Introduction

Much needs to be done, urgently and everywhere, to improve the availability of quality end-of-life care.[1] Despite the major advances in medicine and palliative care over the course of the last century many patients, even in affluent Western nations, still die in pain and discomfort. Some entreat their doctors to put an end to their suffering either by killing them or by helping them to kill themselves. In the vast majority of jurisdictions around the world a doctor who complies with such a request commits the offence of homicide or assisting suicide and faces both criminal punishment and professional censure.

Yet, if opinion polls are to be believed, a clear majority of people in countries like the United States and the United Kingdom think it should be lawful for a doctor to end a suffering patient's life on request, either by administering a lethal injection or by assisting the patient's suicide.[2] Campaigners for relaxation of the law, such as 'Compassion and Choices' (formerly the 'Hemlock Society') in the United States and 'Dignity in Dying' (formerly the 'Voluntary Euthanasia Society') in the United Kingdom, are not proposing that a doctor should be allowed to kill[3]

[1] Felicia Marie Knaul et al., 'Alleviating the Access Abyss in Palliative Care and Pain Relief – An Imperative of Universal Health Coverage: The *Lancet* Commission Report' (2018) 391 *Lancet* 1391; Keown3, chapter 11.

[2] Polls purporting to show this must, however, be treated with caution. Research commissioned by the House of Lords Select Committee on the *Assisted Dying for the Terminally Ill Bill* (the 'Mackay Committee') concluded that the opinion polls studied were of limited value and could not be accepted at face value as an authentic account of opinion. This was particularly true of polls of public opinion which reflected knee-jerk reactions to simple options and which did not form a very useful guide to public opinion as support for legislative change. *Report of the Select Committee on the Assisted Dying for the Terminally Ill Bill* (HL Paper 86 I of 2004–05) para. 232. See also Keown4, 113–4; Robert Goff, 'A Matter of Life and Death' (1995) 3 *Med L Rev* 1, 11. One may add that the polls may largely reflect the influence of the mass media, whose coverage of the issue, with its focus on the moving stories of individual patients who want euthanasia, is broadly supportive of legalisation.

[3] Some advocates of VAE object to the use of the word 'kill' in this context. They argue that 'killing' is a word that like 'rape' connotes a lack of consent, and that in discussions of VAE

patients whenever the doctor wants. Mindful of the obvious and gross abuses which might follow were doctors to be given a completely free hand, such organisations typically propose that doctors should be allowed intentionally to end life only if patients are competent to make a decision about euthanasia; have been informed about their diagnosis, prognosis and alternatives such as palliative care, and have voluntarily asked for life to be ended or to be given the means to end their own life. Nor do such organisations typically propose that the law should allow doctors to kill patients whenever the patient wants. The patient should not only have considered the options but must also be terminally ill or experiencing unbearable suffering. Further, reformers typically put forward some form of procedural safeguards in an attempt to ensure that VAE would be available only to patients whose request was truly voluntary and who were genuinely terminally ill or suffering unbearably and for whom there was no reasonable alternative. Such safeguards may include a requirement that, beforehand, the doctor consult an independent doctor and, after the event, file a report with some public authority like a review committee.

The ethical question whether it can ever be right for a doctor intentionally to kill a patient, even one who is suffering and who asks for death, continues to generate debate. That important issue of fundamental moral principle has been debated in other books, including *Euthanasia Examined*.[4] Although *Euthanasia, Ethics and Public Policy* outlines these arguments, its focus is different. It asks: whether or not VAE and PAS are morally justified in certain circumstances, if they were legalised could they be effectively controlled by the law? 'Effective control' means *control which is sufficient to achieve the degree of control and protection that is warranted by the importance of the rights and interests to be protected, and that has been regularly accepted by proponents of relaxed laws to be desirable and asserted by them to be attainable in virtue of the safeguards*

the word 'kill' is misleading and emotive. See Jean Davies, 'Raping and Making Love Are Different Concepts: So Are Killing and Voluntary Euthanasia' (1988) 14 *J Med Ethics* 148. However, whereas the normal definition of 'rape' is sexual intercourse without consent, the normal definition of 'kill' is simply 'put to death; cause the death of, deprive of life' (*The New Shorter Oxford English Dictionary* (1993) I, 1487). One can, therefore, kill with or without consent. It makes perfect sense, for example, for a soldier to say, 'My wounded comrade asked me to put him out of his misery so I killed him.' Although it is true that the word 'kill' carries emotive overtones, these overtones may be said to reflect the inherent moral gravity of taking life.

[4] Keown1, especially chapters 1–10.

stipulated in the proposed laws themselves. The rights and interests to be protected could scarcely be more important: we are considering proposals to allow some private citizens (doctors) intentionally to kill other private citizens (patients) and to help them kill themselves. We should surely show something of the same scrupulousness about the criteria and procedures for allowing such killing as we should when considering proposals to permit capital punishment. It may well be that a majority of people support relaxation of the law to permit capital punishment but, leaving aside the disputed moral question whether capital punishment is ethically defensible in principle, those proposing reform should be able to demonstrate, in view of the importance of the rights and interests to be protected, that a law permitting capital punishment would precisely define the criteria for capital punishment and ensure that only those who met those criteria were executed.

If the law were relaxed to permit doctors, as a last resort, to administer or provide a lethal drug to a patient who was suffering unbearably and who freely asked for it, could it effectively limit VAE and PAS to those circumstances? Or would the practice sooner or later slide down a slippery slope to ending the lives of those who did not really want to die, because their request was contaminated by depression or by pressure from others; or who were incapable of making a request, like babies or the severely demented; or whose unbearable suffering could be alleviated by palliative care, or who were not suffering unbearably or even at all? Although the question whether VAE and PAS can be justified in principle is important, the question whether they could be effectively controlled is hardly less important. Indeed, in the worldwide debate it is proving even more important. It was certainly significant in the landmark decision of the US Supreme Court in 1997, which upheld the constitutionality of laws against PAS. For example, Justice Souter concluded, 'The case for the slippery slope is fairly made out here . . . because there is a plausible case that the right claimed would not be readily containable by reference to facts about the mind that are matters of difficult judgment, or by gatekeepers who are subject to temptation, noble or not.'[5] However, his rejection of PAS seemed provisional rather than final. Having noted that the advocates of PAS sought to avoid the slope by proposing state regulation with teeth, he concluded that 'at least at this moment' there were reasons for caution in predicting the

[5] *Washington* v. *Glucksberg* 521 US 702 at 785 (1997).

effectiveness of the teeth proposed.[6] This judge, therefore, seemed open to the possibility of creating a constitutional right to PAS if the dangers of the slippery slope could be avoided.

In the light of the pivotal importance in the current debate of the feasibility of effective control it is essential to consider the experience of those few jurisdictions which have taken the radical step of relaxing their laws, especially the Netherlands, Belgium, and the US state of Oregon. Although this book will consider all three, it will concentrate on the Netherlands because of that country's much longer and much more fully documented experience. The book will also consider the federal legislation regulating VAE and PAS that was enacted in Canada in 2016 as a result of a decision of its Supreme Court in 2015.[7]

It is appropriate to focus on the Dutch experience. First, given that VAE and PAS have been legally permitted and widely practised there for more than 30 years, an important body of evidence including developments in legal and professional guidelines, empirical data and academic commentary has emerged which is of crucial significance to the ongoing debate. Secondly, the Dutch experience has provoked divergent interpretations. Such divergence has challenged even the judicious, and judicial, reader. Justice Souter observed that there was a 'substantial dispute' about what the Dutch experience showed. 'The day may come', he wrote, 'when we can say with some assurance which side is right, but for now it is the substantiality of the factual disagreement, and the alternatives for resolving it, that matter. They are, for me, dispositive of the ... claim [for a constitutional right to PAS] at this time.'[8] This book offers a path through the thicket of conflicting interpretations.

[6] Ibid.

[7] Mainly in the interests of space the book will not address a similar decision of the Constitutional Court in Colombia (for links to an English translation of the judgment and to subsequent legal developments see Patients Rights Council, 'Colombia'. http://bit.ly/2rR8tdG); the statutory legalisation of euthanasia in Quebec (Loi Concernant les Soins de Fin de Vie, S-32.0001, Légis Québec Source Officielle http://bit.ly/2rWqo1T) and Luxembourg (see The Official Portal of the Grand Duchy of Luxembourg, 'Euthanasia and palliative Care'. http://bit.ly/2IUSRje) (all three links last accessed 18 May 2018); or the practice of assisted suicide in Switzerland (see Griffiths2, chapter 16; Guenter Lewy, *Assisted Death in Europe and America: Four Regimes and their Lessons* (2011) chapter 4).

[8] *Washington* v. *Glucksberg* 521 US 702 at 786 (1997).

The book is divided into seven parts. Part I defines some important terms such as 'voluntary euthanasia' and 'physician-assisted suicide', and considers a key moral and legal difference between intended and merely foreseen life-shortening.

Part II outlines three main arguments for permitting VAE and PAS and three counter-arguments. It also explains the two slippery slope arguments: the empirical and the logical.

The remainder of the book focuses on the extent to which relaxed laws have demonstrated effective control of VAE and PAS. Part III explores the Dutch experience. It begins by outlining the legal guidelines. It then summarises the evidence generated by several official national surveys carried out by the Dutch into their practice of VAE and PAS; the extent to which practice has conformed to the legal guidelines; the response of the Dutch and their supporters to criticisms that it has not, and the continuing extension of those guidelines. Part IV considers the Belgian experience and Part V the experience of the Northern Territory of Australia where VAE was temporarily permitted. Part VI outlines the law and practice of PAS in the United States with particular reference to Oregon, and the decision of the US Supreme Court rejecting a constitutional right to PAS. Part VII turns to Canada. It analyses the landmark decision of its Supreme Court in 2015 creating a right to VAE and PAS under the Canadian Charter of Rights and Freedoms, and the legislation enacted by the Canadian Parliament in 2016 to accommodate that decision.

In short, the book offers an up-to-date analysis of one of the key questions in the one of the most important moral and political debates of our age: if VAE and PAS were legalised, could they be effectively controlled by the law?