

heir%20disease%20or%20symptoms.&text=Palliation%20of%20pain%20is%20essential,patient%27s%20life%20may%20be%20shortened> accessed 13 Nov 2021.

[1065] Isra Black, Better off Dead?, p.30 (n 5).

[1066] Ibid.

[1067] (n 224) 2010 Bill Official Report, Col 94.

[1068] Intent in Scots criminal law does not always include that foresight must be present.

psychological distinction, whether that translates into law or ethics is another matter.[1069]

A survey by Seale in January 2006 estimated that one-sixth of all deaths in the UK were hastened by the use of 'double effect'[1070], although a later study found that it was 'much less common than suggested in earlier estimates, rarely involving intent to end life or being judged to have shortened life by more than a day'.[1071] These findings have been contested,[1072] and some argue that double effect does not shorten life;[1073] nonetheless, it remains accepted medical practice in the UK.

The doctrine of 'double effect', developed by the English courts, may provide a defence to a charge of murder or manslaughter in England. However, case law in Scotland has not clarified the position,[1074] although Ferguson has suggested that this doctrine 'probably' also applies in practice in Scotland.[1075] In the absence of reported Scottish case law on the doctrine, the position is uncertain. Its usefulness and accuracy are generally much debated, yet its use and disreputable connotations persist in practice.[1076]

[1069] For discussion see, M.Gore, 'Should the Law Distinguish Between Intention and (Mere) Foresight? (1996) 2 (4) Legal Theory 359.
[1070] C. Seale, 'National survey of end-of-life decisions made by UK medical practitioners.' (2006) 20 (1) Palliative Medicine 3-10.
[1071] C. Seale, 'End-of-Life Decisions in the UK Involving Medical Practitioners' (2009) 23 Palliative Medicine 198.
[1072] The National Council for Palliative Care, 'Briefing 17. End of Life Treatment: Decisions and Attitudes of Doctors' <https://www.ncpc.org.uk/sites/default/files/Briefing_Bulletin_17.pdf> accessed 11 June 2020.
[1073] Ibid. p.4; see also Claud Regnard, 'Double Effect is a Myth Leading a Double Life' (2007) *BMJ*, 334: 440.
[1074] Scottish Parliament Information Centre, 'Briefing Assisted Suicide (Scotland) Bill 2015' (2015) p.3 <http://www.parliament.scot/ResearchBriefingsAndFactsheets/S4/SB_1502_Assisted_Suicide_Scotland_Bill.pdf> accessed 11 Oct 2017.
[1075] Ferguson, "Killing 'without getting into trouble'? Assisted dying and Scots criminal law" p.295 (n 253); Gordon and Christie, *Criminal Law* (3rd edn. W Green 2000) para 23.03; Earle and Whitty, "Medical Law" *Stair Memorial Encyclopaedia* (Butterworths 2006) para 385; John Christman, 'Autonomy in Moral and Political Philosophy', *The Stanford Encyclopedia of Philosophy* (Fall 2020 Edn) <https://plato.stanford.edu/archives/fall2020/entries/autonomy-moral/> accessed 14 May 2022.
[1076] Biggs and Ost, 'As it is at the end so it is at the beginning: legal challenges and new horizons for medicalised death and dying' (2010) in special issue: Legal challenges and new

Biggs and Ost have said: “Were we to re-characterise interventions that give rise to the spectre of double effect as merely necessary symptom control, their incidental effects would be seen in a different light”.[1077] They leave open the question of whether double effect is a ‘moral fiction’ – a false statement endorsed to uphold cherished or entrenched moral positions in the face of conduct that is in tension with these established moral positions.[1078] Again it is worth reiterating that openness, dialogue and cooperation about the realities of end of life decision-making are paramount so that accountability and understanding are prompted and, for the key approach of this thesis, can satisfy the test for good governance as outlined by Fuller in his appeals to clarity[1079] and promulgation.[1080]

During the 2013 Bill consideration, there were claims that the doctrine of double effect is currently practised in a ‘covert, unregulated and risky’ manner.[1081] The committee was unpersuaded by the argument that legislating for PAD would help to avoid this and instead viewed double effect as making sense, considering it “as a treatment decision within the context of the therapeutic relationship between healthcare professional and patient.”[1082] The committee also spoke of the ‘risk’ of crossing a moral and legal “Rubicon”[1083] if PAD were legalised. However, there are already inherent risks in medical practice; we already entrust HCPs with end-of-life decisions and the *tangible* experiences of those suffering unbearably at the end of life, experiencing intense pain, distress, and indignity, should be given considerable weight when balanced against any *potential* risk.

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horizons for medicalised death and dying 18 (4) MLR Winter Issue 437-441 < https://pubmed.ncbi.nlm.nih.gov/21098044/> accessed 12 July 2020.

[1077] Ibid [439].

[1078] See further FG Miller, RD Trough and DW Brock, ‘Moral Fictions and Medical Ethics’ (2010) 24 (9) *Bioethics,* 453, 457-8.

[1079] *The Morality of Law* 63.

[1080] Ibid 49.

[1081] H&S Committee, Stage 1 Report on AS (Scot) Bill para 103.

[1082] Ibid para 110.

[1083] Ibid para 70.

Nevertheless, however ethically disputable, double effect is part of ordinary medical practice in the UK - the basis and justification for its use is compassion to avoid or alleviate suffering. So, an extension of the law to allow PAD would, in this sense, just be expanding on principles, practices and objectives that are already an accepted part of our medical practice.

8.3 Palliative Sedation

Palliative sedation (PS) is a widely used term to describe the intentional administration of sedatives to reduce a dying person's consciousness to relieve intolerable suffering from refractory symptoms, including insomnia, delirium, and pain.[1084] In the UK, doctors discuss the need for PS with patients but take the decision themselves, whereas in the Netherlands and Belgium, where PAD is legal, it must be patient-initiated.[1085]

Officially, a doctor will prescribe these drugs in whatever dosages are necessary to keep the patient symptom-free. If a doctor can show that their primary intention was to alleviate suffering rather than hasten the death of the patient, the administration or supply of potentially life-ending dosages of drugs is not criminal,[1086] even when the doctor realises that death is a likely consequence [1087] - a similar situation to Double Effect discussed at 8.2.[1088] Palliative sedation and double effect are undoubtedly acts and not omissions,[1089] but their use is justified in the healthcare setting to avoid harm to the patient.

Ethically, PS is justified by necessity.[1090] Its aim is for the patient to enter a deep sleep. It is generally used as an exceptional last resort, and some attest

[1084] Robert Twycross, 'Reflections on Palliative Sedation' (2019) 12 Palliative Care Research and Treatment <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6350160/> accessed 11 May 2020.
[1085] Ibid p.3.
[1086] *R v Adams* (1957) Crim LR 365.
[1087] Ibid.
[1088] At 1.1.2.
[1089] In the way that WWT outlined at 6.0 is, for example.
[1090] V.Cellarius and B. Henry, 'Justifying different levels of palliative sedation' (2010) 152 Ann Intern Med 332.

to it working well. [1091] [1092] However, others describe it as 'torturous and barbaric'[1093] with the person experiencing pain, fatigue, and impaired cognitive functioning[1094] whilst essentially 'starving/dehydrating'[1095] to death:

> The expectation was this cocktail would put her into a peaceful sleep and she would pass away within a day or two... Instead, she woke up the third night in a panic.[1096]

There are reports of people waking (either spontaneously or through doctors' interventions) and being extremely distressed,[1097] [1098] citing, *inter alia*, sensations of drowning,[1099] despite appearing in a peaceful state to observers. Families find it distressing if deep sedation is not rapidly achieved and if their loved one awakes several times before death.[1100] Furthermore, families generally assume that the suffering has been relieved, with the sedated person appearing peaceful. However, studies show that a significant proportion of people still have a level of awareness and feel pain but are

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[1091] NHS Scotland, 'Scottish Palliative Care Guidelines. Severe Uncontrolled Distress', (March 2019) <https://www.palliativecareguidelines.scot.nhs.uk/guidelines/end-of-life-care/severe-uncontrolled-distress.aspx> accessed on 13 Nov 2021.
[1092] Ganzini et al., 'Nurses' experiences with hospice patients who refuse food and fluids to hasten death', (2003) 349 NEJM 359-365.
[1093] Dying unfairly assisted dying, 'The Inhumanity of Terminal Sedation', (9 April, 2019) <https://dyingunfairlyassisteddying.wordpress.com/2019/04/09/the-inhumanity-of-terminal-sedation/> accessed 13 Nov 2021.
[1094] E.E.Bolt et al., 'Primary care patients hastening death by voluntarily stopping eating and drinking', (2015) 13 (5) Ann Fam Med. 421-8.
[1095] A. Formby, et. al., 'Cost Analysis of the Legal Declaratory Relief Requirement for Withdrawing Clinically Assisted Nutrition and Hydration (CANH) from Patients in the Permanent Vegetative State (PVS) in England and Wales.' (2015) CHE Research Paper 108, University of York.
[1096] Harlan Seymour (husband of Jennifer Glass), in Michael Ollove, 'Palliative Sedation, an End-of-Life Practice that Is Legal Everywhere' (*PEW Stateline* 2018*)* <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/07/02/palliative-sedation-an-endoflife-practice-that-is-legal-everywhere> accessed on 13 Nov 2021.
[1097] Ibid.
[1098] Dignity in Dying, 'The inescapable truth about dying in Scotland' 60 (n 161).
[1099] See (n 895) for the Californian case of Jennifer Glass. Described to me in a private meeting by Senator Monning, Senate Majority Leader, co-author of the Californian End of Life Option Act. Tuesday 14 March, 9am. The State Capitol, room 313. See also n 902.
[1100] P. Pype, *et al. '*Suboptimal palliative sedation in primary care: an exploration' (2018) 73 Acta Clinica Belgica 21-28.

unable to communicate this,[1101] with some thus dying in great but unrecognised distress.

Evidence suggests there are circumstances where some palliative care professionals may be reluctant to instigate or use effective dosages of sedation for fear of being perceived to be hastening a person's death.[1102] One commentator points out: "many experts claim that this practice increasingly being used by hospice physicians today, is virtually the same as killing the patient. Residing in a deep, drug-induced coma while awaiting death can be, from the patient's point of view, no different from death itself".[1103] Given that the use of double effect/palliative sedation has no public records kept to monitor its use[1104] - and the dissonance between guidelines and practice is an ongoing matter of concern[1105] - it is impossible to know the number of people who die with this procedure included in their end-of-life care, but there is some evidence of its use.

Seale, writing in *Palliative Medicine* in 2009, noted that "continuous deep sedation is relatively common in UK medical practice, particularly in hospitals and home care settings", with the study showing that PS occurs in 16.5 per cent of deaths.[1106] This finding was replicated in a later study of 8,857

[1101] R. Deschepper, ***et al.*** *'*Palliative Sedation: why we should be more concerned about the risks that patients experience an uncomfortable death' (2013) 154 Pain 1505-1508 and M. Graham, ***et al.*** *'*Minimizing the harm of accidental awareness under general anaesthesia: new perspectives from patients misdiagnosed as being in a vegetative state' (2018) 126 Anesth Analg 1073-1076.
[1102] Kirk and Mahon, 'National Hospice and Palliative Care Organization (NHPCO) Position Statement and Commentary on the Use of Palliative Sedation in Imminently Dying Terminally Ill Patients' (2010) 39 (5) Journal of Pain and Symptom Management 914.
[1103] L. Shavelson, *A Chosen Death: The Dying Confront Assisted Suicide* (New York Simon and Schuster, 1995) p.231.
[1104] In France, patients have a legal right to continuous deep sedation until death (Claeys-Leonetti Law, 2016) and a record of all cases must be kept.
[1105] Ten Have H and Welie JV., 'Palliative sedation versus euthanasia: an ethical assessment.' (2014) 47 J Pain Symptom Manage 123-136.
[1106] C. Seale, 'End-of-Life Decisions in the UK Involving Medical Practitioners' (n 870). This survey also found that withholding or withdrawing life-prolonging treatment occurred in 21.8 per cent of deaths.

doctors, which found that it occurred in 17 per cent of hospital deaths and 19 per cent of deaths in a home setting.[1107]

In another study, 18.7 per cent of doctors surveyed reported its use, and in only 12.8 per cent of the reported cases, the request came from the dying person.[1108] [1109] Doctors who supported a change in the law on AD and doctors who do not profess religious beliefs are more likely to report using palliative sedation.[1110] More recently, a 2019 survey showed that 62 per cent of Scottish healthcare professionals believe there are circumstances in which doctors or nurses have intentionally hastened death as a compassionate response to a patient's request to end their suffering at the end of life.[1111] [1112]

This is an ethically complex area, as Twycross outlines:

> Continuous sedation is controversial because it ends a person's 'biographical life' (the ability to interact meaningfully with other people) and shortens 'biological life'. Studies suggest that continuous deep sedation has become 'normalized' in some countries and some palliative care services. Of concern is the dissonance between guidelines and practice. At the extreme, there are reports of continuous deep sedation which are best described as non-voluntary (unrequested) euthanasia.[1113]

[1107] L. Anquinet et al., 'The practice of continuous deep sedation until death in Flanders (Belgium), the Netherlands and the UK: a comparative study' (2012) 44 (1) Journal of Pain and Symptom Management. 33-43

[1108] Seale, 'Continuous deep sedation in medical practice: A descriptive study' (2010) 39 Journal of Pain Symptom 44-53.

[1109] Because of delirium, many patients will not be able to give valid consent. Thus, family or proxy consent will be the norm. S. Mercadante, et al. 'Controlled sedation for refractory symptoms in dying patients.' (2009) 37 J Pain Symptom Manage 771-779.

[1110] Dignity in Dying, 'The inescapable truth about dying in Scotland', p.63 (n 161).

[1111] YouGov poll in Dignity in Dying, 'The inescapable truth about dying in Scotland' 64 (n 161).

[1112] Additionally, in June 2016, Baroness Molly Meacher claimed: "Thousands of Doctors are helping people to die every year" Sarah-Kate Templeton, 'Thousands of doctors helping people to die' (*Sunday Times,* 12 June 2016) <https://www.thetimes.co.uk/article/thousand-a-year-die-with-help-of-doctor-9cfmm97mn> accessed 13 Nov 2021.

[1113] Twycross (n 883).

Whilst there is very little data on PS in Scotland[1114], studies indicate that its use is increasing in many countries[1115] , and the demarcation between PS and AD is dissipating. This is coupled with a "mission creep" of PS which seems to be occurring.[1116] Twycross has suggested that the use of PS is easier for doctors than grappling with the other issues underlying a patient's distress and that PS may be a retreat from a holistic approach into a biomedical one. This may be paternalism operating within the healthcare system, or a natural consequence of increasingly stretched resources, including severe time restraints, but could also be an argument for reconsidering the prohibition on PAD – if there is a grey area between PS and PAD, then the case for greater clarity is heightened. Furthermore, the law as a protective measure is evident again when we consider that an assisted death would only be carried out upon successful and thorough satisfaction of regulatory steps, including competency evaluations.

Moreover, despite it being available, PS is not always compatible with how people wish to live the remainder of their lives, and some still want an assisted death. In *Conway*,[1117] the Divisional Court observed that if Mr Conway wished to die, he could lawfully act by requesting that his NIV breathing equipment be removed and receive palliative care. Mr Conway believed this method of suicide, as he considered it, was inhumane, not acceptable and would be distressing for his relatives.[1118] The Supreme Court said:

> The evidence from the specialist in palliative care who is looking after him is that medication can be used to ensure that he is not aware of the NIV being withdrawn and does not become uncomfortable and distressed. However, Mr Conway does not accept that the withdrawal

[1114] AM Finucane, et al. 'Palliative and end-of-life care research in Scotland 2006-2015: a systematic scoping review' (2018) 17 (1) BMC Palliat Care. 19. <doi:10.1186/s12904-017-0266-0> accessed 13 Nov 2021.
[1115] Twycross (n 1084). p.11.
[1116] Henkten Have & J.V.M Welie, 'Palliative Sedation Versus Euthanasia: An Ethical Assessment.' (2014) 47 (1) Journal of Pain and Symptom Management 136.
[1117] *R (on the application of Conway) v Secretary of State for Justice* [2018] EWCA Civ 1431.
[1118] *Conway* [4].

> of his NIV under heavy sedation would be a dignified death. He does not know how he would feel, whether he would experience the drowning sensation of not being able to breathe, whether he would be able to hear his family and feel their touch. Taking lethal medicine would avoid all these problems. In his view, which is shared by many, it is his life and he should have the right to choose to end it in the way which he considers most consistent with his human dignity.[1119]

With the need for more and better palliative care increasing across the UK,[1120] instances of PS will likely increase. Other jurisdictions have reckoned with this and removed the prohibition on PAD, viewing it as an extension of palliative care (including PS). It is not paradoxical to see PAD and palliative care as having the same focus – a compassionate response to relieve suffering. Time will tell if jurisdictions that have legalised PAD see a reduction in the use of PS, but as it stands, it is another accepted, though contested, part of medical practice in Scotland and the UK.

8.4 Euthanasia

Research suggests that 1,000 people in the UK each year receive illegal help to die.[1121] Early studies give the impression that physician-assisted voluntary euthanasia may have been a fairly widespread practice in the UK.[1122] For example, a 1994 anonymous survey of doctors in England found that 32 per cent of those that had received a request for euthanasia had complied with it.[1123] However, later studies cast doubt on how widespread voluntary euthanasia might be. In the study mentioned above by Seale, where 870

[1119] para 4 of appeal (which was refused) to the UKSC (27 Nov 2018).
[1120] Marie Curie, 'Palliative Care and the UK nations: An updated assessment on need, policy and strategy' (2016) <https://www.mariecurie.org.uk/globalassets/media/documents/policy/marie-curie-reports/state-of-the-nations-mariecurie-report-england.pdf> accessed 13 Nov 2021.
[1121] Dignity in Dying, 'Isn't assisted dying happening already?', <https://www.dignityindying.org.uk/assisted-dying/key-questions/> accessed on 13 Nov 2021.
[1122] John Keown and contributors, *Euthanasia Examined: Ethical, Clinical and Legal Perspectives* (Cambridge University Press 1995).
[1123] BJ Ward BJ, PA Tate., 'Attitudes among NHS doctors to requests for euthanasia' (1994) 308 (6940) BMJ 1332-4. <doi: 10.1136/bmj.308.6940.1332.> accessed 11 Jan 2017.

doctors participated, it found that there were also 936 cases of voluntary euthanasia, where patients had requested death from their doctor, which amounts to 0.16 per cent of deaths. In a further 0.33 per cent of deaths – 1930 patients – doctors said they had ended life "without an explicit request from the patient". [1124] [1125] Again, these findings have been contested.[1126]

Anecdotally, we know that HCPs practice euthanasia and many cases have come to light in recent years.[1127] It has been suggested that professionals who are guided by personal virtues, namely compassion and empathy, have chosen to break the rules in order to implement their values of the compassionate relief of suffering. Of course, others will be guided by duty alone, i.e., not breaking the rules and following professional guidelines and the law. In Part II, I considered the claim of diminished responsibility for relatives who care for and assist family members to die. Arguably, the patient's suffering does not similarly cloud the judgement of professionals because they are not close relatives of their patients, and they are trained to deal with such distress. Instead, HCPs' compassionate virtues override their professional and legal obligations when faced with great suffering, such as that described in case of Dr Cox, who was found guilty of attempted murder:

> Her pain was constant and grindingly severe…the severe continuous pain did not respond to increasingly large doses of opioids. Dr Cox gave her large doses of diamorphine, but she was still crying in pain. A staff nurse said that Mrs Boyes 'howled and screamed like a dog' when anyone touched her[1128]... As an act of compassion, he injected

[1124] C. Seale (2006) (n 869); C. Seale, 'Characteristics of End-of-Life Decisions: Survey of UK Medical Practitioners' (2006) 20 (7) Palliative Medicine 653–59.
[1125] Sarah Boseley, 'Euthanasia: doctors aid 3,000 deaths' (*The Guardian*, 18 Jan 2006) <https://www.theguardian.com/society/2006/jan/18/health.science> accessed 13 Nov 2021.
[1126] Ibid.
[1127] *BBC News*, 'Murder trial GP 'admitted killing hundreds'' (16 April, 1999) <http://news.bbc.co.uk/1/hi/health/321212.stm>;*The Guardian*, 'GP cleared of murdering 85-year-old patient' (11 May 1999) <https://www.theguardian.com/uk/1999/may/11/5>; *R v Cox* (1992) 12 B M L R 38.; M. Irwin, 'Am I breaking the law again?' (2004) 328 BMJ 1440; Nigel Bunyan, 'Murder case GP Dr Howard Martin' (*Telegraph* 18 June, 2010) <https://www.telegraph.co.uk/news/health/7839369/Murder-case-GP-Dr-Howard-Martin-I-helped-patients-die.html> accessed on 13 Nov 2017.
[1128] C. Dyer, 'Rheumatologist convicted of attempted murder' (1992) 305 1992 BMJ 731.

> two ampoules of potassium chloride and recorded this in the notes. The patient died a few minutes later, peacefully in the presence of her sons.[1129]

Begley, a nurse practitioner, writing to mount a virtue-ethics based defence to *voluntary* euthanasia, has said:

> [P]ractitioners act in response to [patients'] requests. A focus on abstract principles can deflect from responding to individual needs, and adherence to absolutes such as 'do not kill' can leave us in a position where we are stifled and unable to be compassionate or kind.[1130]

An apparent tension has emerged between virtue (compassion) and duty (codes of conduct, duties of doctors, and the law). At present, as far as the law is concerned, duty comes before virtue, and professionals are expected to set aside compassion and sympathy – arguably virtues that we would all wish to see in our healthcare practitioners – because direct assistance is illegal.

From early in HCPs' professional lives, empathy and compassion are nurtured, but we expect them to set aside compassion in the interests of obeying abstract general rules, because the law limits their options to assist individuals at the end of life. However, some HCPs are guided by virtues and act outwith the law to satisfy these. By contrast, the nurse who reported Dr Cox was governed by *duty* to the rules;[1131] thus, adherence to a code was her action-guiding consideration. Dr Cox was guilty in law but good in the eyes of many; the nurse who reported him was above reproach legally and professionally but was, nevertheless, vilified and subject to abuse for

[1129] D. Brahams, 'Medicine and the law.' (1992) 340 Lancet 782–83.
[1130] Ann Begley, 'Guilty but Good: Defending Voluntary Active Euthanasia from a Virtue Perspective.' (2008) 15 (4) Nursing Ethics 437.
[1131] She reported him, he then admitted that he had used potassium chloride, instead of the usual traditional double effect drugs.

reporting Dr Cox.[1132] Neither action is being condoned or criticised here, but light is shed on the complex conundrums arising from the ban on PAD. It is highly likely that if PAD had been legal, the patient under Dr Cox's care would have requested it, avoiding the negative consequences that arose in this case.

When considering the tension between duty and morality, it is helpful to refer back to Fuller's theory which is premised on the two moralities – the morality of duty and the morality of aspiration, with duty starting at the bottom of human achievement and the morality of aspiration at the top.[1133] The morality of duty are basic rules which capture the fundamental duties that we need to follow in order for order and community to be possible, i.e., which people must obey for the law to function socially, then later working towards the law of aspiration. Some of the most cited duties and obligations are in reference to the biblical Ten Commandments - 'thou shalt not kill' being the most prominent.[1134] Arguably here, Fuller's most basic rules are being breached by HCPs in a bid to reach the heights of morality – the law of aspiration. HCPs are acting in what they see as the best interests of their patients, aspiring to be the best clinicians that they can, ones who provide a peaceful death for their patients, but at present, they must break the law to do so.

If PAD were legalised, it would allow HCPs to meet their own, the laws, and Fuller's criteria to obey the law as part of their professional and societal duty. Additionally, it would allow our society to ascend Fuller's aspirational ladder to a situation where people do not have to break the law (fail the duty requirement) to act on their compassionate virtues.

It has been said that dying is 'no longer something that happens to you but something you do'[1135] – Scottish society is becoming more liberal and

[1132] H. Kuhse, *Caring: nurses, women and ethics*, (Oxford: Blackwell, 1997).
[1133] See section 1.2.
[1134] Exodus 20:13 KJV.
[1135] M.P Battin et. al., *Physician assisted suicide: expanding the debate* (Routledge, 1998).

compassionate, medicine and technology are ever more advanced, but the law is stuck in historical constraint. It is likely that many patients and their family members have been grateful to have death hastened by a doctor,[1136] and it seems inhumane to convict such clinicians for murder, as was the case in Cox. Begley has said:

> The judge agreed that Dr Cox had acted from compassion…The judge, however, asked the jury to 'put aside any feelings of sympathy'. In relation to Dr Cox, Mr Justice Ognall stated that: … in doing what you did, you allowed what you knew to be your clear duty to be overruled by your deep personal distress and compassion for your patient, who was on the brink of a painful death.[1137]

Indeed, other doctors testified to describe what Dr Cox did as courageous and hoped they would do the same if the situation presented itself. The interesting thing about the Cox case is that compassion was considered a stumbling block to duty. In the virtue approach, however, and as far as Dr Cox was concerned, duty in the form of external rules, codes and laws posed as an impediment to virtue.[1138] Pattinson has observed that:

> Very few doctors who facilitate or accelerate a patient's death will find themselves in prison. In addition to the broad categories of legally permissible end of life responses, there is an evident reluctance to prosecute, convict or harshly sentence doctors who act out of sympathy for the patient. If euthanasia has not been let in by the front door, the back door is far from locked. The result is a system that balances competing values and interests uneasily.[1139]

[1136] D. Brahams, (n 1129).
[1137] Ann Begley, *Guilty but Good: Defending Voluntary Active Euthanasia from a Virtue Perspective.* p.439 (n 1130).
[1138] Ibid.
[1139] S. Pattinson, *Medical Law and Ethics* (4th edn Sweet and Maxwell 2014) p.532.

In summary, euthanasia does happen within the NHS already, but in an unregulated and illegal way, posing problems for the rule of law and protection of vulnerable people. Evidence shows that most of the UK population want the choice of PAD, but the current situation does not allow this. A PAD law would empower individuals to make this autonomous choice for themselves. Regarding safeguarding and protective principles of law, it would first require *the patient to request* PAD followed by robust safeguarding procedures to assess whether they met strict criteria to qualify, introducing oversight and regulation where currently there is none.

It is imperative to consider the possibility, as proposed, of an PAD law being passed and the consequences for HCPs whose personal values do not accord with facilitating a request for PAD – the next section will look at conscientious objection.

8.5 Conscientious Objection (CO)

No attempts to reform the law in Scotland have included a 'conscience clause'. This was because, had such a provision been included in the Bills, they would not have received a statement of legislative competency from the Presiding Officer of the Scottish Parliament, and could not have been considered. This is because the powers to regulate the health professions are reserved to Westminster; thus, the Scottish Parliament does not have the competence to legislate in this area.[1140] Neither could the provision be made for conscience rights in secondary legislation of the Scottish Parliament.[1141]

There is wide discussion on PAD and autonomy from the *patient* perspective, but it has also been recognised that a patient's autonomous request for PAD could conflict with an HCP's exercise of their autonomy and that the patient too has responsibilities to the HCP who is being asked to 'do something

[1140] HC Briefing Paper *Reserved matters in the United Kingdom* Number CBP 8544 5 April 2019 Head G p.18 < https://researchbriefings.files.parliament.uk/documents/CBP-8544/CBP-8544.pdf> accessed 11 Nov 2021.
[1141] Health and Sport Committee, Stage 1 Report on AS (Scotland) Bill. at 221 (n 748).

which is traditionally against the medical ethics'.[1142] We do not only have autonomy and responsibilities of our own to consider but those of whom we are asking to be involved, and equal respect must be afforded to both. One way of doing this is to allow PAD but to give adequate protection for HCPs and staff who would not wish to be involved with the process and to develop a register of willing HCPs and staff whose personal ethics do permit participation. [1143] [1144]

The usual way of explaining why it is necessary to accommodate conscientious objection involves citing the need to protect individuals from being obliged to violate their moral integrity in the course of performing their professional roles.[1145] Conscience is an aspect of moral agency that contributes to people's moral integrity and sense of self. Given that attempts at legislation have put the medical profession at the centre of facilitating PAD and that resistance to legislation historically came primarily from medical practitioners, especially palliative care specialists[1146], it is crucial that there is space for objection and non-participation.

This is not a departure from current practice, with CO already valid in other equivalent 'life and death' decisions, such as termination of pregnancy and withdrawal of treatment. However, it is a contentious issue, with some viewing it as having no, or very limited, space in our healthcare system. The

[1142] HL Paper 86-I, Prof Nigel Leigh, *Select Committee on the Assisted Dying for the terminally ill Bill* (2005) Vol I report para 49.
[1143] In the Netherlands around 60 physicians are on the books of the Levenseindekliniek, or End of Life Clinic, which matches doctors willing to perform AD or euthanasia.
[1144] On two firm opinions opposing the participation of physicians see: P.J. Weithman, 'Of Assisted Suicide and 'The Philosopher's Brief' (1999) Ethics 548-578; B. Baumrin, 'Physician, Stay Thy Hand!', in M.P. Battin et al. (eds.), *Physician Assisted Suicide*, 177-181.
[1145] Mary Neal, 'CO, Professionalism & Proper Medical Treatment' Chapter 8 in John Adenitire, *Religious Beliefs and Conscientious Exemptions in a Liberal State* (Hart Publishing 2019).
[1146] On 6 Feb 2020, 50 palliative care doctors published a letter to the editor in the *Times* newspaper opposing AD and urging the BMA to remain opposed. *The Times,* 'Times letters: Assisted Suicide and end-of-life-care, (16 Sept 2021) <https://www.thetimes.co.uk/article/times-letters-assisted-suicide-and-end-of-life-care-8m779t2l8> accessed 17 Sept 2021.

'incompatibility thesis' is well documented[1147] with some viewing conscience as a shirking of responsibility towards patients, that patient needs should take precedence,[1148] and that HCPs should not enter careers where their values conflict with medical practice, especially if that career is in the taxpayer-funded, National Health Service.[1149] This is an irrational school of thought, not least because technological and medical advancements are moving us, at pace, into unknown territory. HCPs entering the profession now cannot reasonably be expected to foresee how their profession will develop over the course of decades. Furthermore, providing healthcare services has always meant that diverse ethical quandaries present themselves, and they will continue to do so. Therefore, it is unreasonable to expect total moral neutrality from practitioners, in the same way that the general population do not always maintain neutrality in matters of morality or ethics. Professional and personal values are not static, and we must build this into our healthcare system if we expect to attract people into the professions.

If legislation on PAD was passed, there would likely be an obligation under the NHS Act for the system to provide the service.[1150] One of the foremost considerations for legislators should be the facilitation of conscientious objection for HCPs and support staff. Reassurances are given that this is an important policy intent in the proposed *Assisted Dying for Terminally Ill Adults (Scotland) Bill* 2021.[1151]

[1147] For discussion on this see: Mary Neal & Sara Fovargue, 'Is conscientious objection incompatible with healthcare professionalism?' (2019) 25 (3) The New Bioethics 221-235 < 10.1080/20502877.2019.1651935> accessed 11 Nov 2020.
[1148] "Physicians must not be permitted to disavow responsibility on the grounds of conscientious objection…practitioners must choose careers in which their fundamental values do not interfere with the autonomy and well-being of patients." in LF Ross and EW Clayton, 'To the Editor' (2007) 356 N Engl J Med 1890; "health care providers — and all those whose jobs affect patient care — should cast off the cloak of conscience when patients' needs demand it." in JD Cantor, 'Conscientious objection gone awry: restoring selfless professionalism in medicine' (2009) 360 NEJM 360.15 1484.
[1149] I Kennedy, 'What is a medical decision?' in *Treat Me Right: Essays in Medical Law* (Clarendon Press: Oxford, 1988) pp28-29 "a doctor employed and paid by the taxpayer" should "remember the last word [in 'National Health Service'], and serve".
[1150] National Health Service (Scotland) Act 1978, Part II Provision of Services.
[1151] At 3.3 Conscience, p. 21-22.

8.6 Conclusion

Life-ending conduct already takes place within the healthcare setting but in an unregulated and haphazard way. The only way to obtain data on the prevalence of the acts mentioned in this chapter (WWT, Double Effect, Palliative Sedation and Euthanasia) is through academic studies, such as those utilised. However, these do not give enough detail, are anonymous, and deal with relatively small sample sizes. Arguably all of the practices mentioned, which are commonplace in current end-of-life care, contribute to a culture where assistance in death, in its varying forms, is seen as a kind and compassionate way to attempt to secure a peaceful death for the patient.

However, the lack of legal regulation around current practice is a cause for concern if we apply Fuller's criteria. The only clear line of delineation between what is and what is not acceptable is that PAD – requested by a competent person after meeting several safeguarding criteria – is illegal. However, it has been suggested that a culture of covert assistance is now so embedded in our healthcare system that an expansion of intervention is possible.

Very few healthcare practitioners have been prosecuted for helping their patients to die – in my view, those responding to a competent request and acting compassionately for their patient's benefit should not be potentially liable to criminal sanctions. Likewise, patients should be protected from those who act out of malice or without consent. One way of helping to rectify the situation is to draft an PAD law that tempers compassion with protection and has robust monitoring and reporting procedures such as those seen in permissive jurisdictions like Oregon, Canada, Victoria and New Zealand.[1152]

[1152] Oregon Death with Dignity Act 127.815 - 127.865 Section 3 safeguards; Criminal Code Canada Bill c-7 (2021), Chapter 2, Criminal Code, s. 241.2; Victoria Voluntary Assisted Dying Act 2017, Division 5 Reports s. 107 Annual Reports; New Zealand End of Life Choice Act 2019 Part 3 Accountability.

Returning to Fuller's criteria (which I am using as a way of evaluating whether this is good law), departure from the rule of law affronts individuals' dignity as responsible agents, and those individuals are judged and responded to, based on a standard of conduct they had no opportunity to meet.[1153] This could be because the law was not clear,[1154] because it was not published,[1155] or because the published clear standard is not the one used by officials deciding on the requirements for prosecution.[1156]

There are situations where the law does not regulate in detail but gives discretionary freedom to citizens. This is not to be censured: it fits well into a communicative approach. If one considers an interactive process, the provisions around the current end-of-life practices may not seem deficient. The primary responsibility is left to citizens – the doctors who would be carrying this out. There is an argument that they can better see the best thing to do, to realise certain values in specific situations and contexts. This form of self-regulation can be more efficient in realising those values and may do more justice to the democratic ideal of respect for individual moral autonomy. [1157] The problem is that value-based decisions are left to one specific cohort of professionals, whose values system may be at odds with the patient or general public. A good example of this is the historical opposition to PAD from professional bodies representing doctors, whilst the majority of the public support it.[1158] This historical medical opposition is now shifting to align more with the general public's views; In September 2021, the British Medical Association (BMA) dropped its long-standing opposition to AD, and in March 2019, the Royal College of Physicians (RCP) dropped its opposition in favour

[1153] *The Morality of Law* 70.
[1154] Ibid 63.
[1155] Ibid 49.
[1156] Ibid 81.
[1157] W. Van der Burg, 'The Expressive and Communicative Functions of Law, Especially with Regard to Moral Issues', (2001) 20 Law and Philosophy 54.
[1158] Ian Marland, '75 per cent of Scots back change to assisted suicide law.' (*The Times*, 22 Jan 2018) <https://www.thetimes.co.uk/article/75-per-cent-of-scots-back-change-to-assisted-suicide-law-cm3plmglv> See also: Dignity in Dying, 'Largest ever poll on assisted dying finds increase in support to 84% of Britons' (2 April 2019) <https://www.dignityindying.org.uk/news/poll-assisted-dying-support-84-britons/> accessed 13 Nov 2021

of neutrality following member surveys.[1159] Such shifts from medical bodies have provided the impetuous for legislative change in other jurisdictions.[1160]

These changes raise interesting questions about the role of the professions and of individual doctors, in particular, whether it is the function of the health professions to provide whatever service is in current public demand. There are other controversial practices that the public wants HCPs to do, but the bottom line is whether PAD is perceived as "proper medical treatment" that should be included in healthcare instead of criminalised. Mary Neal argues that if it is proper healthcare, it is "liminally" so – justified by appeal to 'public good' arguments rather than a clear benefit to the individual patient (as although it will relieve suffering and distress, it will result in their death). This means that if PAD is legalised, it should only be permitted following an explicit competent request, and HCPs ought to have an opt-out.[1161]

The point of this chapter has not been to offer a comprehensive framework of reform to healthcare and end-of-life practices more generally but to identify that assistance to die is regularly and routinely provided within the healthcare system, with some deaths including involuntary euthanasia. The basis for these practices is compassion, best interests and the relief of suffering. Thus, legalising PAD would not be a considerable departure from already established ethics or practice.

The next chapter, Chapter Nine, will analyse the arguments presented in chapters six, seven and eight to conclude Part III of the work before considering how the proposed reforms should be constructed in Part IV.

[1159] RCP, 'The RCP clarifies its position on assisted dying' (30 March 2020) <https://www.rcplondon.ac.uk/news/rcp-clarifies-its-position-assisted-dying> ; G. Iacobucci, 'BMA moves to neutral position on assisted dying' (2021) 374 BMJ <doi:10.1136/bmj.n2262>; The Royal College of Nursing, Royal College of Nursing Scotland, Royal College of Psychiatrists, and Royal Pharmaceutical Society all hold a neutral stance on assisted dying, with many other professional bodies not taking a formal position.

[1160] Jeff Blackmer, 'Commentary: How the Canadian Medical Association found a third way to support all its members on assisted dying' (30 January 2019) BMJ 364 < https://www.bmj.com/content/364/bmj.l415>.

[1161] Mary Neal (2019) "CO, Professionalism & Proper Medical Treatment" (n 1145).

Chapter 9: Analysis of Part III

Part III of this work considered the consequences of the ban on AD. Specific consideration was given to avoidable suffering, disempowerment, traumatic deaths without dignity, suicide, and contemporary medical practice's contradictory and confusing nature.[1162]

If a person has been given all the appropriate health and social care[1163] and no longer wants to remain alive, it seems unnecessary and inhumane for that person to be sedated while awaiting organ failure from dehydration or to be given increasing dosages of drugs, with or without double effect. Instead, it would seem sensible to create an open, legalised process with checks and balances to ensure that patients' wishes are respected and doctors are protected (and acting legally) when they act in the best interests of their patients – even when that includes knowingly hastening their death. Some believe that palliative sedation and double effect are the same as euthanasia.[1164] Whilst some medical professionals strongly disagree,[1165] the boundary between the two has been described as “fuzzy, grey and conflated”.[1166] In both cases, the goal is usually to relieve suffering.

Protecting vulnerable people is paramount, but the current system arguably protects people less effectively than a regulated statute on PAD would. One concern has been the inability of doctors to satisfactorily detect and address coercion. For example, in 2015, Dr Kathryn Mannix, a palliative care consultant, wrote in The Guardian that doctors see ‘occasional loveless families where coercion to “die sooner” would certainly occur should the law allow it.’[1167] A few days later, in a debate in the House of Commons, Fiona

[1162] At Chapter Eight.
[1163] And if not, this must be addressed before any consideration of AD.
[1164] (n 1094).
[1165] Section 6.2 Double Effect (n 871-872). Some but not all e.g., the Christian Medical Fellowship and association of Catholic doctors believe it is tantamount.
[1166] David Grube, national medical director at the advocacy group Compassion and Choices, quoted in Michael Ollove’s article (n 1096).
[1167] *The Guardian,* ‘Medical profession’s views on the assisted dying bill’ (8 Sept 2015) <https://www.theguardian.com/society/2015/sep/08/medical-profession-views-on-assisted-dying-bill> accessed 14 Nov 2020.

Bruce MP said that proposed AD legislation did not address how doctors could be satisfied that the person seeking to end their life had a 'settled and voluntary intent' or that there was 'no coercion behind' a request for an assisted death.[1168]

However, at present, when a person with a terminal illness asks, for example, for their ventilation to be removed, the Association for Palliative Medicine's (APM) specialist guidance states it is the responsibility of doctors to validate the person's decision by ensuring that it is the 'settled view of the patient,' 'that there is no coercion' and that the patient has the capacity to make the decision.[1169] Similarly, guidance on identifying coercion in other healthcare contexts, such as women seeking abortion, is already in place and work well.[1170]

Arguments against PAD based on non-detection of abuse ignore the fact that coercion can already influence end-of-life decisions and that doctors have both a responsibility to identify it and guidance to help them do so. These are similar to the safeguards proposed in law reform attempts in Scotland, which already exist in PAD legislation around the world.[1171] For example, in preparation for the implementation of AD in Victoria, Australia, the Department of Health and Human Services published information and training modules to support healthcare professionals in detecting possible coercion around decisions relating to AD. The information acknowledged that doctors should already be alert to coercion in a range of healthcare decision

[1168] HC Deb. Vol 599 cols. 670-671, 11 Sept 2015.
[1169] APM, 'Withdrawal of Assisted Ventilation at the Request of a Patient with Motor Neurone Disease Guidance for Professionals' (Nov 2015) <https://apmonline.org/wp-content/uploads/2016/03/Guidance-with-logos-updated-210316.pdf> accessed 14 Nov 2019.
[1170] Royal College of Obstetricians and Gynaecologists, 'The Care of Women Requesting Induced Abortion Available', (2011) <www.rcog.org.uk/en/guidelinesresearch-services/guidelines/the-care-of-women-requesting-induced-abortion/> accessed 15 July 2020; NICE (National Institute of Health and Care Excellence) and Royal College of Obstetricians and Gynaecologists, 'Abortion care: NICE guideline' (2019) <www.nice.org.uk/guidance/ng140/resources/abortion-carepdf-66141773098693> accessed 15 July 2020.
[1171] Assisted Dying for Terminally Ill Adults (Scotland) Bill consultation, p. 19.

scenarios.[1172] Permissive PAD laws will always contain upfront safeguards and be accompanied by secondary legislation to which professional bodies/regulators, such as the GMC and others, will respond. Post legalisation, they have an obligation to publish their own guidance and oversight (introducing even more accountability and clarity) in addition to the already available, arguably sufficient, healthcare guidance on coercion and abuse. Such rigour and accountability are why AD should be moved out of criminal law to healthcare if it is to be legalised appropriately, to allow transparency, peer-to-peer best practices and support to develop.

It has been shown that much of the perceived or forecasted negative consequences of legislating to allow PAD has been disproved by countries who now have accumulated decades of data on the practice.[1173] Given that requisite checks and balances are currently not in place in the UK, it is inevitable that some relatives and doctors operate or practice in a manner that is unsupervised, unaccountable, and arguably unethical.[1174] The present prohibition means that any relative or physician who has intentionally assisted a person's death has done so without following a set of rules, outwith observation from peers, and beyond the watchful eyes of the law.

Thus, while Dr Mannix and others opposed to PAD express fear of abuse if it were to be legalised, nobody currently oversees those relatives and physicians who are already assisting people to die. This constitutes failure on almost every aspect of what Fuller considers a functioning legal system and 'good law'. Protection, oversight, boundaries, review, reprimand and repercussion are all completely absent. Section 8.6 outlined just how problematic this is, by leaving the responsibility and *self-regulation* to one

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[1172] Victorian Government, 'Voluntary Assisted Dying: Identifying coercion. Video transcript' (March 2019) <https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Fwww.health.vic.gov.au%2Fsites%2Fdefault%2Ffiles%2Fmigrated%2Ffiles%2Fcollections%2Ffactsheets%2Fv%2Fvad-identifying-coercion_video-transcript.docx&wdOrigin=BROWSELINK> accessed 14 Dec 2021.

[1173] n 219.

[1174] See section 6.4 Euthanasia.

subset of society, i.e., HCPs whose values systems may be at odds with the patient or general public, thus hindering equality, access, and justice. When PAD is legalised, HCPs willing to participate can opt-in and (with PAD then a legal right), patients can access it as part of their end-of-life care, levelling the equality of access for all.

The current approach provides inadequate protection for the reason given by Lord Neuberger in *Nicklinson*, namely that:

> … A system whereby a judge or other independent assessor is satisfied in advance that someone has a voluntary, clear, settled, and informed wish to die and for his suicide then to be organised in an open and professional way, would provide greater and more satisfactory protection for the weak and vulnerable, than a system which involves a lawyer from the DPP's office enquiring, after the event, whether the person who had killed himself had such a wish, and also to investigate the actions and motives of any assistant, who would, by definition, be emotionally involved and scarcely able to take, or even to have taken, an objective view.[1175]

Because there is no specific offence of AD in Scotland and no law allowing it, it is very difficult to obtain an accurate figure on how many assisted deaths are happening. Following the publication of DPP guidelines in 2010, reported cases of AD increased. The DPP said that this was because "people feel more confident to come forward and say what they've done because they've got a degree of clarity about what might happen to them."[1176] It is possible to legislate for AD and build in safeguards to prevent vulnerable people from being abused. Safeguards, however, cannot be built into the current situation in Scotland. Often, the only source of information about the circumstances of

[1175] *Nicklinson* SC ruling [108, 186].
[1176] Robert Winnett, '44 assisted suicide cases since CPS guidelines published.' (*The Telegraph*, 3 Sept 2011) <https://www.telegraph.co.uk/news/uknews/law-and-order/8738415/44-assisted-suicide-cases-since-CPS-guidelines-published.html> accessed 14 Nov 2019.

the death is the suspect, with the repercussions only realised *after the event* and no independent verification of the suspect's account. This is typical of the Scots criminal law system, with reform usually coming from court decisions or public controversies instead of a programme of ongoing legislative improvement.[1177]

In Scotland, Jeremy Purvis, now Lord Purvis, was a liberal democrat MSP when he attempted to legalise AD based on the Oregon Death with Dignity Act (1997).[1178] The bill allowed capable adults with a terminal illness the means to 'die with dignity'[1179]. At the time, Purvis's inclination was driven by his own family's experience of relatives who had died by suicide whilst suffering from unbearable pain.[1180] He was attempting to address the inequality he saw in the law that prevented people from getting help to die from medical professionals whilst making criminals out of friends and relatives who wished to help competent adults who wished to die. In addition, Mr Purvis wished to encourage wider debate and discussion on end-of-life issues.[1181]

The consultation for the Purvis proposal opened discussions in Scotland around inconsistencies in the law:

> As it stands, the law permits suicide and allows competent adults to refuse life-sustaining treatment. It also permits doctors to withhold and withdraw life-prolonging treatment that is considered 'futile' from patients who cannot express an opinion (for example patients in a permanent vegetative state). However, terminally ill patients who are not physically able to commit suicide and are not in a position to end their lives by refusing treatment, are not entitled to ask for help to die.

[1177] "What remains relatively absent from the development of criminal law and procedure in Scotland, however, is pro-active rather than reactive reform" in J. Chalmers, 'Developing Scots criminal law: a shift in responsibility?' (2017) (1) Juridical Review 37.
[1178] *Dying with Dignity consultation* (2003) (n 832).
[1179] Ibid 5.
[1180] Ibid 4.
[1181] Ibid.

> Arguably, this situation is discriminatory as well as logically inconsistent.[1182]

Mr Purvis described what he saw as a further paradox, in that current legal procedures are regulated only by guidelines and common law and that there were no "statutory safeguards to prevent abuse or ensure that the law is always applied appropriately".[1183] He contrasted this with well-established PAD laws abroad, which require numerous safeguards and reporting and monitoring of conditions. [1184]

Purvis believed that the best way to allow individuals choice and dignity, whilst also protecting the vulnerable, was to make end-of-life decisions transparent and subject to scrutiny and safeguards, that is, legislating for PAD. Whilst expanding choice was an aim for Purvis, the consultation responses do not mention autonomy, and, unlike all later attempts, this does not appear to be one of his *primary* motivations; it was clarifying the law and protecting vulnerable people[1185] – the line of support which this thesis takes.

Attempts at law reform have included criteria requirements of a terminal illness, mental competency, oversight by two or more medical practitioners, and other safeguards. PAD is a decision made by a competent person, not one where outsiders – doctors or amateur assisters – make the decision for another person. This thesis advocates an approach that brings legal clarity to end of life decision-making and believes that it would protect vulnerable people far more effectively than the current situation. There would be a clear difference between an unrequested, premature death and choosing a peaceful end after robust safeguards have been met.

[1182] Ibid 9.
[1183] Ibid 4.
[1184] Oregon's Death with Dignity Act 1997.
[1185] *Dying with Dignity consultation,* p.4. (n 248).

For example, palliative sedation and double effect are sophisticated ways of reconstructing the law – procedures over which doctors hold a monopoly. Patients have no legal right to request these measures. Although the processes may be discussed with the patient or relatives, it is ultimately entirely at the doctor's discretion, thus contriving a practice that is lawful, although arguably indistinguishable from PAD.

Doctors already accede to the wishes of patients and families, for instance, on withdrawing treatment in cases of patients in persistent vegetative states. As Jackson put it in an unpublished lecture: "The lawful means that doctors use to shorten people's lives are almost certainly more open to abuse than legalised euthanasia."[1186] Moreover, normally, intention in the criminal law is established through straightforward foresight that a given outcome will be the likely effect of one's act.[1187] With double effect, the law limits its focus to the primary intention of the doctor – to relieve the patient's pain.

Ost considers changing double effect to a defence of necessity, and in relation to this has said:

> The legal application of the doctrine undoubtedly requires reliance upon physicians to truthfully report their primary intent. Yet, if a physician did administer lethal treatment with a primary intent to cause death, can we really expect him to reveal this truth, given the legal consequences of this revelation?[1188]

Some medical professionals, such as Dr Cox discussed at 8.4, have chosen to disobey legal boundaries to satisfy a moral imperative.[1189] People choose

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[1186] Reported in Simon Jenkins, 'Deciding How to End one's Life Should Be the Ultimate Human Right', (*The Guardian*, 2018) <https://www.theguardian.com/commentisfree/2019/mar/22/death-human-right-assisted-dying> accessed 13 Nov 2019.
[1187] *R v Woolin* (1999) I AC 82.
[1188] S. Ost, 'Euthanasia and the defence of necessity: advocating a more appropriate legal response'. (2005) Crim L Rev 355.
[1189] n 1055.

whether to obey or disobey the law as a way of expressing their opinion of it. Fear of punishment is only part of why people obey the law.[1190] Fundamentally, we obey the state because we acknowledge its legitimacy. It is a collective instinct that we owe each other to accept the authority of our institutions, even when we do not approve of how they are operating.[1191] In short, we have collective identity and accountability to one another as citizens of our state. But, even in an age when collective identities are under strain, legitimacy is still the basis of all consent.[1192] Despite its immense power, the modern state depends, to a large measure, on tacit consent.[1193] The behaviour of doctors and the public who choose to help loved ones die communicates that prohibition is unsustainable. If such cases continue, this may provide the impetus for permissive PAD legislation.

The majority of deaths in intensive care units (ICUs) follow withdrawing or withholding (WWT) decisions.[1194] It has been estimated that artificial nutrition and hydration (ANH) is withdrawn from 18,000 patients in intensive care units in England and Wales per annum and 1,800 per year in Scotland.[1195] This is an estimate, as court cases, which are the only recording mechanism, are not required in the vast majority of instances, with decisions instead being taken and implemented on the basis of common law and professional guidelines.[1196] Note that this relates only to cessation of ANH in intensive care. If the withdrawal of ventilation, antibiotics, and other therapeutic measures in all settings are included, the number of cases is likely to be much larger. Thus, we can surmise that collectively, deliberate actions to end

[1190] Lon L. Fuller, 'Positivism and Fidelity to Law: A Reply to Professor Hart' (n 410).
[1191] Richard Dagger and David Lefkowitz, 'Political Obligation', *The Stanford Encyclopedia of Philosophy* (Summer 2021 Edn) <https://plato.stanford.edu/archives/sum2021/entries/political-obligation/> accessed 14 May 2022.
[1192] Jonathan Sumption, Lecture 2: In Praise of Politics, The Reith Lectures 2019: Law and the decline of Politics (*BBC*, 28th May 2019) <http://downloads.bbc.co.uk/radio4/reith2019/Reith_2019_Sumption_lecture_2.pdf> accessed 3 Jan 2020.
[1193] Ibid.
[1194] Jean-Louis Vincent, 'Withdrawing May Be Preferable to Withholding' (2005) 9 (3) Critical Care 226 <https://doi.org/10.1186/cc3486> accessed 11 June 2016.
[1195] Record of information provided privately by Professor Celia Kitzinger on 11 March 2018.
[1196] Kitzinger (n 1021).

life take place, on a significant scale, every day in the UK. Though not taken lightly, such decisions are part of ordinary medical practice and are accepted as the right thing to do in our society. When we consider then that only 29% of Scottish healthcare professionals think refusing treatment to bring about death is more ethical than giving people the option of an assisted death,[1197] it gives us space to explore the issue of introducing more clarity, compassion, and choice to our end-of-life practices and extending what is already available to include PAD.

There are many reasons why the law has to be clarified. Most relevant for the present discussion is the need for people to be able to govern their conduct according to express rules; so that the law can act as a protective and preventative function against abuse; and so that people have a legal avenue upon which standards are set to pursue. The law sets boundaries and parameters but also acts as an instrument for people's rights, and for goals like autonomy, equality and justice to be realised.[1198]

In the absence of PAD, the current options for medical practitioners and patients are to withdraw, withhold or refuse treatment, letting the underlying disease/condition cause death. Alternatively, if there is no ongoing treatment to stop, a further choice may be for the patient to choose to die by refusing food and fluid (starvation/dehydration). This is often a protracted exercise, potentially involving considerable pain and distress. In *Nicklinson*, Lord Neuberger acknowledged that authorising a third-party to switch off a person's life support, as in *Bland* or *Re B (Treatment)*,[1199] is arguably "a more drastic interference to a person's life and a more extreme moral step that authorising a third party to set up a lethal drug delivery system so that a person can, but only if he wishes, activate the system to administer a lethal drug."[1200]

[1197] YouGov (2019) in Dignity in Dying, 'The inescapable truth about dying in Scotland' p.56 (n 161).
[1198] *The Morality of Law,* Chapter IV. The Substantive Aims of Law 152-184.
[1199] *Re B (Consent to Treatment: Capacity)* [2002] EWHC 429 (Fam), [2002] 1 FLR 1090.
[1200] at [94].

The absence of legalised PAD entrenches paternalism, the medicalisation of death, and the power of medical practitioners over patients.[1201] The benefits of technological and medical interventions are, of course, welcome, but there are costs, both human and economic, and there is at times an uneasy conflict of interests between the parties involved – a tug of war between interested persons and the legal/medical institutions.[1202]

Scholars such as Coggon[1203] and Ost [1204] have argued that PAD should be taken out of the realms of medical law. Ost considers the phenomena of amateur AD, which is taking place already, and she theorises that this signals something of a de-medicalisation of assisted death. The rates of suicide tourism further support this. Citizens taking death into their own hands allow a rebalance to emerge – citizens now taking back control from the disadvantage and disempowerment their disease has imposed on them. But these changes are not without issues, and there are costs to all parties involved. At worst, they may further entrench inequalities, allowing the choice of AD only for a privileged few who have the finances, physical and mental capacity, support network, willing assister and resolve to navigate the process.

This thesis recommends that only AD carried out by healthcare professionals, primarily doctors, is legalised. This is known as physician-assisted dying (PAD). 'Amateur assisted dying', where ordinary citizens assist one another, should remain within the realms of criminal law. Worldwide, permissive AD laws require strict criteria to be satisfied prior to any AD. These include, but are not limited to, medical diagnoses, such as the person having a terminal or other illness. Likewise, the person typically must have the mental capacity to request assisted death autonomously and make that decision free from any pressure or coercion. As such, the satisfaction of

[1201] (n 914).
[1202] See chapters six and seven and eight.
[1203] John Coggon, 'Assisted-Dying and the context of debate: 'Medical Law' versus 'End of Life Law'' (2010) 18 (4) Med Law Rev 541.
[1204] Suzanne Ost, 'The De-Medicalisaton of Assisted Dying: Is a less medicalised model the way forward? (2010) <https://eprints.lancs.ac.uk/id/eprint/34628/1/Ost_Demedicalisation_of_Assisted_Death_FINAL.pdf> accessed 14 Nov 2020.

these criteria must be assessed by HCPs as these conditions are part of ordinary medical practice (diagnoses, consent and capacity checks *inter alia*). HCPs are professionally trained and qualified in these roles and are governed by regulatory bodies, a standard which does not apply to ordinary citizens.

Permissive laws impose a statutory professional duty on HCPs to complete formal paperwork for monitoring and reporting purposes, which would be difficult to enforce if amateur citizen assistance was the norm. HCPs are more objective and impartial than, for example, a family member who would assist a loved one. This helps to address concerns about the detection and prevention of potential coercion or abuse and also minimises the emotional turmoil and distress of ordinary citizens. There are many other reasons why PAD only is recommended and not the complete decriminalisation of AD. Not least on a practical level because HCPs can access medication and other resources (such as referring the patient for psychiatric evaluation if competency is in question), which ordinary citizens cannot.

Furthermore, ultimately allowing citizen AD would mean making exceptions to the criminal law; in most circumstances (save HCP assistance due to terminal illness following a competent request), AD should be illegal – if I assist my loved one to die without an explicit request or for non-altruistic reasons, that should be criminal. If we decriminalise assisted death entirely, it casts the net too wide. The degree to which prosecutorial discretion would need to be applied to operate and facilitate amateur citizen assistance effectively is problematic - a fundamental principle of the rule of law is that questions of legal rights and liability should ordinarily be resolved by application of the law and not the exercise of discretion. It is also a principle of the rule of law that laws should apply equally to all, save to the extent that objective differences justify differentiation. Equity of access is pertinent here as some citizens might not have a willing relative or friend to assist them.

If we strive to be a society that responds compassionately to human suffering whilst having strict laws which prohibit vulnerable people from being abused, it is open to us to find novel ways to legalise AD. Laws can act as facilitators *and* preventative instruments, allowing patient autonomy and dignity to prevail whilst acting as a strict deterrent to those who act out of non-altruistic motives, something that has been shown by jurisdictions that have legislated successfully.

In Scotland, reform is even more crucial with an increasing number of assisted deaths likely taking place, with little or no guidance for individuals or the legal institutions. This leaves a situation of uneasy equivocation and a lack of compassion and empathy shown for human suffering. The likely unintended consequences will increase across the UK, whilst other jurisdictions grasp the nettle, approach this pragmatically and proactively, and seek to offer PAD to those who need it most.

The cases reviewed in this part of the thesis demonstrate that the legal landscape is now one where patient autonomy, within the bounds of legality, is the principal consideration, rather than that of preserving life at all costs. As Dr Evan Harris has said: "if sanctity of life as a priority were any basis for regulation, then we would seek to prevent competent persons from refusing life-saving medical treatment".[1205] It has been a long road to arrive at where we are now, a situation where the sanctity of life does not always trump self-determination. Time will tell whether this trend will continue, which would likely facilitate an argument in favour of extending patient autonomy to allow PAD.

Part III of this work has considered many of the principles that underpin end-of-life choices and decisions, namely autonomy, self-determination, bodily integrity, the sanctity of life, best interests, supported decision-making and

[1205] Select Committee on Assisted Dying for the Terminally Ill Bill (9 Sept 2004) at question 16 from Lord Turnberg para 56 <https://publications.parliament.uk/pa/ld200405/ldselect/ldasdy/86/4090903.htm> accessed 14 Nov 2020.

the understanding that ANH is medical treatment and not basic care. These principles have become cornerstones of medical law only because they have evolved and developed over many years and now represent accepted medical practice. The point at which the law is originally made is necessarily in some fixed historical era, and, whilst general principles may hold good for all time, their detailed application will need to develop in the light of social changes, and will almost certainly change as the time at which the law was established becomes more remote.[1206]

AD is increasingly legalised worldwide, which inevitably puts pressure on legislators to either change their archaic laws or justify the status quo. There will always be disagreement on the detail of moral issues such as this, but work must still be done to find a solution to address the unintended consequences that the current ban produces. The next and final part of the thesis, Part IV, will consider a framework for suggested reform.

[1206] J. E. Penner & E. Melissaris, *McCoubrey & White's Textbook on Jurisprudence*, (5th Edn, OUP 2012) p.22.

Part IV

Chapter Ten: Redressing the balance

Compassion is the basis of Morality.[1207]

10.0 Incorporating Compassion

I have argued throughout this thesis that the law on AD in Scotland should be reformed via legislation and should take a permissive approach. Having charted previous attempts to remedy the situation via the legislator and the courts, which were based on respect for autonomy and human dignity, I offer a change of perspective.

Previous attempts have failed for various reasons; most recently in Scotland was the practical consideration that the 2013 Bill was 'poorly drafted'[1208] but MSPs are asked to vote on the *principles* of the proposal at Stage 1 of the legislative process, not the detail – that comes later at Stage 2 when amendments are proposed. Thus, the underpinning principles driving reform (autonomy, dignity) failed to convince legislators. Similarly, attempts via the judicial route (focusing primarily on interferences with individual autonomy) have not been successful.[1209]

The technical shortcomings can be quite straightforwardly solved by learning from the previous 2010 and 2013 attempts and drafting a better Bill. Some practical considerations are included in this final chapter but, from a theoretical perspective, a different way to approach law reform is to shift from autonomy/dignity as the underpinning principles (although they are still

[1207] Arthur Schopenhauer, *On the Basis of Morality*, 1840.
[1208] Isra Black, 'Assisted suicide bill is laudable, but poorly drafted' (*The Conversation*, 2014) <https://theconversation.com/assisted-suicide-bill-is-laudable-but-poorly-drafted-24737> accessed 14 Nov 21; Stage 1 Report, H&S Committee, said that the 2013 Bill contained "significant flaws".
[1209] For example, the argument presented in *Ross* about his Article 8 rights being infringed.

relevant and necessary considerations)[1210] towards principles of (i) legality as defined by Fuller and (ii) compassion – the Fuller + Compassion formula. This attempt may break the impasse; at the very least, it provides a novel approach to move this enduring debate forward.[1211]

Striking a balance is challenging, but a clear commonality in this debate is that both sides have sincere and deeply held compassion for human suffering at the end of life. Focusing on this shared concern allows us to interpret a potential unity that has not presented itself thus far. The optimisation of legality and compassion is a solid model on which to base any reform. It has been shown that there is a significant segment of society that believes the law in Scotland is not clear and, as regards compassion, much end-of-life care in Scotland and elsewhere is already based on a compassionate approach.[1212] Similarly, Scotland has an enviable reputation for being a country with a compassionate heart.[1213]

The lack of empirical data to show forecasted abuse in jurisdictions where AD is legal,[1214] coupled with the genuine examples of suffering outlined in this work, evidences a glaring imbalance in the Scots AD law and practice. A stark omission in the status quo is the lack of compassion shown to those with a terminal illness who would want the choice of an assisted death. I have argued throughout this work that for too long, the onus has been protecting those who might be open to abuse, and the real suffering of those with a terminal illness has not been given enough credence, evidenced by the discussion on how the current ban is not proportionate.

[1210] As noted at 7.5.2 *Choice* and the discussion of Dignity throughout section 6.2.
[1211] D Harris, et.al., 'Assisted dying: the ongoing debate' (2006) 82 (970) Postgrad Med J. 479 <doi:10.1136/pgmj.2006.047530> accessed 11 Jan 2019.
[1212] There are many examples of this approach to be found around the world, such as the Milford Care Centre 'Compassionate Communities Project', in Ireland; the 'Compassionate Community Network', in Australia; and 'Compassionate Korail', in Dhaka, Bangladesh.
[1213] Iain Smith, 'Kindness in Court: Who Cares?' (*Law Society of Scotland*, Feb 2019) <https://www.lawscot.org.uk/members/journal/issues/vol-64-issue-02/kindness-in-court-who-cares/> accessed 14 Nov 2020.
[1214] Colburn (2022) found that AD laws do not harm people, including those in vulnerable groups and also that healthcare was not damaged by the introduction of AD laws (n 219).

As mentioned in Part I of this thesis, the primary framework for this work was Fuller's desiderata, which evidenced a lack of clarity and legality in Scots Law on AD. Having shown that throughout this work, attention now turns to incorporating compassion into our consideration of how AD law can best be reformed. It will be shown that given its deep roots in early moral development,[1215] it is legitimate to use compassion as the basis for law reform on the deeply moral issue of AD.

The importance of compassion is recognised in many segments of society. Most of the world's religious traditions place compassion at the centre of their belief systems. International professional bodies in healthcare, education and the justice system also emphasize the importance of compassion.[1216] Within the healthcare domain, compassion is believed to have numerous practical advantages. It has been argued that treating patients compassionately has wide-ranging benefits, including improving clinical outcomes, increasing patient satisfaction with services, and enhancing the quality of information gathered from patients. Treating oneself and others with compassion is also believed to promote individual wellbeing and improve mental health.[1217]

Section 1.7 of this thesis outlined exactly what we mean by compassion, an active principle that aims to help reduce a person's suffering on a practical level. According to the Oxford English Dictionary, the word "compassion" stems from the Latin "compati", meaning "to suffer with". In the literature, there appears to be a broad consensus that compassion involves feeling for a person who is suffering and being motivated to act to help them.[1218] For

[1215] Intellectuals such as Adam Smith and others frequently considered Compassion during the Enlightenment. Adam Smith, The Theory of Moral Sentiments, (1759) D.D. Raphael and A.L. Macfie (eds.) (OUP 1976); Francis Hutcheson, An Essay on the Nature and Conduct of the Passions and Affections, with Illustrations on the Moral Sense. None ed., (Indianapolis: Liberty Fund, 2012).
[1216] Clara Strauss et al., 'What is compassion and how can we measure it? A review of definitions and measures', (2016) 47 Clinical Psychology Review 15-27.
[1217] Clara Strauss et al., 'What is compassion and how can we measure it? A review of definitions and measures', (2016) 47 Clinical Psychology Review 15-27.
[1218] Ibid.

example, in his seminal work on human emotions, Lazarus defines compassion as: “Being moved by another's suffering and wanting to help”.[1219] Similarly, in a major systematic review of compassion and its evolutionary origins, Goetz et al. define it as: “the feeling that arises in witnessing another's suffering and that motivates a subsequent desire to help”.[1220] These definitions have in common the suggestion that compassion is not only about feeling touched by a person's suffering, but also about wanting to act to help them.

Those opposed to law reform recognise the suffering experienced but are not convinced that acting to alleviate it, by allowing PAD, is appropriate. A core component of compassion, unlike other concepts like sympathy, is not simply acknowledging suffering but incorporating compassion in a *practical* way. By adding this additional dimension of compassion, we are acting to alleviate the suffering, not simply acknowledging it yet not seeking to address it. In this way, compassion moves us beyond the stalemate of persistently rejecting law reform but offering no better alternatives – it forces us to act to address the suffering of those who want the choice of PAD but are not legally afforded it.

Opponents acknowledge terminally ill people’s suffering by suggesting more and better palliative care. This thesis has shown that whilst more and better palliative care is most welcome, it does not negate the need for PAD. Compassion adds a novel way of addressing the impasse by listening to the wants and needs of the terminally ill, who have voiced that despite good care, they want the choice of PAD. Thus compassion takes a person-centred approach and goes a step further than simply acknowledging suffering (but continuing to hinder choice) and allows us to act by increasing end-of-life options to include PAD. It, therefore, has a practical element to it over and

[1219] R.S. Lazarus., *Emotion and adaptation* (OUP 1991) 289.
[1220] Goetz et al., ‘Compassion: An evolutionary analysis and empirical review’ (2010) 136 (3) Psychological Bulletin 351.

above, simply witnessing but not seeking to address the pain and anguish.[1221]

Furthermore, on a practical political level, the approach of clarity + compassion offers a refreshed approach to a debate that MSPs are aware has previously been debated and heavily defeated. It allows the member in charge of any new Bill to ask MSPs to readdress the issue in light of a change in perspective. This, coupled with the now available empirical data from overseas (that PAD is safe and effective), will assist with convincing MSPs that although AD has been 'tried and tested' before, it is worth taking another look at.

Although not used before in the way proposed in this thesis, compassion has been explicitly referenced throughout the AD debate[1222] and was a feature of the 2013 Bill, although one which the H&S committee did not believe justified the need for legislation.[1223] As a standalone principle, perhaps compassion is not a strong enough argument for reform of Scots Law on AD; likewise, the neutral purpose of clarifying, substantiating, and fixing the current law (to meet Fuller's criteria) is not in itself reason enough to change it, as there are many areas of Scots Law (particularly around homicide and causation) that are uncertain or unclear. Individually, then, neither the desiderata nor compassion provide all of the necessary components for reform.

As an example, one way of reforming the law to address the issues of clarity would be to double down on AD and implement a statutory offence, similar to that in England and Wales via the Suicide Act 1961. However, that change

[1221] Clara Strauss et al., 'What is compassion and how can we measure it? A review of definitions and measures', (2016) 47 Clinical Psychology Review 15-27.
[1222] See Emily Jackson and John Keown, *Debating Euthanasia* (Hart 2011) where Jackson advances a case based on a principled commitment to a secular, liberal legal system, arguing that obligations rooted in compassion require the careful development of laws to permit AD; HC Deb 11 Sept 2015, Vol 599, Assisted Dying (No.2) Bill <https://hansard.parliament.uk/Commons/2015-09-11/debates/15091126000003/AssistedDying(No2)Bill> accessed 11 May 2022.; See Suzanne Wilson case at 3.1 for example.
[1223] H&S Committee Report p.11-12 (n 748).

would only address clarity and would not reflect a compassionate response to the human suffering described in Part III.[1224] However, when we consider together the arguments in earlier chapters on the lack of clarity, the need for compassion, and the subsequent negative consequences of ignoring either, a compelling case for law reform built on both aspects is made. The point is that the law must be clarified and better ordered but merely saying *that* does not tell us *how*: that is where compassion comes in; it shows us the way forward.

Compassion as a directive for policy is not uncommon in Scotland. It has been borne out in legislation most recently on removing the social security entitlement time limit for terminally ill individuals, pardoning for gay offences, and on anti-smacking legislation.[1225] The word, *Compassion* is engraved on the head of the mace of the Scottish Parliament as a reference to the ideals to which the people of Scotland aspire.[1226] Thus, in inter-personal dealings – which constitute the greater part of politics – there is a prima facie case for compassion. That is, compassion is considered a fundamental and appropriate principle in the Scottish legal and political sphere. [1227]

The idea that compassion could form the basis of AD law reform in Scotland has gained traction in practice, with the proposed *Assisted Dying for Terminally Ill Adults (Scotland) Bill* 2021. Consultation on the proposed Bill signalled a shift, not away from autonomy and dignity, but towards incorporating compassion in a way that had not been done previously.[1228] Indeed, the document references compassion more than a dozen times and is a proposal that "…has strong safeguards that put transparency, protection

[1224] Chapter 6: Avoidable Suffering, disempowerment, and traumatic deaths without dignity.
[1225] Scottish Government, Social Security, <https://www.gov.scot/policies/social-security/terminal-illness/> accessed on 12/3/2020;
The Historical Sexual Offences (Pardons and Disregards) (Scotland) Act 2018; The Children (Equal Protection from Assault) (Scotland) Act 2019.
[1226] Scottish Parliament website, Michael Lloyd The Mace, <https://archive2021.parliament.scot/visitandlearn/24496.aspx> It was noted at 1.7 that parliamentarians are currently not living up to the ideals as scribed on the mace.
[1227] Whitebrook, (n 153).
[1228] See the authors note of interest at 1.1.

and compassion at its core".[1229] This, as outlined at 1.1, demonstrates that the work underpinning this thesis is already having direct impact and making original contributions, and that policymakers at the highest level (the member in charge of the proposal is the Deputy Presiding Officer of the Scottish Parliament) have been convinced of the viability of compassion and adopted its role in this debate.[1230] The proposal also considers the issue of clarity as being fundamental (at 2.1), noting that "transparency, protection and compassion" are at its core.[1231]

Thus, the time is ripe for redress to reform the Scots AD law in a compassionate way, which serves the dual purpose of tempering clarity and protection with justice, equality and compassion. This final chapter will critique how the law, in other areas, already does this and will outline how we can move the law towards a more explicitly compassionate approach for those at the end of life in Scotland.

10.1 Protection, Justice and Equality

This thesis has considered the protective function of law; from this, I have derived a 'protective principle' that has emerged through this research. Here the protective principle acts to protect vulnerability and to prevent exploitation. There are several rationales for the protective principle. One is that it simply adds to the consent requirement, in that people should always capaciously consent to an assisted death. Linked to this are the concepts of justice – that malevolent people should be subject to the criminal law, and equality – that the law should apply to every citizen in an equal way, without subsets of the population being able to circumvent the law to increase their end of life choices.[1232] The fundamental idea is that the law should give special protection to people society considers vulnerable[1233] but that (as a

[1229] P.3, Foreword.
[1230] The lack of clarity is not an 'original' contribution as it has been previously recognised that this area lacks clarity.
[1231] P.3, Foreword.
[1232] See Suicide Tourism at 7.5.
[1233] For example, persons with a physical or mental disorder and persons over whom others hold a position of trust.

way of doing this) any such restrictions on peoples' choices should be carefully balanced with the rights of others to have an assisted death.[1234]

Whilst acknowledging the wider context, it is argued that the law on AD should focus on the individual whose interests are at the core of this issue - the terminally ill. This fits with already established medical practice which takes a person-centred approach.[1235] Restrictions on choices at the end of life must face the burden of justification, especially considering the now available empirical evidence from overseas, which shows that AD can be implemented safely. Historically the opinions of those opposed to AD have outweighed the real and inhumane suffering of the terminally ill. Recognising the conflict of privacy and public (state) concerns, the balance of the argument decidedly favours the terminally iII individual since it is the patient and not the state who would have to endure the very real suffering precipitated by a terminal illness.[1236] This is an altogether more compassionate approach than the status quo.

The government's duty to protect is arguably its most basic function. It is why citizens give up their autonomy to a state in return for protection from the natural order of things.[1237] Beyond that, the government's duty is to govern in a way that promotes equality and justice. In modern-day Scotland, it cannot be beyond the wit of legislators to attempt to do both, as opposed to narrowly focusing on the protection of the vulnerable alone. It has been argued that the current prohibitive approach fails to protect public safety because vulnerable people are at risk by virtue of a policy that tolerates AD, by way of suicide tourism, medical interventions, amateur at-home assistance and negligible prosecutions.[1238] The Scottish legal institutions are essentially a sleeping watchdog. The balance should be actively and transparently

[1234] *MS v Sweden* (1997) 3 BHRC 248.
[1235] National Education Scotland, Person Centred Care <https://www.nes.scot.nhs.uk/our-work/person-centred-care/> accessed 31 Jan 2022.
[1236] Nina Clark, *The politics of assisted suicide*. (Routledge 2011) p.6.
[1237] Hobbes, 1651, Section XIII.9.
[1238] And the current situation prohibits Scotland from being able to record cases with any useful level of detail.

redressed to protect those vulnerable to abuse, whilst also attending to the needs of other vulnerable members of society – those with a terminal illness who would want the choice of PAD. Having outlined the practical principles underpinning this work, this chapter will now consider how AD law reform in Scotland would look.

10.2 Dignity & Autonomy

Dignity and autonomy are most commonly used as the basis for justifying law reform on AD.[1239] Central themes of the 2013 Bill were first that the law needed clarification and codification and that patient choice, dignity, and personal autonomy should be at the core of law reform.[1240] Compassion, dignity, and autonomy are similarly porous concepts and whilst it is not my intention to analyse the concepts of dignity and autonomy in great detail here, some analysis must be provided to give context to historical attempts to reform the law.

Dignity, conceived as a value, has been deemed by Reichstein as the most fundamental value since one can be deprived of every right and possession but still, in some circumstances, retain one's dignity.[1241] Autonomy, in contrast, is, for the most part, discussed in terms of it being a right – the right to autonomy over one's body, for example.[1242] Both can also be categorised as principles that help to guide decision making.

[1239] End of Life Assistance (Scotland) Bill Committee Report. 1st Report, 2010 (Session 3) at [55] Concept of Autonomy {81} Concept of Dignity< https://archive.parliament.scot/s3/committees/endLifeAsstBill/reports-10/ela10-01-vol1.htm#19> accessed 11 May 2020; The 2013 Bill Stage 1 debate 'mentioned 'Autonomy' 37 times, 'choice' 24 times and 'dignity' 16 times.

[1240] These arguments can, for example, be found in all the debates in Parliament on AD Bills. See, for example, Hansard Vol 658 (10 March 2004), regarding the second reading of Lord Joffe's Assisted Dying for the Terminally Ill Bill or Hansard Vol 755, Friday 18 July 2014, regarding the second reading of Lord Falconer's Assisted Dying Bill. See also Keown in Jackson and Keown, *Debating Euthanasia* (2012); R. Harries*, Questions of Life and Death: Christian Faith and Medical Intervention* (SPCK Publishing 2010); Biggs, *Euthanasia, Death with Dignity and the Law* (2001); Coggon and Miola, 'Autonomy, Liberty and Medical Decision-Making' (2011) 70 Cambridge Law Journal 523; Battin, *The Least Worst Death* (OUP 1994).

[1241] Reichstein, (n 455) 738.

[1242] John Christman, 'Autonomy in Moral and Political Philosophy', *The Stanford Encyclopedia of Philosophy* (Fall 2020 Edn)

Much has been written about the concept of dignity and countless attempts have been made to provide a precise definition.[1243] Autonomy has similar definition issues, but in this context, it can be narrowed down to focus on bodily autonomy and the right to self-determination, as illustrated by various attempts to assert this as a legal right via Article 8 (right to private life) challenges.[1244]

The premise that human rights are grounded in human dignity is reflected in post-Second World War human rights instruments. The Preamble and Article 1 of the Universal Declaration on Human Rights, for example, take as a fundamental premise the claim that we each have inalienable and intrinsic human dignity.[1245] Thus the use of dignity as the basis of law reform seems, at first blush, rather fitting. However, it has proved problematic in the context of AD due to the messaging that the law sends. That is, if PAD is allowed in order to preserve people's dignity, people who would qualify for PAD but choose not to have it may perceive that the law is suggesting their lives are lacking in dignity. Likewise, a person who chooses an unassisted death might be perceived as being undignified if that death involves suffering. From jurisdictions that have legalised AD, we know that a large proportion of the population appreciates having the choice but does not avail themselves of AD.[1246] Many will not need PAD and will die naturally, but others find meaning in suffering,[1247] and this as a choice in itself should be factored in. This is a simplified version of a highly complex concern.

<https://plato.stanford.edu/archives/fall2020/entries/autonomy-moral/> accessed 14 May 2022.

[1243] Dupré, *The Age of Dignity* (2015); Kateb, *Human Dignity* (2011); McCrudden (ed.), *Understanding Human Dignity* (2013); Rosen, *Dignity. Its History and Meaning* (2012).

[1244] See chapter three.

[1245] The United Nations General Assembly's Universal Declaration of Human Rights (UDHR) 1948; the International Covenant on Civil and Political Rights (ICCPR) 1966; and the International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966 (together forming the International Bill of Human Rights) all open with a statement on human dignity.

[1246] Oregon Health Authority. Annual reports (n 841).

[1247] J. Varelius, 'Suffering at the end of life' (2019) 33 (1) Bioethics 195.

Similar issues arise with attempting to use autonomy as the basis of law reform. Autonomy alone does not adequately support the need for the legalisation of PAD, as the law naturally sets limits to autonomous choices and will typically err on the side of caution.[1248] Furthermore, the preservation of dignity and autonomy is paramount in the context of person-centred care, but most agree that autonomy is relational and should, in some circumstances, be limited in consideration of the broader communities in which we live.[1249] Likewise, it has been recognised that dignity is a relational concept.[1250]

Dignity and autonomy in this context are interwoven, and Pattinson says that within the human rights traditions, dignity is used to emphasise individual choice and autonomy.[1251] An issue here is that dignitarian perspectives can be cited by opposing sides on issues of controversy, likewise with autonomy. Pattinson gives the example of a patient who is "voluntarily euthanised" and how those relying on dignity as a constraint typically condemn such a practice as violating human dignity, even where the patient makes a free and informed decision. Those relying on dignity as empowerment, or choice, will point to the free and autonomous decision-making as a reason why the doctor should not be prohibited from letting the patient die "with dignity".[1252]

Naturally, there are many ways in which one person's action may affect the life of another and such interferences can amount to an offence to the dignity or a violation of the autonomy of the person affected. When considering the importance of observance with the law, Raz too viewed dignity and autonomy as linked, stating that "Respecting human dignity entails treating humans as persons capable of planning and plotting their future. Thus, respecting

[1248] Stage 1 report, Assisted Suicide (Scotland) Bill para 83-85.
[1249] Ibid, see also, Catriona Mackenzie., 'The importance of relational autonomy and capabilities for an ethics of vulnerability.' (2014) Vulnerability: New essays in ethics and feminist philosophy 33.
[1250] Corbett, 'The Promotion of Human Dignity: A Theory of Tort Law' (2017) 58 Irish Jurist 121.
[1251] Pattinson (n 1139).
[1252] Ibid.

peoples' dignity includes respecting their autonomy, their right to control their future."[1253]

As we have seen, many attempts to reform the law focus on a violation of Article 8 limiting the person's autonomous choice to decide how they die.[1254] Respect for autonomy is qualified and limited by the rights of others, namely public safety considerations and the need to balance the respect with competing values and principles. The difference in principle between those who support AD and those who do not, is not that the former do not believe in the sanctity of life or that the latter do not support personal autonomy. Each side values both, but when principles conflict, each side feels that a different principle should take precedence.

As stated in the introductory chapter, autonomy will always play a central role in this debate. It supports the role of voluntariness and consent from the patient's perspective but also gives space for the realisation of conscientious objection for HCPs who choose to opt-out of taking part in PAD. If PAD is legalised, it is the patient's autonomous decision to choose PAD (the consent requirement) that moves the actions of HCPs from the criminal law into healthcare, since the patient is permitting the HCP to assist with ending their life. The thesis has also outlined, primarily through the work of Colburn, how giving patients more autonomy contributes to the reduction of their suffering, which is the primary aim of legalising PAD.

In this debate, the usual theories of autonomy and dignity have not been the wrong approach to take; they have simply led to an impasse.[1255] This impasse is a practical *and* philosophical one, and politicians have refused to legislate on that basis. After repeated failed attempts to legislate for AD based on dignity and autonomy, the ground is ripe for the exploration of

[1253] Raz (n 2) p. 221.
[1254] *Pretty, Nicklinson, Gross, Koch* and others discussed throughout this work.
[1255] B. Colburn, 'Autonomy and end of life decisions: a paradox.' in Räikkä, J. and Varelius, J. (eds.) *Adaptation and Autonomy: Adaptive Preferences in Enhancing and Ending Life.* (Springer Germany 2013) 69-80.

alternatives. This thesis has demonstrated the accessibility of an emerging theoretical and practical literature on compassion and the law. This literature had not been applied to Scots Law or AD in Scotland before, but given this research, it has now been incorporated as one of the guiding principles to law reform on AD in Scotland.[1256]

As well as using this emerging literature to provide a novel approach to reform, this thesis demonstrates that recasting the debate towards an argument for greater compassion provides a stronger basis for reform because it recognises the interests of both positions in the argument and can therefore achieve a compromise between protecting the vulnerable and empowering the capacious adult. When used as an instrument to prevent harmful consequences, such as those outlined in Part III, compassion allows us to step back from considering the minutiae of the concept. Compassion courts less futility in debates about the end of life, and it seems more capable of moving the issue forward, both theoretically and practically.

10.3 Relevance in healthcare

Compassion has come to occupy a particular place within the caring disciplines. It is recognised as a critical aspect of the art of nursing, medicine and effective communication and is considered essential if patient (and family) needs are to be met and the desired clinical outcomes achieved.[1257] Today, compassion is at the centre of many debates about how health and social care should be delivered, sitting at the heart of what it is to be human and exist in relationships, caring not only for our own welfare but also for other people.[1258]

In this context, ‘compassion’ has also been invoked by a variety of people in the field of end-of-life care. Indeed, it has become the flagship concept to

[1256] As noted, the author drafted the consultation and is Advisor on the proposed Assisted Dying for Terminally Ill Adults Scotland Bill 2021.
[1257] S. Zaman et al., ‘A moment for compassion: emerging rhetorics in end-of-life care’ (2018) 44 (2) Med Humanit 140-143.
[1258] Ibid.

support some end-of-life organisations and projects, it is seen as an attribute to be nurtured in the delivery of end-of-life care and it is a rallying call for community action and public health interventions.[1259] Perhaps most significantly, compassion has become the orienting principle for 'public health' approaches to end-of-life care. It was first developed in the notion of 'compassionate cities' by Kellehear.[1260]

However, the sources of compassionate action and perceptions about its promotion can be a matter of contention. Some see compassion as an 'art' with its own 'value' or 'virtue', whilst others see compassion in more tangible and functional terms, for example, in the notion of a knowledge-based 'science' of compassionate caring.[1261] I view it as a concept, principle and virtue that provides a practical tool for decision-making when used as an approach to law reform.[1262]

Key among the literature on compassion is its reference to AD – which has referenced compassion, often positively, in parliamentary reports, papers and books throughout the world.[1263] A small body of literature also approves of compassion as an element of human rights. For instance, Gearty argues in favour of drawing from compassion to help human rights survive what he sees as its crisis of authority.[1264] Compassion is pertinent, according to

[1259] A. Karapliagkou & A. Kellehear *Public Health Approaches to End of Life Care, A toolkit.* National Council for Palliative Care (London 2014).
[1260] A. Kellehear, *Compassionate Cities. Public Health and End of Life Care* (London: Routledge 2005).
[1261] University of Glasgow, End of Life Studies Future Forum programme, *End of Life Care: Challenges and Innovation*. June 2020.
[1262] i.e. a concept and principle when we use it as the basis of policy decisions and a virtue in the context of wanting professionals to have it.
[1263] Biggs (2011) (n 138); A Grubb, 'Euthanasia in England: A Law Lacking Compassion?' (2001) 8 European Journal of Health Law 89–93; Keating and Bridgeman (2012) (n 332); Mullock (2010) (n 138); across Canada B.Chan and M. Somerville 'Converting the "Right to Life" to the "Right to Physician-Assisted Suicide and Euthanasia": An Analysis of *Carter v Canada* (Attorney General), Supreme Court of Canada' (2016) 24 (2) MLR 143–175; Australia: A.L. Plattner 'Australia's Northern Territory: The First Jurisdiction to Legislate Voluntary Euthanasia, and the First to Repeal It' (1997) 1 (3) DePaul Journal of Health Care Law 645–654.
[1264] C. Gearty, *Can Human Rights Survive?* (Cambridge University Press 2006).

Gearty, because it evinces ‘active concern for others’ and helps ‘frame and mobilise responses to suffering and atrocities’.[1265]

Thus, whilst compassion is little studied in legal theory, it is compelling and fits well with a country that identifies as compassionate, especially in how it already approaches end of life issues. We already have compassion-based utilities with double effect, terminal sedation and other end of life practices as outlined in chapter 8. Some already consider these practices to be “passive assisted dying”.[1266] Thus, using compassion as the basis for legislative law reform on AD would not be a departure from already established practice. It would extend the principles that already underpin the relief of suffering and allow us to remove the limitation that presently prevents us from showing adequate compassion to people at the end of their lives who wish to access AD in Scotland.

10.4 Contemporary Relevance in Law

Whilst compassion features prominently in philosophy from Sophocles to the present day, it is rarely used as the basis for legal jurisprudence. Besides Richard Peters’ lectures on reason and compassion in 1973,[1267] the literature on compassion and the law is relatively new.[1268] Feenan et al. observe that “There is relatively little reference to compassion in law in the United Kingdom and a corresponding dearth of associated literature.”[1269] Thus, its recent emergence means that there is not a substantial body of legal literature to draw upon. However, helpfully, some of the most eminent medico-legal scholars have written about it, and particularly useful is the International Journal of Law in Context 2017 edition, devoted to the subject. In sum, the papers represent the first published collection of scholarly work

[1265] Ibid p.43.
[1266] Reichstein, (n 455) 735.
[1267] R.S. Peters, *Reason and Compassion (*New York: Routledge & Kegan Paul 1973).
[1268] Although it does feature in philosophy (Nussbaum, 1996), ethics (Crisp, 2008), health care (de Zulueta, 2013b), sociology (Wuthnow, 1991), cultural studies (Berlant, 2004) and, increasingly, in self-care and psychologically based therapies (Gilbert, 2005).
[1269] D. Feenan, et al., 'Judicial compassion - commentary on 'Compassion and the law: a judicial perspective' (n 210).

specifically on law and compassion,[1270] and here we find submissions from Herring, Bandes, Biggs, Feenan and others, whose work has already helped to inform previous chapters.

Compassion appears most notably in immigration law, sentencing and prisoner release and is often associated with mercy, clemency or leniency. Perhaps more surprisingly, it also appears in a wider range of laws such as housing and employment.[1271] The limited references are set out elsewhere,[1272] but it does already feature in sentencing, if not officially, and in areas that allow discretion; for example, a prison parole scheme might permit compassionate release if the prisoner has terminal cancer[1273] , and immigration laws might take compassion into account in granting asylum.[1274]

Perhaps surprisingly, in the context of medical law literature, there is little reference to compassion. Herring points out that in the NHS constitution, 'Respect, dignity, compassion and care...' are at the core of how patients and staff are treated but that the list of *rights* do not refer to compassion, mirroring the idea that it is not the place of the law to require or expect it.[1275]

Several other jurisdictions incorporate compassion into their AD laws to reduce the sentence in homicide. For example, the Swiss approach criminalises AD only when the suspect's motives were selfish and provides that a person who, for compassionate reasons, kills a person based on his or her serious and insistent request will only receive a maximum three-year

[1270] A small edition of papers on compassion and judging was published in the US in 1990. See: A.M. Cloud, 'Introduction: Compassion and Judging' (1990) 22 Arizona State Law Journal 13.
[1271] D. Feenan, 'Law and Compassion' 121 (n 139).
[1272] Feenan et al., 'Judicial Compassion…' (n 210).
[1273] Section 30 Crime (Sentences) Act 1997 allows the Secretary of State, following consultation with the Parole Board, to at any time release a life prisoner on licence if satisfied that exceptional circumstances exist which justify the prisoner's release on compassionate grounds.
[1274] The Immigration Rules provide for leave to remain in the United Kingdom for family members in the most exceptional compassionate circumstances.
[1275] Herring, 'Compassion, ethics of care and legal rights' at 162 (n 191).

sentence.[1276] Increasingly, litigation and legislation on AD rely upon the language of compassion – for instance, with *Compassion & Choices*, a US-based non-profit organisation, both litigating key appellate cases and advocating for legislative change.[1277]

While the Supreme Court of Canada nowhere refers to compassion in its *Carter v Canada* judgment which changed the law on AD, the case nevertheless was seen widely, and illustratively by the appellant's legal team, as a 'victory for the protection of human rights and compassion at the end of life'.[1278] Arguing compassionately from the outset that perpetuating avoidable suffering is inhumane, the court declared that:

> ... people who are grievously and irremediably ill cannot seek a physician's assistance in dying and may be condemned to a life of severe and intolerable suffering. A person facing this prospect has two options: she can take her own life prematurely, often by violent or dangerous means, or she can suffer until she dies from natural causes. The choice is cruel.[1279]

There are various and enduring references to AD as a compassionate act in the case law, and it is often referenced when the decision not to prosecute is the result. In *Purdy*, Lord Hope referred to the gulf between what "section 2(1) [of the Suicide Act 1961] said and the way that the subsection was applied in practice in compassionate cases". Likewise, Lord Brown's remarks hint at compassion as an exception to the criminal law in cases of AD:

[1276] Article 115 of the Swiss Federal Criminal Code 1937 (StGB) states that:
"Whoever, from selfish motives, induces another person to commit suicide or aids him in it, shall be confined in the penitentiary for not over five years, or in the prison, provided that the suicide has either been completed or attempted.".
[1277] *Carter v Canada (Attorney General),* 2015 SCC 5, [2015] 1 SCR 331.
[1278] British Columbia Civil Liberties Association, 'The Death with Dignity Decision Explained'. (6 Feb 2015) <https://bccla.org/2015/02/the-death-with-dignity-decision-explained/> accessed 14 Nov 2021.
[1279] *Carter* (2015) [1].

> ... behaviour contrary to the criminal law is invariably to be deprecated if not always to be prosecuted… I seriously question whether one should always deprecate conduct criminalised by section 2(1)… suppose, say, a loved one, in desperate and deteriorating circumstances, who regards the future with dread and has made a fully informed, voluntary and fixed decision to die, needing another's compassionate help and support to accomplish that end (or at any rate to achieve it in the least distressing way)… Are there not cases in which… many might regard such conduct as if anything to be commended rather than condemned?.[1280]

In some ways, compassion is already enshrined in the *English* legal framework on AD; key amongst the DPP guidelines on assisted suicide is the sixth guideline that tends in favour of prosecution, which explains that prosecution is more likely if the person assisting is 'not wholly motivated by compassion'.[1281] In contrast, prosecution is less likely if 'the suspect was wholly motivated by compassion'.[1282] Paragraph 44 of the policy, however, stresses that motive is key — the mere fact of some benefit or gain accruing to the person(s) assisting the AD is insufficient to establish that their conduct is not motivated by compassion:

> [T]he police and the reviewing prosecutor should adopt a common sense approach… The critical element is the motive behind the suspect's act. If it is shown that compassion was the only driving force behind his or her actions, the fact that the suspect may have gained some benefit will not usually be treated as a factor tending in favour of prosecution…[1283]

[1280] *Purdy* [102].
[1281] CPS, 2010, para. 43 (6).
[1282] Ibid 45 (2).
[1283] Ibid 44.

Interpretation of the compassion factor may be somewhat challenging to operationalise. Lewis notes that when compassion is the mechanism or justification for legal change on AD, 'the suspect's compassion is [understood as] a response to the suffering experienced by the victim'.[1284] Lewis argues that: [b]y eliminating these crucial characteristics of a compassion-based regime, the policy fixates on an impoverished understanding of compassion as an unselfish motive, rather than as a response to the victim's suffering.

Following Lewis' analysis, it appears that the policy's compassion criterion will be fulfilled when the assistant's conduct is not explained by gain-seeking (material and/or perhaps emotional) reasons. However, this negative definition is vague and implausible. It is surely not the case that any non-self-interested motive qualifies as compassionate. Black asks,[1285]

> Am I compassionate if I assist someone's suicide in the belief it will free scarce (public) resources that might benefit others more than V? Probably not. Rather, it is submitted that D's compassion must somehow be oriented toward V. This leaves us with one set of victim-focused policy factors that may add substance to the compassion criterion: those that point to V having made a valid decision to perform suicide. However, acting from concern for V's autonomy is probably inadequate to warrant the judgment that D's conduct is compassionate; at least, this conclusion appears counterintuitive.

Compassion for the dying person requires more than the mere satisfaction of their autonomous choices; rather, concern for their welfare appears better to capture what it means for the assistant's conduct to be compassionate. In the *Loder* case, in respect of the public interest in prosecuting one of the suspects, the CPS found 'he acted out of compassion and he understood Ms

[1284] Penney Lewis, 'Informal legal change on assisted suicide: the policy for prosecutors' (2011) 31(1) LS 119 132.
[1285] Isra Black, Better off Dead? p.123 (n 5).

Loder [sic] wish to die and respected it'.[1286] And in *Arnold*, the CPS statement reads, '[the assistant's] parents had clearly communicated their decision to her and that she was acting out of compassion'.[1287] Therefore, on the limited available evidence, Lewis' argument that the policy employs a notion of compassion is correct. Thus, UK law already, albeit indirectly, incorporates compassion via prosecutorial decision-making.

This might be appropriate for England and Wales, where arguably there is already clarity in the law, but that is not the case in Scotland. Lord Sumption said in *Nicklinson* (in relation to the argument in *Purdy*) that 'Although presented as a complaint about the lack of clarity in the published policy, it is in reality a complaint about its substance'.[1288] Arguments for lack of clarity in England may well be a spurious attempt to change the law (as outlined at 3.3), but in Scotland, legislating for AD and publishing prosecutorial guidelines therein (as recommended at 4.0) would have a dual benefit – clarifying the law and building the substance of that law on compassion i.e. adopting the Fuller + Compassion formula. There are likely instances of suicide assistance that are not appropriate, and the criminal law must not make exceptions for such behaviour, but when presented with an opportunity to build a brand new law, as is the case in Scotland, it can do so in a novel and effective way.

Feenan calls for more research on compassion and law and believes it may help change the optics by which law is scrutinised, not simply through traditional categories but through prisms of harm, injury, and suffering, which will allow for greater socio-legal awareness.[1289] Such research will help us to better understand the law in action and is ripe for further research on AD:

[1286] CPS, 'No charges following death of Caroline Loder' (16 Aug 2010).
[1287] CPS, 'Assisted Suicide of Dr and Mrs Arnold' (15 Jan 2014).
[1288] *R (Purdy) v DPP*; cf *Nicklinson* [247].
[1289] D. Feenan, 'Law and Compassion' [2017] (n 139).

> The increasing recognition of the importance of addressing the beliefs, values and broader welfare not only of mentally incompetent persons, but also of those mentally competent persons seeking assisted dying makes this another area ripe for further research. The recognition of rights to life, liberty and security of the person seeking assisted dying in Canada, and linked justifications elsewhere on the bases of autonomy and bodily integrity, suggests consideration of new doctrinal development while also reinvigorating assessment of existing scholarship on rights and compassion...[1290]

Thus, whilst compassion is clearly an emerging area of law and legal jurisprudence, its usefulness is promising in the context of healthcare/medical law and the legal sphere more generally, especially as the basis of study on end of life scholarship.

10.5 A defence of 'compassionate killing' – a compromise position?

Compassion is most often considered in the context of defences and sentencing, but I aim to apply it prior to this, at the stage where we consider what the law *ought* to be, before drafting a statute to allow it. Section 2.1.2. touched upon whether, following *Drury* introducing a *wicked* element to the law of homicide, a defence of compassionate death could be introduced, and it is worth exploring that submission more now.

The use of compassion *after the fact* is not persuasive; Bandes[1291] highlights that "a more serious rule-of-law problem is posed when compassion is used to make unauthorised exceptions to a rule",[1292] which we see with AD in the UK at present. In developing the concept of compassion as a defence,

[1290] Ibid.
[1291] Bandes, 'Compassion and the rule of law' (n 155).
[1292] Ibid 187.

Keating and Bridgeman[1293] build on the work of Nussbaum,[1294] who identifies three components of compassion, based upon Aristotle's *Rhetoric*:

(1) the belief that the suffering is serious rather than trivial.
(2) the belief that suffering was not caused primarily by the person's own culpable actions.
(3) the belief that the pitier's own possibilities are like those of the sufferer.[1295]

Some jurisdictions have adopted a nuanced approach to homicide law, with 'compassionate killing' or 'consensual homicide' as lesser offences,[1296] though still subject to penalties of imprisonment and large fines,[1297] whilst others provide that the defendant who commits consensual homicide motivated by compassion may be wholly exonerated.[1298] In Scotland, compassionate killings are unlawful homicides, so the argument here is that it is no longer appropriate to treat compassionate assistance following a competent request in the setting of a terminal illness as homicide. Instead, we should explicitly reframe AD proactively, leaving any discrepancies that might fall outwith a statutory framework to the criminal law, therefore removing a whole subset.

[1293] Heather Keating and Jo Bridgeman, 'Compassionate Killings: The Case for a Partial Defence' 713 (n 332).
[1294] M. Nussbaum, 'Compassion: the Basic Social Emotion' (1996) 13 Social Philosophy and Policy 27, 28. See also, M. Nussbaum, *Upheavals of Thought: The Intelligence of Emotions.* (Cambridge University Press 2001)
[1295] M. Weber, 'Compassion and Pity: An Evaluation of Nussbaum's Analysis and Defence' (2005) 7 (5) Ethical Theory and Moral Practice 487–511.
[1296] In Italy the Penal Code has 'consensual homicide' as a crime. See the case of *Piergiorgio Welby* where a doctor was acquitted on the grounds that she is bound to act according to her patients will; Switzerland also operate under consensual homicide under Article 114; The Dutch Criminal Code has similar wording in Criminal Code (Neth.), Art293.1, as amended by the Termination of Life on Request and Assisted Suicide (Review Procedures) Act 2001 as discussed in P. Lewis, *Assisted Dying and Legal Change (*OUP 2007) p.7-8.
[1297] Criminal Code (Neth.), Art. 23. States 'imprisonment not exceeding twelve years of a fifth-category fine (45000 Euros)'.
[1298] Penal Code (Uruguay), Art. 37.

Understandably, the offence of homicide must carry the most serious of consequences to act as a deterrent. However, attempts to prevent AD through these sanctions are ineffective since we have numerous doctors admitting to the practice and numerous families assisting.[1299] Prejudices and a strong inclination to "do the right thing"[1300] are firmly rooted in a person's identity and moral outlook, and, arguably, the mere use of sanctions will not work to dissuade people. We have seen[1301] that some subscribe to the principle that if a law is unjust, it is not only right to disobey it, but that you are obligated to do so. Bandes considers compassion in the context of those who deviate or flout the law, and references Martin Luther King's famous argument for violating the law to increase respect for the law in his *Letter from Birmingham Jail* 1963.[1302]

For a long time, compassion has been applied to reduce a homicide charge to manslaughter (in England, Wales and Northern Ireland) if done to aid another in danger. Lord Holt C.J. said in *R v. Mawgridge* (1708):

> '[I]f a man perceives another by force to be injuriously treated, pressed, and restrained of his liberty ... and others out of compassion shall come to his rescue, and kill any of those that shall so restrain him, that is manslaughter ... for when the liberty of one subject is invaded, it affects all the rest: it is a provocation to all people, as being of ill example and pernicious consequence.' [1303]

The concept continued to be used as the partial defence of provocation to a charge of murder in Canada,[1304] although, in English Law, provocation has

[1299] See part III of this thesis.
[1300] *Ian Gordon* [34].
[1301] At 8.2.
[1302] Susan Bandes, 'Compassion and the rule of law' at 184 (n 155).
[1303] 84 E.R. 1107.
[1304] In the Canadian case *R. v. Hayward* (1833), 6 Car. & P. 157, 172 E.R. 1188, at p.1189, Tindal C.J. told the jury that the defence was derived from the law's 'compassion to human infirmity'; applied *R. v. Tran*, 2010 SCC 58, [2010] 3 S.C.R. 350.

now been replaced by loss of control.[1305] Compassion is not incorporated more widely within common law in the UK. For example, in the law of tort, there is no general legal duty to alleviate the suffering of another:

> The dictates of charity and of compassion do not constitute a duty of care. The law casts no duty upon a man to go to the aid of another who is in peril or distress, not caused by him. The call of common humanity may lead him to the rescue...A man who, while travelling along a highway, sees a fire starting on the adjacent land is not, as far as I am aware, under any common law duty to stop and try to put it out or to warn those whom it may harm. He may pass on, if not with a quiet conscience at least without a fear of legal consequence. [1306]

Proposals to consider compassionate killing as an exception to the criminal law have been considered in England and Wales but were unsuccessful.[1307] Nevertheless, the idea of a special defence is gaining currency[1308] and may be suitable for a jurisdiction such as England and Wales, where there is already a clearly-defined crime of assisted suicide as a starting point. Keating and Bridgeman have argued for the introduction of a partial defence of consensual homicide or 'compassionate killing', which would reduce the offence, in recognition of the act as a responsive relational act of care.[1309]

Huxtable would stop short of legalising PAD, and instead of a *defence*, proposes a special reduced *offence* of 'compassionate killing'. He argues that this label reflects the 'killing' aspect that concerns opponents of AD and the 'compassion' aspect that exercises proponents.[1310] I have argued in this

[1305] Coroners and Justice Act 2009, Section 56 Abolition of common law defence of provocation; Section 54 Partial defence to murder: loss of control.
[1306] *Hargrave v. Goldman* (1963) 110 C.L.R. 40, 66–67, per Windeyer J.
[1307] Criminal Law Revision Committee, *Working Paper on Offences Against the Person* (1976) (82) and Report No. 14 (1980) (115) later updated by the Reform of Offences against the Person (2015) Law Com number 316.
[1308] H. Keating & J. Bridgeman, (n 332).
[1309] Ibid.
[1310] Richard Huxtable, 'Splitting the difference? Principled Compromise and Assisted Dying' (n 334).

thesis that opponents and proponents have a shared value and goal to show compassion to people at the end of life. Appropriate sentences might include probation or other non-custodial penalties, counselling and other necessary support, and perhaps further training in the case of convicted health professionals.[1311]

Huxtable's suggestion of a specific offence is prudent and could work quite well in Scotland, where there is no specific offence. It could help clarify some of the uncertainty around what types of assistance are considered murder/culpable homicide, and give a clear steer about which criminal offence is the appropriate choice for the prosecutor, assisting with fulfilling Fuller's criteria.[1312] However, whilst *legally* a specific offence of compassionate killing could work (and would be similar to Section 2 of the Suicide Act 1961 with less severe consequences), it would not address the issue of showing greater compassion to those who wish the choice of AD at the end of life. It would remain a criminal offence to assist someone in ending their life, and the objective of showing compassion to the terminally ill would not be met; thus, only the clarity aspect of the Fuller + Compassion formula would be met. Likewise, it would not act as a proactive protective measure in the way that a proscribed PAD law would, as none of the safeguarding *prior* to the death would be present. Furthermore, our concerns regarding justice, access, and equality present themselves again, as some may not be able to secure a willing HCP or relative to assist them.

During consideration of the 2013 Bill, Laurie indicated that he would support the creation of a specific offence but, in contrast to Huxtable, in a negative way - "where manifest undue influence has been established", this 'coercion' offence would carry a specific penalty.[1313] Again, this is a very prudent suggestion in terms of clarity and one I would support in a broader sense as

[1311] R. Huxtable & M. Möller. 'Setting a Principled Boundary'? Euthanasia as a Response to 'Life Fatigue' (n 785).
[1312] *The Morality of Law* 63.
[1313] Health and Sport Committee. Official Report, 20 January 2015, Col 38 at para.188.

outlined in Section 2.1.[1314] However, Laurie recommended that this offence sits within the proposed permissive legislation. A PAD law is arguably not the appropriate place for this since this thesis treats AD and suicide as distinct. Therefore, assisting suicide as an explicit offence for those acting out of malice should be a separate task from legalising PAD for reasons of clarity and compassion.

There are, however, persuasive arguments in favour of introducing a new partial defence to homicide. The provision of a partial defence would enable courts to recognise that there are significant moral distinctions to be drawn. In practice, of course, prosecutorial authorities do exercise discretion not to prosecute for homicide in AD cases, but as outlined, discretionary enforcement of the law is problematic.[1315] The question is whether these exercises of merciful discretion should be replaced by a formal provision of an appropriately defined partial defence to homicide, namely AD, for compassionate consensual reasons. Building such a defence would not be too onerous a task, and a good starting point would be to refer to the DPP guidelines regarding prosecution in England and Wales, which is a consideration in relation to prosecution for assisted suicide.[1316]

The main motivation to dismiss a partial defence or offence of compassionate killing and instead advocate for legislation to change the status of the offence itself is because all of this would take place *after* the fact. It would involve prosecutors piecing together evidence based on circumstances to which the victim can offer no testimony. Therefore, adopting a compassionate killing approach seems to defeat the very idea of the principles (clarity and compassion) behind an AD law in the first place. Legislation to provide for AD, on the other hand, would allow a full and thorough investigation of the

[1314] 2.1 Examination of the Current Law, *"The legal status of suicide is an area that could benefit from clarification".*
[1315] See part II of this thesis.
[1316] CPS (2010) Policy at para 43.6, 44 and 45.

facts *prior* to any death, providing opportunities to ensure the assisted death was safe.

A defence or offence of 'compassionate assisted dying' is not appropriate for Scotland. It does not solve the already established problems about prior safeguarding, for example, whether compassionate (opposed to wicked) assistance was provided following an explicit request from a person with capacity. A defence such as this would not provide for the checks, balances, safeguards and review and reporting procedures associated with legislation to permit AD. Importantly, AD legislation would provide the opportunity for patients to discuss any alternative care packages that could negate the need for AD with their trusted HCP, potentially providing an avenue for lives to be saved (by avoiding the actions taken by the terminally ill outlined in chapter 6 and 7) or at least happily prolonged.[1317] A well-drafted AD law should always include discussing and offering alternative health and social care requirements before any AD. This recommendation features in the proposed *Assisted Dying for Terminally Ill Adults (Scotland) Bill* 2021, again evidencing this work's contribution and impact - although, arguably, any well-drafted proposal on AD should have such safeguards in place.

Rejecting compassion being used after the fact is justified, *inter alia,* on the basis that it is difficult to quantify. Thus, compassion has a place in the rule of law, but only to the extent that it should be used as the basis to help inform deliberations on what the law ought to be, not to deal with the criminal law after the fact. Herring would agree:

> ...compassion is simply too vague to satisfy the requirements of the rule of law. If the law is going to require individuals to act in a particular way, then citizens are entitled to know in advance what the

[1317] An interesting area of research would be consideration of whether AD legislation enhances Article 2 (right to life) via protecting vulnerable people who are wrongfully assisted to die.

> law requires of them. The difficulty is that the concept of compassion is insufficiently clearly defined to provide precise guidance.[1318]

Thus, reforming the law with clarity and compassion serves the dual purpose of providing a framework to know what the law *is*, with compassion at the forefront of our minds when drafting what the law *ought* to be – it ought to be clear *and* compassionate as a vehicle to promote protection, justice, and equality. Such an approach would satisfy Fuller's criteria for good law, allowing a key theme of this work to be fulfilled whilst instigating a more compassionate response to society's suffering at the end of life.

10.6 Limitations

Compassion in the law, whilst relatively new, shares another characteristic with AD in that it too courts controversy. When a US Law School partnered with a compassionate communities programme and declared itself 'the nation's first compassionate law school',[1319] many, including the professors, took exception to it. One student responded that the 'compassionate' label recognised the importance of advocating for social justice,[1320] and of course, that is the basis of the rule of law.

While much of the literature approves of compassion in law, a considerable literature opposes its role. Epstein sees compassion as 'dangerous' as he argues it allows 'rational, self-maximising recipients' to 'play the system for all it is worth'.[1321] Again, I would argue that such comments are made in the context of how we *currently* use compassion in law – after the fact in judicial decisions, for example. Whereas when we flip this, and use it as the basis to create a much-needed statute, these concerns are diminished. Feenan argues that Epstein's concerns incorrectly assume, however, that human

[1318] Herring, 'Compassion, ethics of care and legal rights' 161 (n 191).
[1319] L. Milligan, 'Commentary: UofL Law School Is No Longer Neutral' (2016) Courier Journal.
[1320] Ibid.
[1321] R.A. Epstein, 'Compassion and Compulsion', (1990) 22 Arizona State Law Journal p.27.

behaviour inherently involves 'rational, self-maximising', whereas extensive psychological research shows that human behaviour is much more complex:

> But, even if some people were 'rational, self-maximisers', it neither follows that law need be gulled by those who would seek to engage in exploitation for personal gain or that, even if this were attempted, an occasional exploitation should necessarily deny compassionate law for all.[1322]

This argument has been made in previous chapters, that is, that the real tangible suffering of people should be given more credence than the theoretical concerns that harm will be done to a very small minority, especially when this harm factor has been disproved by jurisdictions that have legalised AD.[1323] The projected moral erosion that was hypothesised in jurisdictions such as the US, Switzerland and other states was refuted by evidence to suggest otherwise in the aforementioned case of *Canada v Carter*, which allowed the court to consider the claim that AD is the thin end of the wedge; it rejected that claim, having drawn on the most comprehensive research on AD ever presented before a court.[1324] In Oregon, the jurisdiction which has had AD legislation for the longest period, none of the abuses some predicted have materialised. [1325]

Another criticism of the mainstream understanding of compassion is that it prioritises the experience of those who witness suffering – thus, compassion arguably grows out of privilege and reaffirms hierarchies and inequalities.[1326]

[1322] Feenan 'Law and Compassion' (2017) 126 (n 139).
[1323] Battin, et al,. 'Legal physician assisted dying in Oregon and the Netherlands: evidence concerning the impact of patients in "vulnerable" groups"' (n 529).
[1324] Para 23-28, 105 & 120, *British Columbia Supreme Court, 2012 BCSC 886, 287 C.C.C. (3d) 1* <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/14637/index.do> accessed 11 May 2020.
[1325] Timothy E. Quill, 'Legal Regulation of Physician-Assisted-Death – The Latest Report Cards,' (2007) 356 NEJM 1911-13; Susan Okie, 'Physician-Assisted-Suicide – Oregon and Beyond,' (2005) 352 NEJM 1627-30; Courtney Campbell, "Ten Years of 'Death with Dignity'," (2008) New Atlantis 33-46.
[1326] E. Spelman, *Fruits of Sorrow: Framing Our Attention to Suffering* (Boston: Beacon Press 2001).

I disagree with this and believe that compassion prioritises the experience of those who suffer. In any case, embedding compassion in laws on PAD would mean that only those who seek to use the compassionate law would do so. It would still remain embedded in the broader, already established, end-of-life practices, such as those seen in palliative care.

Some argue that there are better ways of showing compassion to those at the end of life, primarily focusing on the increased use of palliative care, but as outlined at 6.3, this approach misses the reality that more and better care cannot alleviate all symptoms and suffering.[1327] As was outlined in chapter 8, paternalism is still embedded in end-of-life care, borne via the compassion of doctors to do their best for their patients. Compassion as the basis of law reform, however, allows a shift to empowering *patients* with autonomy to make their own choices, something that is of significant importance to dying people (as outlined at 7.5.2 *Choice*). In any case, it has been shown that palliative care and AD can go hand in hand and are not mutually exclusive.[1328]

Nevertheless, some will see compassion as the basis for law reform on AD as anathema and maintain the view that PAD erodes compassion and dignity. One example of a marked contrast is between Rowan Williams, the former Anglican Archbishop of Canterbury, who stated that, “there is a very strong compassionate case” for AD, whilst Pope Francis has said that this is “false compassion.”[1329]

Thus, an ideal scenario is one where a compromise position is adopted, with a law allowing us to practice compassion towards sufferers, alongside protecting vulnerable people, where the doctrine of the sanctity of life is not affronted. Others have illustrated what a compromise position in this context

[1327] See part III.
[1328] Gerson (n 836); See also Assisted Dying for Terminally Ill Adults (Scotland) Bill 2021 at section 2.4 Palliative Care.
[1329] Death with Dignity, Religion and Spirituality <https://deathwithdignity.org/learn/religion-spirituality/> accessed 14 Nov 2021

means to them;[1330] this research recommends that PAD should be legalised in Scotland, but only for a narrow set of people – those who are terminally ill.

10.7 Constrained Compassion

There are differences in the extent to which AD has been legalised worldwide; whether it applies to physical or mental suffering, the time limits on disease trajectory before qualification, self-ingestion, or HCP administration, amongst many other considerations, the different elements of which go beyond the scope of this work but all of which should be thoroughly considered as part of the legislative process. Terminology and lack of decisive definitions were major issues in the 2013 Bill, namely that "terminal", "life-shortening", and "unacceptable" were too flexible and would potentially allow eligibility to be cast too wide.[1331] Loose terminology such as this has since been accepted in jurisdictions such as Canada, which decided upon death being "reasonably foreseeable" [1332] in the setting of a grievous and irremediable medical condition.[1333]

In Scotland, 'terminal illness' is described as a progressive disease where the consequence of that illness is that death can be reasonably expected - no time limit applies.[1334] The patient has an illness a) that is advanced and progressive, or with risk of sudden death; b) that is not amenable to curative treatment, or treatment is refused or declined by the patient for any reason; and; c) that is leading to an increased need for additional care and support. This definition for the purpose of social security considerations is based on the clinical judgement of a registered medical professional.[1335]

[1330]Richard Huxtable, 'Splitting the difference? Principled Compromise and Assisted Dying' (n 334).
[1331] H&S committee Stage 1 report at p.24.
[1332] Bill C-14 Section 2 (d).
[1333] Ibid.
[1334] Scottish Government, Social Security, <https://www.gov.scot/policies/social-security/terminal-illness/> accessed on 12/3/2020.
[1335] Ibid.

Recommending that AD should only be for terminally ill patients – and relying on already established healthcare definitions of this - means that interpretation issues are forgone or reduced. This position is adopted on the basis that once such a law is passed and proven safe and effective, consideration can then be given, if there is public and political appetite for it, to extend the criteria to include others.

All words have different interpretations depending on who is interpreting them, and so it is possible that some will still take issue with the proposed restriction of AD to terminal illness as currently defined because terminal illness in Scotland includes:

> …a wide range of different diseases and individuals may have a single disease or a number of conditions at any one time.[1336]

This means that the definition is broad and includes diseases such as Multiple Sclerosis (MS), Amyotrophic lateral sclerosis (ALS), and Alzheimer's. However, it is recommended that individuals only be able to access PAD if they have full mental capacity, have given informed consent, and explored all other reasonable health and social care alternatives.[1337] Narrowing the category of legal PAD to terminal illness also makes the situation more coherent for politicians and others to comprehend and acts as an additional safeguard and protection against abuse.

Adopting terminal illness as the criterion helps to strike a balance between compassion and constraint. PAD laws cannot be a free for all, and in this way, compassion and autonomy are constrained to find a compromise position. Limiting AD to the terminally ill is a safeguard – if we lose the safeguards, we end up back in a position of being too far in the direction of after-the-fact mercy, a circumstance that has been thoroughly rejected in this

[1336] Ibid.
[1337] As seen in the Assisted Dying for Terminally Ill Adults (Scotland) Bill 2021 consultation at 1.1 *Safeguards.* The author advised the member in charge on safeguards, the decision on what to incorporate was his own.

thesis. Justice requires that we protect the vulnerable, and initially casting the net narrowly allows us to take considered and cautious steps towards striking a better balance.

Ideally, PAD would be safely available for all those who wish it and case law decisions, such as that in *Nicklinson*[1338] point towards allowing AD not just for the terminally ill but also for people with progressive conditions and those who are permanently disabled. It makes sense not to limit the choice of AD to certain groups if the guiding principles include compassion, equality and distributive justice. However, this is not politically possible, certainly not as a first step.

Attempts to reform the law in Scotland in 2010 and 2013 failed partly because the eligibility criteria were set too broadly. In 2010 the eligibility requirements were that a person had to have a terminal illness and find life intolerable or were permanently physically incapacitated to such an extent as not to be able to live independently and found life intolerable.[1339] The 2013 Bill's criteria were that the person has an illness that is, for the person, either terminal or life-shortening or a condition that is, for the person, progressive and either terminal or life-shortening.[1340] The criteria were set in this way to help as many people address their suffering as possible. However, it proved unsuccessful, with politicians criticising the Bills for having cast the net too wide.[1341]

Adopting the already established definition of terminal illness in Scotland allows us to help people pragmatically and sensibly and offers a compromise

[1338] Lord Neuberger in *Nicklinson* [122] "there seems to me to be significantly more justification in assisting people to die if they have the prospect of living for many years a life that they regarded as valueless, miserable and often painful, than if they have only a few months left to live.".
[1339] End of Life Assistance (Scotland) Bill, Section 4.
[1340] Assisted Suicide (Scotland) Bill, Secion 8.
[1341] Bob Doris MSP, Health and Sport Committee (27 January 2015) <http://archive2021.parliament.scot/parliamentarybusiness/report.aspx?r=9750&i=89313> accessed 15 May 2019; see also Stage 1 report, Assisted Suicide (Scot) Bill para 135-146.

position. It is vexing that this would then preclude those suffering in extremis and who would live for many more years given that their condition alone would not cause death, but it is imperative that *incremental* change happens in an attempt to control what we can, whilst accepting that we cannot find a solution to every probable case. Recommending these restricted criteria is particularly difficult given how evident the level of suffering amongst claimants in AD cases has been.

There remains room for reasonable disagreement on whether PAD should be allowed only for the terminally ill or also for those suffering unbearably. One suggestion offered by Sheila McLean during consideration of the 2013 Bill was that requests for AD in difficult cases could be authorised by a specially appointed judicial or quasi-judicial body, equivalent to the Court of Protection in England. The committee noted that following the decision of the House of Lords in the case of *Airedale NHS Trust v Bland* [1993][1342] whenever it is proposed that life-sustaining treatment be withdrawn from a patient who lacks capacity, an application must be made to the Court of Protection for authority to proceed. However, this is no longer the case following *Re Y* [2018] UKSC 46.

It is open to policymakers whether a quasi-legal regulatory body could consider 'unbearable suffering' cases as exceptions to the legislation to allow, in exceptional circumstances, persons who are not terminally ill to avail themselves of PAD. There will be liminal cases, but most cases will not be liminal, and those few that are indicate 'no gratuitous violation of moral expectations', according to Brassington.[1343] The argument in this thesis is that the current situation, where no one has access to PAD in Scotland, and we operate in a system that is not regulated, is the least favourable scenario.

[1342] A.C. 789.
[1343] Iain Brassington, 'Five Words for Assisted Dying.' (2008) 27 (5) Law and Philosophy 429 < http://www.jstor.org/stable/27652661> accessed 11 May 2019.

Limiting AD to terminally ill patients and within the realms of physician-assisted only goes some way toward satisfying concerns regarding the protection of others. Whether well-founded or otherwise, there are genuine concerns about an overspill of people being edged towards death by internal or external pressures. By minimising the availability of PAD and regulating it within healthcare only, we minimise the risk to vulnerable people. Brassington explains:

> If the bar is too low, and assisted dying too widely available, we might discover situations in which a person feels pressured into making a request for assisted death that is not in earnest, and such situations ought to be avoided. Some people might feel that they have a duty to die…some people are simply vulnerable, and need protection from being nudged towards a death that they do not really want. Terminally ill criteria and unbearably suffering criteria go some way to providing that criteria.[1344]

Brassington believes his criteria could provide a bulwark against any potential abuse and that limiting AD to a narrower subset represents less of a risk. With 'terminal', the person is not going to recover; their death is foreseeable (as opposed to being a considerable number of years away), thus, it simply hastens the inevitable, since the person is not only going to die *with* the disease but *of* it. [1345]

It is worth noting here that whilst adopting Brassington's 'terminal' criteria, his further recommendation that 'unbearable suffering' be present is problematic and is not adopted in this thesis. Whilst acknowledging that suffering is usually present in the terminally ill already, there is inhumanity in laws that include necessary suffering as part of the criteria. If the basis of this reform is compassion, a person's condition should not have to develop to such a point

[1344] Ibid 431.
[1345] Ibid 435.

of intensity that they are suffering unbearably. If they are terminally ill, they should not have to begin suffering in the first place to be qualified to avail themselves. Suffering can also cloud competency, and the objective is to make sure that any person availing has full capacity.[1346] Suffering is also difficult to quantify, and one can imagine, given its subjective nature, a person simply stating their suffering is unbearable, when in reality it is not, in order to qualify for AD and thus to avoid suffering unbearably in the future.[1347]

Problems with terminology are inherent in bioethics generally, with principles such as sanctity and dignity proving challenging to pin down, and meaning different things to different people depending on the circumstances.[1348] However, whether a law is just, compassionate, dignified or none of these it should be in comprehensive existence in the first place. When considering the difference between illegality and justice, Fuller ponders:

> ...the word “law” is indeed an either or word; it stands in this respect in contrast with even so close a cousin as the word “Justice”...we are accustomed to thinking of Justice as something that may be difficult to define; we do not cringe at an open recognition that its boundaries may be shaded and uncertain. The word “law”, on the other hand, contains a built-in bias toward the black-and-white...we assume...that if we but put enough effort into the task, we shall be able to define with exactitude what is lawful and what is not...”[1349]

If Scotland wishes to move beyond the stalemate - as the majority of Scots do according to the polls – an attempt to redress the balance between protection and compassion should be a priority; the answer to this is to build

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[1346] J.L Werth et.al., ‘Requests for physician-assisted death: Guidelines for assessing mental capacity and impaired judgment.’ (2000) 6 (2) Psychology, Public Policy, and Law 348 <https://doi.org/10.1037/1076-8971.6.2.348> accessed 11 June 2019.
[1347] Jennifer Corns, 'Suffering as significantly disrupted agency' (n 978).
[1348] Kurt Bayertz, *Sanctity of Life and Human Dignity*, (1996) PHME Vol 52.
[1349] *The Morality of Law* 199.

a law that draws on a shared commitment to compassion which underpins Scottish society and culture.[1350] Whilst the current formal approach to AD in the UK is underpinned by deterrence, statutory reform to incorporate clarity and compassion is now desirable. In order to meet the test of good law, laws and policies should be adopted that maintain a firm line between permitted and prohibited PAD.

10.8 Conclusion

This chapter has outlined why compassion is an important but often overlooked principle in the AD debate. Incorporating it as the basis of law reform on this issue allows justice, equality, and Fuller's list to be satisfied, ultimately redressing the balance that has been skewed towards protection from potential harm for too long.

This chapter did not outline in detail what the specifics of any subsequent legislation would look like. In 1996 McLean and Britton wrote a draft bill that was not adopted by policymakers, being primarily an academic exercise.[1351] Drafting legislation is an art in itself, undertaken by drafters who are highly skilled and extensively trained in their expertise, which is why this thesis does not produce a draft bill. Instead, this chapter offers the philosophical foundations and some practical suggestions upon which future Bill discussions could be based, leaving it to Parliament to debate the fine details, remit and safeguards.

Practical recommendations include that any AD law should be restricted to healthcare practitioners only as they would be required to undertake medical diagnoses, capacity assessments, physiatric or other referrals and the prescribing and dispensing of medication *inter alia*; that health and social

[1350] Successfully reforming the law depends on a specific cultural script that renders AD morally permissible. This was seen recently in Canada, where AD is considered "culturally appropriate".
[1351] S.A.M McLean & A. Britton, *Sometimes a small victory,* 1996.

care needs should be addressed before any PAD; that AD should be limited to those who are terminally ill as per the Scottish definition for this, and that policymakers should examine whether a quasi-legal regulatory body could consider hard cases as exceptions to the legislation to allow, in exceptional circumstances, PAD for those who are not terminally ill but unbearably suffering.[1352] Earlier chapters recommended that conscientious objection be foremost when drafting PAD laws, and that a register of willing HCP's is constructed.[1353] Other matters that remain to be settled are whether a specific offence or defence should be included in proposed legislation; my recommendation has been that it should not, but that these considerations could form part of the broader discussion around homicide and AD reform more generally.

Whilst the rule of law is historically impartial, strict and definitive, society is not, and the law should better reflect that. This chapter has argued that whilst the law remains unclear, it is open to the Scottish Parliament to reform it in a way that, whilst little studied in legal literature, incorporates compassion – something that is already woven throughout Scottish society and end of life decision making.

Clichés about slippery slopes and non-consensual doctor executioners bedevil PAD,[1354] but there is now enough evidence from permissive jurisdictions that regulatory concerns can be answered. The international evidence is enduring, and whilst there is not a one-size-fits-all piece of law, much can be learned from the lessons of Scotland and other jurisdictions. Legal inertia on this subject is no longer sustainable; if AD is permissible, then laws should be framed so as not to inhibit this; instead, they should be fortified to facilitate it safely.

[1352] As noted, these recommendation, with the exception of the quasi-legal body, have been introduced to the proposed Assisted Dying for Terminally Ill Adults (Scotland) Bill 2021.
[1353] at 8.5.
[1354] Melanie Phillips, 'We risk turning doctors into executioners' (*The Times*, 18 March 2019) <https://www.thetimes.co.uk/article/we-risk-turning-doctors-into-executioners-mrbxg7w7c> accessed 1/2/22.

To summarise the Fuller + Compassion application; Scots Law has a general law on homicide but not a general law on AD. The generality of law is important in some instances, it requires flexibility to respond to our pluralistic society, but there is a lack of detail and clarity in Scots Law, which has led it to be confusing, unsafe and unjust. Scotland characterises itself as a compassionate country, and the time is ripe for reforming the law to extend compassionate choice to those at the end of life, whilst maintaining a steadfast commitment to deter the potential abuse of vulnerable people. Properly constructed good law, as per Fullers criteria, can do both.

This thesis argues that the current 'law' is not fit for purpose. This thesis further identifies that by legalising PAD, stringent safeguards and robust reporting and review processes would be put in place to facilitate the law. These processes would move towards protecting individuals, whilst affording the terminally ill safe liberation from suffering, and autonomy to control their death. If a statute is adequately promulgated (meeting Fuller's criteria for clarity, non-contradiction *inter alia*), prospectively enacted, and administered impartially in line with the law and with due process, this is an appropriate exercise under the Rule of Law – people being governed by measures laid down in advance and enforced equally according to the terms in which they have been publicly promulgated.[1355] This is *good law*, and to satisfy the requirements of this criteria, the Scottish Parliament should draft a PAD Bill that meets the values of clarity and compassion as accepted by Scottish society. The current proposal, *Assisted Dying for Terminally Ill Adults (Scotland) Bill* 2021, is the timely opportunity and the appropriate avenue to make this happen.

[1355] Jeremy Waldron, 'The Rule of Law' (n 94).

Thesis Conclusion

This thesis has explored assisted dying and has argued that in Scotland, the law should be used constructively as an instrument for change. The substantive chapters have addressed questions about what the law currently is, the consequences, and what the law ought to be, measured against Fuller's criteria for legal systems and the concept of compassion.

Gap filled

Given the attention that AD has been paid in other jurisdictions, it is unfortunate that a gap remained in the knowledge base on AD in Scotland. By investigating these matters, this research has filled essential gaps in the literature, giving a comprehensive overview of what the law is and judging it against Fuller's criteria to consider whether it is robust enough to withstand criticism levelled and persistent attempts to reform it.

Although Chalmers, Ferguson, and McDiarmid have briefly addressed other work on homicide in the context of Scots law and AD, the present work can be distinguished by its unique focus on the other legal and moral matters associated with AD - not solely the criminal law – and its dedication to a Scotland-specific solution. The research gap bridged is also important, given that policymakers are currently considering a proposal to reform the law on PAD in Scotland. This is significant because previous attempts have highlighted disagreement and a lack of clarity in the existing law, and have somewhat hindered the law reform process. This thesis gives a comprehensive overview of what the law on AD actually is in Scotland.

The introductory chapter of this thesis gave the background upon which the work was built, outlining why AD is a particularly relevant legal and public policy issue and needs to be addressed for modern-day Scotland. It outlined the history of the debate and how it has developed, introducing the view that specific permissive law on PAD is needed to clarify the law, reduce negative

consequences, and respond compassionately to dying citizens. It also outlined the aims and structure of the thesis.

Part I consisted of Chapter One, which introduced the theoretical framework with Lon Fuller's desiderata, serving as the primary framework against which to judge the law. Here also, compassion was introduced as the principal or concept behind any reform ultimately required in PAD in Scotland. Together the theoretical frameworks supported the emergence of the Fuller + Compassion formula, which could then be applied to law reform considerations. This in itself is an original legal and philosophical contribution.

Part II of the thesis included Chapters Two, Three, Four and Five. Chapter Two considered the Scots Law on AD by examining the current law, including an in-depth analysis of homicide and the principles, such as *mens reus, actus reus* and causation that underpin this law. It highlighted the lack of clarity in the existing framework in relation to AD and introduced some relevant case law.

Chapter Three was dedicated to case law on AD and the courts being used as an instrument for reform. It outlined AD cases unearthed as part of the research and analysed them in the context of the other known caselaw. Importantly, it built on the lack of clarity argument by thoroughly analysing the approach taken by the Scottish prosecutor, the Lord Advocate, and the consequences of there being no specific prosecutorial guidance on AD in Scotland, in contrast to the rest of the UK. It recommended that the Lord Advocate produce specific guidelines on AD in Scotland in a bid to comply with ECHR requirements of accessibility and foreseeability. This chapter outlined how the courts are not willing to institute change on AD law – we can see that unwillingness in *Ross,* UK case law and ECHR jurisprudence which have not moved the issue forward.

Building on the case law, Chapter Four was dedicated to the first-ever test case on AD in Scotland, *Gordon Ross v Lord Advocate.* It dissected the case and further evidenced the argument that the lack of clarity in Scots Law is perpetuated by there being no specific offence, defence, prosecutorial guidance and a lack of case law. It argued that the current prosecutorial approach is not fit for purpose and evidenced that there is, in fact, a gap between the law as stated and how the law is practised.

Chapter Five concluded Part II of the thesis by collectively analysing its chapters and the findings therein. Fuller's work featured heavily in this chapter (and Part II generally) and diagnosed the numerous complex problems with the current approach to AD in Scotland. It overturned the argument that the status quo is a protective measure against abuse and introduced the argument that permissive PAD laws act as a protective measure by allowing PAD but only in strictly regulated circumstances determined in advance. Using Fuller, Part II, on the whole, outlined how the Scottish Parliament, courts and the prosecutors' decisions have left Scots Law as a whole in deficit. The prosecutor has a limited mandate in a debate that is foremost concerned with proactivity rather than *after the fact* judgements. In the UK, the judicial route is not the constitutionally appropriate avenue, and in Part II we witnessed how prosecutorial and judicial discretion results in negative consequences, including mercy killings, such as those in the cases uncovered by this thesis. It highlighted how a permissive PAD law would negate the need for amateur assistance and thus reduce the negative consequences associated with this. This thesis has been unwavering in the view that this is a matter that must be addressed by the sovereign body, the Scottish Parliament.

Having built my arguments in Part II, Part III shifted from the criminal law analysis to consider the healthcare aspects of AD. It dealt with the consequences of the current prohibition and included Chapters Six, Seven, Eight and Nine.

Chapter Six was the most difficult chapter of this thesis to research. It dealt with the current prohibition's very real and harrowing consequences and gave examples from case law and case studies of people suffering harm, indignity and traumatic deaths. It dissected the argument that more palliative care would alleviate the need for PAD, it illustrated that the two are not mutually exclusive, and that PAD and palliative care already work well together in jurisdictions that have legalised AD.

Chapter Seven built on this and considered suicide by terminally ill people, the increasing phenomenon of rational suicide, the criminalisation of those who assist loved ones, the consequence of failed suicide attempts, premature deaths as a result of the current prohibition, and the phenomenon of suicide tourism. It considered the injustice in the current system; that AD is available to some, not explicitly by law, but by perpetuating a system where little is done to prevent assisted deaths from happening in our communities. Again, it showed how giving people the choice of PAD could negate many of the unintended negative consequences of the status quo.

Chapter Eight, on contradictory and confusing medical practice, outlined the medical interventions/omissions that take place every day in end-of-life care and began to build the argument that adding PAD to the already available choices would not be a leap into the unknown or even a calculated risk, but one which fits well with existing practice in a practical and principled sense, since compassion, autonomy, dignity and the alleviation of suffering already underpins much of end of life care.

Chapter Nine analysed and summarised the findings from Part III and justified why AD should be moved from the criminal law into healthcare, illustrating why HCPs are most appropriate to undertake the service of PAD. It then set the scene for the final part of the thesis.

Part IV consisted of Chapter 10, which brought the reader back to the theoretical concept of compassion as the basis of law reform in this area and described how this approach, when tied to clarity, is fitting, in a move away from autonomy and dignity as the foremost guiding principles. It depicted how autonomy and dignity will still play a prominent role because of their usefulness regarding patient consent and reducing suffering via expanded choices. It showed that compassion is an emerging area of legal analysis and one which merits further serious consideration in relation to AD in Scotland. This chapter also gave some practical recommendations for reform. Whilst acknowledging compassion's limitations, it was concluded that the Fuller + Compassion formula can serve to correct the lack of clarity and compassion in Scots Law on AD.

The importance of this thesis is twofold: at the level of the individual citizen the thesis argues for law reform for reasons of clarity in decision making, protection of vulnerable people and importantly, compassion towards avoidable suffering. At a wider level, the thesis allows policymakers, academics, and others to have a succinct reference point from which to glean information on AD in Scotland. It has been shown that the research from this thesis is already being used as the basis of attempts to reform the law on AD in Scotland, evidencing its original contribution, impact, and the viability of the arguments presented.

The term “law reform” is used throughout this work, but it has been shown that we are beset with so much uncertainty that this is more an exercise in *creating* much-needed law than reforming clearly understood existing law. In any case, this thesis moves the debate forward and gives practical steps as to how the law in Scotland can be set within appropriate boundaries and parameters. This thesis offers a framework for *good law* as judged against Fuller's criteria and provides novel approaches to end-of-life issues for legislators, practitioners and citizens.

Prohibitions are often both instrumentally and symbolically important and some believe their removal could weaken critical attitudes, practices, and restraints.[1356] However, the success or failure of such arguments ultimately depends on speculative predictions of a progressive erosion of moral restraints. If dire consequences had been proven to follow in other jurisdictions which have taken the step to legalise PAD, then prohibiting practices is justified. But this thesis has shown evidence to the contrary and that distinctive firm lines can be maintained in public policies thus, "better safe than sorry" is not a comprehensive enough or proportionate justification for maintaining the argument that those suffering at the end of life should not have the choice of an PAD in Scotland.

Scotland has consistently demonstrated a willingness to learn from practice elsewhere and carve a distinctive legislative path from the rest of the UK.[1357] Looking (in this thesis) at what other devolved legislatures have done has been necessary and instructive, although no direct comparison has been undertaken. After the last attempt to reform the law in Scotland (2013 Bill), the Scottish Parliament Health and Sport Committee concluded that experience in other jurisdictions provides a limited basis for reflection and cannot be read across into the Scottish context.[1358] This is because the requirement within each bill varies from country to country, and the cultural context in which laws operate will be different. This thesis has examined the requirements of Scots Law and married it with the principles and values explicit in Scotland's culture to provide a unique and bespoke Scottish solution to the issue of AD.

[1356] Beauchamp and Childress, *Principles of Bioethics,* p.180 (n 880).
[1357] Following the 2013 Bill failing, the Scottish Parliament Health and Sport Committee tasked Professor David Clark with producing a report titled 'International comparisons in palliative care provision: what can the indicators tell us?' 9th Report, 2015 (Session 4); also more recently, Finland for example, where the baby box programme originated and was subsequently implemented in Scotland.
[1358] H&S Comm, Stage 1 Report on AS (Scot) Bill, 6th Report, Session 4, (2015) at para 133-134.

I can defend this thesis on the basis that I approached the problem with critical distance and from a position of compassion and understanding for both sides of the debate. As someone who has worked in a professional capacity in this area *and* as a legal scholar - my conviction, at this time, that the law must be clarified in a way that shows compassion to terminally ill people who want the choice of PAD, is unwavering. I respectfully disagree with schools of thought and opinions/policies throughout this thesis; my hope is that I have done so in an informative and respectful manner and that this research will help contribute to the debate as it inevitably moves forward.

This thesis has brought much-needed clarity to the issue of Scots Law on assisted dying and will, I trust, serve as a tool for a "drop in temperature" and an "increase in light".[1359]

This thesis started by dedicating the work to those who have fought for the right to have a peaceful death on their terms and those who have died a bad death. My sincere hope is that this work can play some small part in helping to secure greater choice at the end of life for my fellow Scots; then, it will all have been worth it.

[1359] H. L. A. Hart, 'Book Review—*The Morality of Law*' (1965) 78 HLR 1281.

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