

# John Stuart Mill and the Status of Canadian Legislation Concerning Physician-Assisted Suicide

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## Abstract

The boundaries protecting civil liberties from the realm of legitimate government intervention are subject to widespread debate. In the Canadian context, this debate has gained attention due to the Supreme Court's ruling that the government shall no longer prohibit physician-assisted suicide. The complexity of the issue arises from its various dimensions, which include legal, political and moral perspectives. In 1859, John Stuart Mill produced the 'harm principle' to explain how complex issues ought to be addressed. This article analyzes the state of Canadian legislation concerning assisted suicide, in order to determine if the issue is treated appropriately according to Mill's prescriptions. Beginning with the 'harm principle', this article establishes a framework by which Canadian statutes and case law can be assessed. It concludes that from Mill's perspective, the status of legislation is appropriate.<sup>1</sup>

Among John Stuart Mill's most impactful intellectual achievements is a theory of liberty designed to protect civil freedoms against state paternalism in liberal societies. At the core of his theory is the so-called 'harm principle', which designates the circumstances under which government intervention ought to be considered appropriate. This harm principle is often thought to be a central consideration in justifying the enactment of legislation in contemporary Western liberal democracies, and is particularly relevant with regard to contentious policy areas such as physician-assisted suicide. This

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investigation assesses the present state of legislation regarding assisted suicide in Canada from the perspective of the harm principle, in order to determine whether the government is overstepping its role, as Mill would conceive it.

To begin, 'assisted suicide' and Mill's harm principle are defined in succession for the purpose of placing this investigation into context. Next, an analysis of Canadian legislation relating to assisted suicide is conducted by reference to relevant statutes, legal cases, medical reports and ethical commentary. The exposition proceeds on two levels. First, the Supreme Court's *process* for jurisprudential analysis is assessed to determine the extent to which it corresponds with the harm principle. Second, this investigation explores evidence of the potential harm that assisted suicide may cause to society, in order to determine whether the Supreme Court's application of the harm principle was *demonstrably sound*. After considering both levels of analysis, this investigation concludes that Mill's harm principle corresponds favorably with the current state of legislation regarding assisted suicide in Canada.

For the purposes of this analysis, the topic of 'assisted suicide' or 'physician-assisted suicide' refers specifically to the act by which physicians, on the basis of medical evidence, assist a suffering patient in fulfilling her wish to die. The phrase 'physician-assisted suicide' is often used distinctly from "voluntary euthanasia".<sup>2</sup> Robert Wesley Boston notes that this distinction "concerns the primacy of agency", and that while "assisted suicide" emphasizes the patient as the primary actor, "voluntary euthanasia" emphasizes the physician.<sup>3</sup> While this distinction may be paramount from an ethical point of view, both actions are in practice "roughly equivalent".<sup>4</sup> Therefore, this investigation includes 'voluntary euthanasia' within any reference to 'assisted suicide' or 'physician-assisted suicide'.

In his essay *On Liberty*, John Stuart Mill sets out to address "the nature and limits of the power which can be legitimately

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<sup>2</sup> Boston, Robert. W. (2000). "Crossing the Line: A Reflection on Palliative Care and Assisted Suicide." In *Assisted Suicide: Canadian Perspectives*. Ottawa: University of Ottawa Press, p.27

<sup>3</sup> Ibid.

<sup>4</sup> Ibid.

exercised by society over the individual”.<sup>5</sup> In doing so, he postulates a theory of civil liberty. Mill makes the context and relevance of his theory clear from the outset by pointing out that, though ideas of democracy and “self-government” have become popular, “the will of the people...practically means the will of the most numerous or the most active *part* of the people”.<sup>6</sup> This allows for a situation in which the state is ruled by a “tyranny of the majority”.<sup>7</sup> Beyond simply dictating the political matters of the state, this tyranny of the majority can impose “prevailing opinions...by other means than civil penalties”, upon individuals.<sup>8</sup> Mill states that these dangers are widely recognized and thus there ought to be “a limit to the legitimate interference of collective opinion with individual independence”.<sup>9</sup> While the need for a limitation on “social control” is not original to Mill’s thought, he is uniquely concerned about “the practical question...[of] where to place the limit”.<sup>10</sup>

In introducing his theory, Mill states that, “over himself, over his own body and mind, the individual is sovereign”, but actions that involve others should be “amenable to society”.<sup>11</sup> The type of other-regarding action that concerns Mill is not that which is benign or beneficial to others, but that which causes harm. It is these harmful other-regarding actions that permit social control. Perhaps the most crucial element of Mill’s theory is the notion that there are different *kinds* of harm, and that these warrant different *means* of social control.

The first type of harm Mill discusses is that which affects another person’s “permanent interests”.<sup>12</sup> As a classical utilitarian, Mill does not intend for “permanent interests” to refer to some “abstract right” that people are endowed with naturally.<sup>13</sup> Rather,

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<sup>5</sup> Mill, John S. (1859). “On Liberty.” In *The Basic Writings of John Stuart Mill* (2002). Toronto: Random House, p. 3

<sup>6</sup> Mill, J. S. *On Liberty*, p. 6

<sup>7</sup> Ibid.

<sup>8</sup> Mill, J. S. *On Liberty*, p. 7

<sup>9</sup> Mill, J. S. *On Liberty*, p. 7

<sup>10</sup> Ibid.

<sup>11</sup> Mill, J. S. *On Liberty*, p. 12

<sup>12</sup> Mill, J. S. *On Liberty*, p. 13

<sup>13</sup> Ibid.

“permanent interests” refer to the basic needs that we each require for living our lives as “progressive beings”.<sup>14</sup> Some examples of permanent interests would include the provisions of food, shelter and physical security from others. For Mill, these permanent interests ought to be constituted as rights in a properly constructed liberal society.<sup>15</sup> In cases where a person commits or attempts to commit harm to another’s permanent interests, the offender’s action ought to be punishable “by law”.<sup>16</sup> Mill contends that there are also cases in which individuals ought to be “compelled to perform” certain actions by law, such as “saving a fellow creature’s life”.<sup>17</sup> However, such affirmative responsibilities under the law ought to be justified on the basis that one’s *failure* to act would cause harm to another’s permanent interests. Any action that does not harm the permanent interests of others falls into the “appropriate region of human liberty”, and therefore ought not to fall subject to government prohibition.<sup>18</sup>

For Mill, ‘civil liberty’ includes an inward “liberty of thought and feeling”, as well as the liberty to express these thoughts and feelings publicly.<sup>19</sup> It also includes the “liberty of tastes and pursuits... framing the plan of our life to suit our own character”: a concept that Mill later describes as “individuality”.<sup>20</sup> Finally, it involves the liberty of each individual to combine and unite with other individuals.<sup>21</sup> Crucially, however, Mill asserts that the government ought to be permitted to restrict these liberties only insofar as they might be exploited to cause harm to the permanent interests of others. A government that exercises social control beyond preventing harm by some to the permanent interests of others is breaching the boundaries of its legitimate authority. Mill claims that, “the only freedom which deserves the name, is that of

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<sup>14</sup> Ibid.

<sup>15</sup> Ibid.

<sup>16</sup> Ibid.

<sup>17</sup> Ibid.

<sup>18</sup> Mill, J. S. *On Liberty*, p. 14

<sup>19</sup> Ibid.

<sup>20</sup> Mill, J. S. *On Liberty*, pp. 14, 58

<sup>21</sup> Mill, J. S. *On Liberty*, p. 14

pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it”.<sup>22</sup> Therefore, “the only purpose for which power can be rightfully exercised over any number of a civilized community, against his will, is to prevent harm to others”.<sup>23</sup> For the purposes of this investigation, this prescription is referred to as “the harm principle”.

Certain other-regarding actions may cause a type of harm to others without affecting their permanent interests. Actions by an individual or group can also cause harm to another individual’s ‘lesser’ interests. For example, in exercising one’s freedom of expression, a devout Catholic man might voice his ideas about the immorality of abortions. This expression might cause harm to many members of society, in the sense that they are terribly offended. However, so long as the offender does not directly incite violence or discrimination against those who support abortions, the offender cannot be considered to be harming anyone’s permanent interests. Rather, they are doing a kind of harm to others’ *ideas* about *morality*. As we have established, Mill’s theory does not permit the government to interfere in this situation – even if the majority of society were to be offended. Rather, this type of harm may be discouraged through moral censure, or what Mill refers to as “general disapprobation”.<sup>24</sup> In other words, society may express resounding disapproval for the offender’s words or actions, thus exhibiting a degree of social control. However, this moral censure must stop short of forcibly silencing the offender: such force would constitute an infringement on the offender’s liberty of expression. Conversely, if the offender’s action can be demonstrated to cause harm to another’s permanent interests, Mill’s harm principle states that the government can and should prohibit the action by law.

Having defined physician-assisted suicide and Mill’s harm principle, we may now provide an account of Canadian legislation as it pertains to both of these concepts. The Canadian Charter of Rights and Freedoms enshrines the civil liberties guaranteed to Canadian citizens. In legal cases such as those that would address

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<sup>22</sup> Mill, J. S. *On Liberty*, pp. 14-15

<sup>23</sup> Mill, J. S. *On Liberty*, p. 11

<sup>24</sup> Mill, J. S. *On Liberty*, p. 13

criminal laws against the practice of assisted suicide in Canada, the Charter of Rights and Freedoms is often invoked to argue that the statute in question unduly infringes upon an explicit civil liberty. Section 1 of the Canadian Charter of Rights and Freedoms “guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”.<sup>25</sup> Therefore, the Charter is clear from the outset that laws may restrict any civil liberties that are otherwise granted to Canadians, as long as the restricting law can be “demonstrably justified”.<sup>26</sup> Nevertheless, the definition of ‘demonstrable justification’ for a law is vague, and stands to create a great deal of ambiguity about the assessment of controversial laws that may restrict or deny civil liberties that are otherwise guaranteed by the Charter. As a result of this ambiguity, legal disputes involving Section 1 have been addressed by an analysis known as the “Oakes Test” (due to its original use in *Regina v Oakes*).<sup>27</sup> Using the so-called Oakes Test, Supreme Court judges will deem a law that restricts a civil right to be demonstrably justified if it meets two qualifications.<sup>28</sup>

The first qualification of the Oakes Test requires that the law must aim to achieve a goal that is both “pressing and substantial”.<sup>29</sup> In other words, the law must address an important issue in society. The second qualification is known as the “proportionality test”, and can be broken into three sub-tests.<sup>30</sup> The first sub-test requires that the law must be “rationally connected” to its purpose, and thus cannot be arbitrary.<sup>31</sup> The second sub-test requires that the law “impair the right in question as little as possible”.<sup>32</sup> The third sub-

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<sup>25</sup> *Canadian Charter of Rights and Freedoms*, 1982 <<https://zoupio.lexum.com>>

<sup>26</sup> *Ibid.*

<sup>27</sup> Grimm, Dieter. (2007). “Proportionality in Canadian and German Constitutional Jurisprudence.” *University of Toronto Law Journal*, 57, p. 383

<sup>28</sup> *Ibid.*

<sup>29</sup> *R. v. Oakes*, 1986 SCR 103 <<http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/117/index.do>>

<sup>30</sup> *R. v. Oakes*, 1986 SCR 103 <<http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/117/index.do>>

<sup>31</sup> *Ibid.*

<sup>32</sup> *Ibid.*

test requires a “proportionality between the effects of the [law] and the objective”, meaning that the cost to individuals for adhering to the law does not outweigh the overall benefit that the law brings to society.<sup>33</sup>

The Oakes Test is accepted in Canadian constitutional law as providing the criteria for a law’s “demonstrable justification” in its restriction of a civil liberty guaranteed by the Charter.<sup>34</sup> It seeks to place a practical limit on government interference with civil liberties in Canada, and its methods are largely congruent with Mill’s harm principle. Leonard W. Sumner specifically suggests that, “the Oakes Test bears a striking resemblance to John Stuart Mill’s harm-based approach to justifying restrictions on liberty”.<sup>35</sup> The Test’s two qualifications essentially complete a utilitarian assessment of a law’s capacity to effectively prevent harm to the permanent interests of individuals in Canada. It is difficult if not impossible to imagine a law that would pass the Oakes Test without a demonstrable capacity to protect permanent interests above all other effects.

Therefore, if a law passes the Oakes Test, it does so as a result of its demonstrable capacity to prevent harm to permanent interests; it would thus warrant a minimal restriction by the government to civil liberties under Mill’s principle. If a law does not pass the Oakes Test, it has not demonstrated the capacity to prevent harm to permanent interests and will thus be struck down as an unjust infringement by the government upon civil liberties. As a result, the Oakes Test used by the Supreme Court might be considered an application of Mill’s harm principle within the specific context of Canadian civil rights. While this test will serve as a useful guide in assessing a law’s adherence to Mill’s harm principle, this investigation will strive to apply Mill’s principle in its purest form before concluding whether or not the status of Canadian legislation related to assisted suicide is just.

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<sup>33</sup> Ibid.

<sup>34</sup> Grimm, D. (2007). “Proportionality.” *University of Toronto Law Journal*, 57, p. 383

<sup>35</sup> Sumner, Leonard. W. (2009). “Incitement and the Regulation of Hate Speech in Canada: A Philosophical Analysis.” In *Extreme Speech and Democracy*. New York: Oxford University Press, p. 206

Section 241 (b) of the Criminal Code of Canada states that anyone who aids or abets a person in committing suicide is “guilty of an indictable offense and liable to imprisonment for a term not exceeding fourteen years”.<sup>36</sup> Further, Section 14 of the Criminal Code states that, “no person is entitled to consent to have death inflicted on him, and such consent does not affect the criminal responsibility of any person by whom death may be inflicted on the person by whom consent is given”.<sup>37</sup> Taken together, these statutes prohibit “the provision of assistance in dying in Canada”.<sup>38</sup> As it is relevant to this analysis, the Criminal Code bans physicians from assisting in the suicide of patients who suffer from “grievous and irremediable medical conditions...that [cause] enduring suffering”, regardless of a patient’s wishes.<sup>39</sup>

In an apparent contradiction to the prohibition in the Criminal Code, Section 7 of the Canadian Charter of Rights and Freedoms guarantees Canadian citizens “the right to life, liberty and security of the person and the right not to be deprived thereof”.<sup>40</sup> Section 15 of the Charter complements this guarantee by granting that, “every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination...based on...mental or physical disability”. Taken together, these rights seem incompatible with any prohibition against physician-assisted suicide: the prohibition appears to deprive certain patients of their right to “liberty and security of the person”, and does so on the basis of their “mental or physical [disabilities]”.<sup>41</sup> An additional complication may be posed by Section 12 of the Charter, which guarantees that, “everyone has the right not to be subjected to any cruel and unusual treatment or punishment”.<sup>42</sup> These apparent contradictions formed a significant component of the argument upon

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<sup>36</sup> *Criminal Code*, 1985, s 241 (b) <<https://zoupio.lexum.com>>

<sup>37</sup> *Criminal Code*, 1985, s 14 <<https://zoupio.lexum.com>>

<sup>38</sup> *Carter v. Canada (Attorney General)*, 2015 SCC 5 <<https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/14637/index.do>>

<sup>39</sup> *Ibid.*

<sup>40</sup> *Canadian Charter of Rights and Freedoms*, 1982 <<https://zoupio.lexum.com>>

<sup>41</sup> *Ibid.*

<sup>42</sup> *Ibid.*

which the law against assisted suicide was contested within the Canadian court system.<sup>43</sup>

In 1993, the Supreme Court of Canada made a ruling on *Rodriguez v British Columbia*. The appellant in this case suffered from amyotrophic sclerosis and sought to gain the ability to end her life, with the help of a physician, when she lost the “capacity to enjoy” it.<sup>44</sup> She challenged Section 241(b) of the Criminal Code on the grounds that the law infringed upon the rights granted to her in Sections 7, 12 and 15 of the Canadian Charter of Rights and Freedoms. The Supreme Court ruled that the law prohibiting assisted suicide did not infringe on the rights articulated by Sections 7 and 12 of the Charter, and therefore the Court did not perform an analysis of whether or not any supposed infringements could be justified.<sup>45</sup> However, the Supreme Court acknowledged that the law against assisted suicide *did* impede the right provided by Section 15 of the Charter, and thus the Court performed a subsequent Oakes Test to determine the law’s justifiability.<sup>46</sup> The majority of the Supreme Court ruled that Section 241(b) of the Criminal Code had a “pressing and substantial legislative objective and [met] the proportionality test”, and that it therefore constituted a justified infringement on the right granted by Section 15 of the Charter.<sup>47</sup> According to this ruling, the law addressed the pressing concern of “[protecting] life...[for] those who are vulnerable in society”.<sup>48</sup>

To analyze this ruling in the context of Mill’s harm principle, we might begin by understanding any reference to the Charter or a specific Section therein as synonymous with what Mill would simply consider to be the concept of ‘civil liberty’. Therefore, the act of ‘testing the law’s justifiability in its infringement of Section 15 of the Charter’ can be rephrased as ‘testing the law’s justifiability in its

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<sup>43</sup> *Carter v. Canada (Attorney General)*, 2015 SCC 5 <<https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/14637/index.do>>

<sup>44</sup> *Rodriguez v. British Columbia (Attorney General)*, 1993 SCR 519 <<http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1054/index.do>>

<sup>45</sup> *Ibid.*

<sup>46</sup> *Ibid.*

<sup>47</sup> *Ibid.*

<sup>48</sup> *Ibid.*

infringement of civil liberties'. In performing the Oakes Test to analyze whether the law was demonstrably justified in infringing upon Section 15 of the Charter, the Supreme Court essentially applied Mill's harm principle to test the demonstrable justification of the law's interference with the civil liberty in question. In other words, the judges assessed whether or not the law prohibiting assisted suicide could demonstrably prevent harm to the permanent interests of individuals in society. By ruling that the law's infringement of civil liberty was demonstrably justified, the Supreme Court stated that they had found such demonstrable prevention. According to the ruling, Section 241(b) of the Criminal Code supposedly prevented malicious attempts to influence those in mentally or physically weak positions to commit physician-assisted suicide. As assisted suicide literally deals with protecting the lives of patients, the identified harm clearly affects permanent interests, and this connection was therefore used to justify government intervention under the harm principle.

In 2015, the Supreme Court revisited the challenge to laws prohibiting assisted suicide in Canada when rendering a decision in *Carter v Canada*.<sup>49</sup> In this case, both Section 241(b) and Section 14 of the Criminal Code were challenged for conflicting with Section 7 of the Charter.<sup>50</sup> The Court reconsidered this issue on the basis that "the law relating to the principles of overbreadth and gross disproportionality had materially advanced since *Rodriguez*".<sup>51</sup> In terms of Mill's theory, we might say that the issue was revisited because the Court had advanced the method by which it assessed a law's effectiveness in preventing harm to permanent interests. The law was found to impinge on the right provided by the Charter, and thus the Oakes Test was once again applied.<sup>52</sup> Similar to the case of *Rodriguez v British Columbia*, the Supreme Court acknowledged that the law's objective was "specifically to protect vulnerable persons from

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<sup>49</sup> *Carter v. Canada (Attorney General)*, 2015 SCC 5 <<https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/14637/index.do>>

<sup>50</sup> *Ibid.*

<sup>51</sup> *Ibid.*

<sup>52</sup> *Ibid.*

being induced to commit suicide at a time of weakness”.<sup>53</sup> However, the Court recognized further that the “prohibition [caught] people outside the class of protected persons”, and therefore the “limitation on their rights [was] in at least some cases not connected to the objective...[and] the prohibition [was] thus overbroad”.<sup>54</sup> In terms of Mill’s theory, we might say that the Court determined that while the law was intended to prevent harm to permanent interests, it did not do so *efficiently* or *effectively*. In many if not most cases, the law was found to impede civil liberty *more* than it prevented harm. Further, the judges claimed that the law often “[had] the effect of forcing some individuals to take their own lives prematurely, for fear that they would be incapable of doing so when they reached the point where suffering was intolerable”.<sup>55</sup> This claim suggests that the law not only failed to prevent harm to permanent interests, but also may have sometimes *caused harm* to permanent interests.

*Carter v Canada* resulted in the Supreme Court’s declaration that the laws prohibiting physician-assisted suicide in Canada were unconstitutional and therefore invalid in circumstances that meet two imperative conditions. The first condition requires that the person who wishes to be assisted in dying must be a “competent adult...who clearly consents to the termination of life”.<sup>56</sup> Second, the person must have “a grievous and irremediable condition (including illness, disease or disability) that causes enduring suffering that is intolerable to the individual in the circumstances of his or her condition”.<sup>57</sup> The Court stated that its judgment would require a “legislative and regulatory response” to reconcile the newly established “rights of patients and physicians”.<sup>58</sup> From the perspective of Mill’s harm principle, this was an appropriate process for reaching a jurisprudential conclusion. When the Oakes Test indicated that the

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<sup>53</sup> Ibid.

<sup>54</sup> *Carter v. Canada (Attorney General)*, 2015 SCC 5 <<https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/14637/index.do>>

<sup>55</sup> Ibid.

<sup>56</sup> Ibid.

<sup>57</sup> *Carter v. Canada (Attorney General)*, 2015 SCC 5 <<https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/14637/index.do>>

<sup>58</sup> Ibid.

law prohibiting assisted suicide might not have effectively prevented harm to permanent interests, but rather may have often caused harm to these very interests, the law was declared unjust and therefore invalid. However, certain aforementioned criteria were added so that the prohibiting law would only be determined invalid on a circumstantial basis. This measure was meant to preserve those elements of the law that effectively prevented harm to permanent interests, while restoring civil liberty to those areas where the law failed to do so. Mill could be expected to state that in this ruling, physician-assisted suicide in Canada was returned to “the appropriate region of human liberty”.<sup>59</sup>

Despite the Court’s application of the harm principle, it is worth noting a criticism that Mill would be likely to offer. We have established that the Oakes Test is essentially a practical manifestation of Mill’s harm principle in Canadian jurisprudence. While Mill would therefore endorse the use of the Oakes Test, he would criticize the Canadian court system for the low frequency with which the Test is applied. For Mill, every law ought to fall subject to justification under the harm principle in a properly constructed liberal society. Yet in Canada, not every law requires justification by the Oakes Test. An example of this shortcoming was observed in *Rodriguez v British Columbia*, when the Supreme Court denied the alleged impingement of Sections 7 and 12 of the Charter by the law prohibiting physician-assisted suicide. Since the law was simply deemed not to interfere with the rights in question, the Oakes Test was not applied. This highlights the fact that, had the Court interpreted Section 15 of the Charter differently in *Rodriguez v British Columbia*, the law against assisted suicide might not have undergone the Oakes Test at all. This is perhaps a systematic danger involved with articulating rights and liberties in the carefully worded, fragmented segments of the Charter. It necessitates that a law be shown to conflict with specific statements in the Charter in order for the law to be scrutinized by the Oakes Test. If Mill’s theory had been implemented in its purest form, every law would be assumed to somehow impede some civil

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<sup>59</sup> Mill, J. S. *On Liberty*, p. 14

liberty, therefore automatically requiring justification under the harm principle.

Having established that the *process* for legal reasoning adopted by the Supreme Court of Canada with regards to assisted suicide conforms to the prescriptions of the harm principle, we must now assess whether the Court's premises were empirically accurate. In other words, we must consider whether, in the absence of a law prohibiting physician-assisted suicide, the government is somehow failing to prevent some harm to the permanent interests of individuals in Canadian society. If there were observable evidence of such harm, Mill's principle might yet deem the Court's ruling to be inappropriate.

The individual most directly affected by assisted suicide is the patient. As Mill's theory clearly indicates that self-harm of any kind ought not fall under the providence of government regulation, we cannot say that a patient who wishes to die is falling victim to some harm that the government ought to prevent. Mill does include a small proviso that holds the government responsible for protecting against self-harm to one's permanent interests if the individual in question is "in a state to require being taken care of by others", but this potential complication is remedied by the Court's criteria that the prohibition is only invalid if the patient is a "clearly consenting" and "competent" adult.<sup>60</sup>

The other individual directly involved in the act of assisted suicide is the physician. A review of the medical literature regarding assisted suicide reported in 2006 that, "the emotional and psychological effects on the participating physician can be substantial".<sup>61</sup> Indeed, many doctors who have participated in assisted suicide "describe being profoundly adversely effected" by the

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<sup>60</sup> Mill, J. S. *On Liberty*, p. 12;  
*Carter v. Canada (Attorney General)*, 2015 SCC 5 <<https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/14637/index.do>>

<sup>61</sup> Stevens, Kenneth. R. (2006). "Emotional and Psychological Effects of Assisted Suicide and Euthanasia on Participating Physicians." *Issues in Law and Medicine*, 21, p. 187

act.<sup>62</sup> While the act of assisting in the suicide of a patient may be psychologically damaging and might thus constitute harm to the physician's permanent interests, this should also be understood as self-harm. The ruling in *Carter v Canada* clearly states that, "nothing in this declaration would compel physicians to provide assistance in dying".<sup>63</sup> Therefore, participation in the act of assisted suicide must be based on the consent of both the physician and the patient, and any harm that results for the physician should be conceived as self-harm, which does not permit government intervention under the harm principle.

Aside from those individuals directly involved in the act, there is also the possibility that invalidating the law against physician-assisted suicide somehow allows for harm to the permanent interests of other members of society in general. It has been suggested that the idea of death "confronts [members of society] with terror and aloneness", and that the allowance of assisted suicide "confirms the power of death over hope, of death over life".<sup>64</sup> Some might describe this abstract notion as a negative cultural characteristic of a society. If certain members of that society strongly disagree with physician-assisted suicide on these moral grounds, or if they are offended at the self-harm that patients and physicians commit in the act of assisted dying, then this offense constitutes a type of harm to which opposition may be expressed. For example, groups such as the Council of Canadians with Disabilities, the Canadian Association for Community Living, and the Christian Legal Fellowship "condemned the ruling" in *Carter v Canada* on moral grounds.<sup>65</sup> However, the

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<sup>62</sup> Stevens, K. R. (2006). "Emotional and Psychological Effects of Assisted Suicide." *Issues in Law and Medicine*, 21, p. 187

<sup>63</sup> *Carter v. Canada (Attorney General)*, 2015 SCC 5 <<https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/14637/index.do>>

<sup>64</sup> Somerville, Margaret. A. (2001). *Death Talk: The Case Against Euthanasia and Physician-Assisted Suicide*. Montreal: McGill-Queen's University Press, pp. xiii, xviii

<sup>65</sup> Fine, Sean. (February 6, 2015). "Supreme Court Rules Canadians Have Right to Doctor-Assisted Suicide." *The Globe and Mail* <<http://www.theglobeandmail.com/news/national/supreme-court-rules-on-doctor-assisted-suicide/article22828437/>>

harm that these people experience is not harm to their *permanent interests*. Therefore, under Mill's harm principle, this issue is not eligible for interference by the government and should instead remain within the realm of civil liberty. Those who take offense to physician-assisted suicide may attempt to dissuade its use throughout society, but this ought to be done through moral censure and expressions of disapproval rather than through the implementation of a law that restricts the action altogether. A peaceful protest is one example of how such public disapproval might be appropriately expressed.

In conclusion, Mill's theory of liberty is of great use to understanding and justifying the current status of government regulation concerning physician-assisted suicide in Canada. This analysis has found that the process of legal reasoning regarding the act of assisted suicide in Canada is largely congruent with the prescriptions of Mill's harm principle. Further, it found that there is indeed a lack of evidence for any demonstrable harm to the permanent interests of Canadians that might result from allowing assisted suicide under specific circumstances. While those who are offended by the practice of assisted suicide certainly have the liberty to voice their moral censure, the harm principle dictates that this issue is not the place for government intervention in a properly constructed liberal society.

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