When Prisoners' "Right to Die" Goes Online: A Case-Study of Legal and Penal Sensibilities

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Abstract

Prisoners in Canadian federal penitentiaries can obtain medical assistance in dying (MAiD). This raises questions about the nature and legitimacy of pain and death in incarceration. The authors analyze responses to a *Canadian Broadcasting Corporation* online news article discussing the provision of MAiD to prisoners. The comments exemplify different sensibilities about the state's lethality with respect to prisoners. These sensibilities—both legal and penal—draw on an array of cultural referents to orient to prisoners' deaths generally, but also MAiD specifically. The authors explore how certain referents factor in these legal and penal sensibilities and appear to mediate commenters' judgements. For example, capital punishment factors significantly in conversations about MAiD for prisoners, as well as imaginations of prisoners' bodies in pain. As a result, there is a spectacularization of prisoners' carceral death, despite the humane, "civilized" death MAiD provides, which circumscribes how some commenters imagine the procedure and prisoners' deaths.

Keywords: Comment sections, capital punishment, law and pain, medical assistance in dying, punishment

Introduction

Prisoners in Canadian penitentiaries can request that a physician or nurse practitioner administer or prescribe a medical substance that causes their death (CSC 2017; Downie, Iftene, and Steeves 2019). Such requests are possible because the *Criminal Code* allows every competent, autonomous Canadian patient to obtain medical assistance in dying (MAiD) if they seek "death as a response to a grievous

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and irremediable medical condition."[1] The legal right to MAiD follows from the 2015 decision, *Carter v Canada*, where the Supreme Court of Canada declared that the criminal prohibition of MAiD constituted an unconstitutional limit on one's right to life, liberty, and security of the person. Canada's *Criminal Code* was amended in 2016 to provide a legal framework for MAiD, and in 2017 the Correctional Service of Canada (CSC) issued a policy—Guideline 800-9—which set out the process by which prisoners in federal penitentiaries could request and obtain MAiD (including the procedures of euthanasia and self-administered suicide) (CSC 2017).

Important to the Supreme Court's reasoning in *Carter v Canada* was the experience of the ideal candidate for MAiD: a competent, self-actualizing person, whose independence is failed by an ailing body. The ideal candidate for MAiD was a patient "imprisoned" in their own body due to their condition and the criminal law that prevented them from medically assisted death. But actual incarceration complicates this image. The vulnerability of incarceration places the state in an intimate relationship with the prisoner's death, because the state acts not only as the custodian of prison conditions, admission, and release, but also as the custodian of prisoners' care and access to MAiD. The relationship of the state to a prisoner's MAiD thereby revives concerns about the state's lethality approximately forty years after Canada's Bill C-84 abolished capital punishment in 1976[2] (lethality in the sense that the state appears to be involved in the killing or "letting die" of its population). Concerns with respect to the state's role are also magnified by recent studies on the poor health outcomes of Canadian prisoners (e.g., Iftene 2019; Iftene and Downie 2020), which may compound a prisoner's experience of their body and the desire for MAiD, bringing into doubt the quality of consent even when it is obtained in accordance with law and policy. Prisoners' "right to die" may thereby confront foundational assumptions surrounding death behind bars, as well as MAiD,[3] affecting how individuals orient to and evaluate these public policies and make meanings about law and punishment.

Beyond the content of Guideline 800-9 and the other directives and authorities cited in that guideline (see e.g., Downie, Iftene, and Steeves, 2019), as well as a recent study of how inmates in a Canadian penitentiary navigate end-of-life care and view MAiD (Shaw and Driftmier 2021), little is publicly known about MAiD in prisons (also see Shaw and Elger, 2016; Stensland and Sanders, 2016). The Office of the Correctional Investigator released an annual report in 2019–2020 that identified "three known cases of MAiD in federal corrections, two carried out in the community" (OSC 2020), but the report does not say much more than the Correctional Investigator's recommendations to expand access to compassionate

[1] *Carter v Canada,* 2015 SCC 5, para 2.

[2] See Bill C-84, *An Act to amend the Criminal Code in relation to the punishment for murder and certain other serious offences*, 1st Sess, 30th Parl; However, capital punishment was still permitted for certain military offences until 1999, see Bill C-25, *An Act to amend the National Defence Act and to make consequential amendments to other Acts*, 1st Sess, 36th Parl, 46-47 Elizabeth II, 1997-98.

[3] Dalhousie Health Law Institute, A Prison-Focused Satellite Meeting After the Second International Conference on End-of-Life Law, Ethics, Policy and Practice, Medical Assistance in Dying for Canadian Prisoners (September 2017) http://www.dementiajustice.com/uploads/1/0/2/4/102466336/prison_meeting_report_sept_2017.pdf.

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release. There is also a dearth of cultural or popular critique. Apart from an online news article published by the Canadian Broadcasting Corporation (CBC), MAiD in prisons is rarely mentioned in public discourse. The lack of public discourse, in part, accounts for our study's basis in the comment section of that CBC article. This comment section comprises a rare space in which the under-discussed subject of MAiD in prisons is considered. Further, the content of those comments demonstrates the charged nature of that discussion when brought into focus, with commenters pulling from a number of referents to make normative judgements of MAiD in prisons. Though freighted with its own methodological limits, using the comment section as our sample provides us an access point to an understudied dimension of punishment, namely the way individuals make meanings of medicalized death in a punitive setting. For example, commenters engage with ideas about capital punishment, notions of legitimate pain for the prisoner's body, and the state's role in punitive practices. In other words, the comment section—as a space of dialogue and dissent—allows us to explore how individuals, when confronted by the idea of MAiD in prisons, make sense of their foundational assumptions about MAiD and punishment.

Foundational assumptions—of MAiD or of punishment—are inextricably cultural. As David Garland (2006, 421) writes, punishment and "penal institutions" are "grounded in cultural values and perceptions," draw "upon specific sensibilities" and express "particular emotions." Punishment and penal institutions are "sites of ritual performance and cultural production" and "produc[e] diffuse cultural effects as well as crime control" (Garland 2006, 421). Penal sensibilities involve the everyday constructions and "structures of affect" that shape experience and understanding, including that which emerges in conversation (Smith, Sparks, and Girling 2001). Penal sensibilities are involved in the formation and reproduction of institutions of punishment and are products of punishment themselves, as these sensibilities "communicate values, moralities, and political understandings" surrounding punishment (Smith, Sparks, and Girling 2001, 397). Similarly, as Roger Cotterrell (2018, 527) writes, law and legal institutions *inhabit* culture. This requires the legal theorist to pay "more attention to the nature of law itself as not only an instrument of state regulation but also an *aspect of culture*," including "affective elements [like] *emotional* attachments, allegiances, resistances and rejections" (emphasis in original). These cultural dimensions include people's everyday perceptions or understandings of, and attitudes toward, law in social context. These are popular forms of legal consciousness where detailed narratives, cultural referents, and "structures of feeling" or embodied experience constitute what law is, does, and means in social situations (Ewick and Silbey 1998; Silbey 2018). Given that penal and legal sensibilities share a cultural basis or form, we discuss them together without distinction.

MAiD and punishment are no different from these sensibilities generally; they cannot be understood by reading statutes, decisions, or policies alone—the "official" narratives told by state documents are inevitably incomplete without the admixture of penal and legal sensibilities that arise in their wake (Ewick and Silbey 1998). Thus, the significance of culture to law and punishment, and its incorporation in everyday life, suggests that quotidian sites of cultural exchange and production may also be sites where people potentially reevaluate or solidify,

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reinforce, demonstrate, and contest foundational assumptions of MAiD and punishment.

One such place in which penal and legal sensibilities now emerge is online, as internet users are able to express penal and legal sensibilities in discussion boards, on social media sites, and in comment sections. These online fora allow immediate or near-immediate engagement across vast distances, potentially in a more candid and regular manner than is possible through other media. Oftentimes, these anonymously authored posts are of questionable character, as comments do not need to meet any literary or intellectual standard. Nevertheless, the ideas that emerge from this online discourse can reveal compelling, honest, and often unexpected perspectives on punishment, generated by people outside the official penal system. Comment sections can also reveal uninformed, disingenuous, and callous perspectives, but have intrinsic quality to the extent that they display real human sentiments or beliefs about MAiD in prisons (messy though these sentiments may be). In this paper, we look at how these sensibilities emerge at the conversational site of a comment section of an online news article published by CBC on February 25, 2018 (Harris 2018). The online news article—"Watchdog calls for 'compassionate' parole as prison system adopts new assisted death policy"—reports on the CSC policy that allows Canadian penitentiaries to act, as the author characterizes it, as the "facilitator or enabler" of MAiD for prisoners. In our study of these comments, we trace how MAiD for prisoners, and its foundational assumptions, are constructed in commenters' everyday conversation having regard to a cultural approach to law and punishment.

We focus on the comment section as a particular site of sensibilities pertaining to state lethality. While a range of ethical judgements are made by commenters, with some in favour of the CSC policy and others against, commenters tend to draw on certain narratives, referents and symbols in their construction of state lethality. We foreground the comments in a discussion of how capital punishment is differentially understood in relation to MAiD, foreground the comments again in a section that looks at how conceptions of corporeality mediate diverging views, and then pull these strands together in a discussion of how the spectacularization of prisoner death through MAiD affects ethical orientations to death in incarceration. In doing so, we undertake a critical analysis of paradigms that matter in the commenters' framing of the issue, which shapes their relations to foundational assumptions about MAiD and punishment. Importantly, we do not assume a positivist relationship to identifying and analyzing discrete facts about the sensibilities observed in the comment section. Instead, we take a post-positivist orientation to qualitative analysis and theory, which assumes knowledge is provisional, inextricable from the act-situation of observation (including methods of collection and analysis), and approached "abductively" offering plausible explanations from an array of theories and experiences available to the scholar (Brinkmann 2014).

Medical Assistance in Dying for Prisoners in Canada

The CSC policy on MAiD for prisoners—Guideline 800-9—sets out the process by which prisoners in federal penitentiaries in Canada can request and obtain MAiD (which includes physician/nurse practitioner-administered and self-administered

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medical assistance in dying) (CSC 2017). Prisoners are eligible for MAiD according to the same criteria set out for the public; however, Guideline 800-9, in tandem with other directives and authorities, indicates a process unique for those in federal custody.

Guideline 800-9 adds additional steps to the making of a request and its evaluation (CSC 2017). It also presupposes that the prisoner requesting MAiD will be transferred out of the federal penitentiary into the community for the second of two eligibility assessments and, if eligible, the completion of the procedure. To facilitate such transfers, CSC will consider "all release options," including parole, parole-by-exception, and temporary absence, and inmates can also write to the Governor General of Canada who may grant the inmate's release under the Royal Prerogative of Mercy (Downie, Iftene, and Steeves 2019). Guideline 800-9 specifies that the "external [environment] to CSC [is], namely, […] a community hospital or health care facility" (CSC 2017), where policies and procedures of the hospital would also apply. In "exceptional circumstances," the CSC will permit a prisoner to obtain MAiD within the penitentiary institution or a regional hospital operated by CSC, but it must be at the request of the prisoner, approved by the CSC's Assistant Commissioner of Health Services, and the procedure must involve a practitioner external to CSC.[4]

The Case Study: The CBC Article and Comment Section

On February 25, 2018, CBC published an online news article by Kathleen Harris entitled "Watchdog calls for 'compassionate' parole as prison system adopts new assisted death policy." In this article, Harris outlined a policy that the CSC adopted in late 2017, in which prisons are allowed to serve as "a facilitator or enabler" of an inmate's medically assisted death or MAiD (CSC 2017). Harris further described a letter to acting CSC Commissioner Anne Kelly from the Correctional Investigator Ivan Zinger, which decried the new policy, instead urging the CSC to grant terminally ill inmates a more "humanitarian and compassionate" conditional release.

The comment section for this article included 812 distinct comments posted by 163 separate users between February 25, 2018, at 4:23 AM EST and February 26, 2018, at 3:30 AM EST. We trawled comments manually, copying-and-pasting each comment into an Excel file along with its associated metadata. Each entry in our database was comprised of the commenter's name, the comment's date and timestamp, the content of the comment, and the number of "Likes" or "upvotes" their comment received by other readers. We also indicated whether a comment

[4] Since the enactment of Guideline 800-9, Bill C-7, An Act to amend the Criminal Code (medical assistance in dying), was passed by Parliament and received Royal Assent in March 2021. The Act amends the *Criminal Code* to establish two streams for accessing MAiD: one set of safeguards for MAiD where an individual's "natural death" is reasonably foreseeable, and another set of safeguards where death is not foreseeable, but the individual otherwise qualifies for MAiD. As of February 2022, Guideline 800-9 has not been amended in response to this legislative change; it is unclear how the legislative change has affected the provision of MAiD to prisoners. Furthermore, these amendments were formulated and enacted years after the publication of the CBC article and the comment section. Accordingly, our analysis does not consider these recent amendments.

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was an original post or a reply to another comment. Reply comments were further flagged with information that identified the comment to which they were replying, to keep track of conversations in the comment section.

Once we gathered all comments, we began conducting exploratory research, using the first fifty comments as a test sample from which to develop a codebook of relevant themes and categories present within the comments. The themes and categories we developed clustered around a number of aspects pertaining to punishment, such as punishment's purposes (e.g., retribution, incapacitation, deterrence, rehabilitation, reintegration), critiques of the justice system, critiques of the administration of MAiD, references to the death penalty, as well as compassion or animosity toward inmates. We expanded our selection to 100 comments and adopted processes of iterative categorization (Neale 2016), adding more themes as we read and re-read our dataset. In developing these themes, we approached our comment section case study with a sense of abductive inquiry (Brinkmann 2014). A helpful mode of analysis for the "creative crafting of theory," abduction requires researchers to approach their study with "a wide array of theorizations" to "render surprising situations understandable" (Tavory and Timmermans 2019, 536–541). Throughout coding, we abductively situated our qualitative observations in conversation with sociolegal studies, jurisprudence, criminology and communication studies, as well as Canada's abolition of capital punishment and legalization of MAiD. This emergent form of analysis allowed us to make sense of surprising comments and develop novel coding categories, challenging our conceptualizations of our comment section data while allowing us to engage with our case study more creatively. In this way, coding was only ever provisional, mediating our encounter with theories that might help make plausible sense of the sensibilities observed.

After coding each comment and discussing discrepancies, we flagged 456 comments as irrelevant due to their lack of substantive engagement with the article's content and removed them from the dataset. Discrepancies in coding were resolved in discussion with reference to theories we each saw resonate with the comments. This left 356 relevant comments from which we were to conduct our analysis. Deeming this many comments irrelevant and excising them from our sample attests to the relatively unplanned, unsystematic nature of comment sections. In general, comment sections allow for plural, unrelated dialogues to start, stop, and change direction. Many commenters often engage directly with the topic of the relevant article, but others use the space as a jumping-off point for discussions of other issues. Off-topic conversations appear to be generally tolerated by commenters, perhaps because CBC's editorial staff do not activate comment sections for all CBC articles, which shifts conversations to comment sections on unrelated stories. The mode of conversation in our case study was an open one; even when commenters' commentary dealt with MAiD for prisoners, it could also traffic in other events, concerns, and identities, whether related to punishment or not. While our abductive approach allowed for surprise and breakdown in our qualitative observations, some comments were regarded as perhaps more outside the study's parameters than they were empirically useful to understanding sensibilities that inform judgements of prisoners' deaths.

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On this point, though, we remain convinced of the comment section as an analytically rich venue for our case study. For one, our comment section is a lightly moderated cultural space where people self-identified by name come to converse about the content produced by the CBC. We say lightly moderated because, while comments are screened by site editors before publication, CBC has previously stated that 85% to 90% of comments submitted to CBC.ca are published.[5] This can be contrasted with platforms like Twitter, which engage in far more complex forms of gatekeeping and content moderation (see e.g., Konikoff 2021). The comment section's innate porosity is, in fact, a benefit to our method, in that the conversational architecture of the comment section allows for varied cultural ideas and references to find expression in the comments, as opposed to a debate forum that closely regulates the parameters of speech. And though they are by no means a common data source in sociolegal research, comment sections can offer revealing insights into penal and legal sensibilities.

Public opinion data is an often-tapped resource in criminal justice research. A number of these issues—such as attitudes toward policing, the courts, prisons, neighbourhood safety, and so on—lend themselves particularly well to public opinion research, given the public facing nature of criminality and criminal justice processes. Historically, the dominant ways to gauge public opinion, particularly on criminal justice phenomena, have been opinion polls and surveys (Berinsky 2017; Frost 2010). However, in our current digital era, scholars have argued that the digital footprint that individuals leave behind on social media and in comment sections can be used to measure public opinion and reflect their individual preferences (see e.g., Bond and Messing 2015; Lee and Nerghes 2018; Prichard et al. 2015). While we do not claim that comment sections represent public opinion (e.g., it was exceedingly rare for anyone in the comment section to oppose MAiD generally even though an Ipsos poll ($n = 3500$) conducted on behalf of Dying with Dignity suggests 13% of Canadians opposed the policy in 2021),[6] comment sections overall are a site in which cultural attitudes find expression, which may inform place-defined understandings (Davies 2015) of state lethality and punishment. We consider place-based understandings of state lethality and punishment to be "[p]erformative 'truths' […] produced by actions that connect humans to the material (and ideational) world, constituting the subjects and objects" (Davies 2015, 221) that come to define social experience in a specific place. The comments here express sensibilities informed by the place and time of the comment section, and the experiences they bring to that virtual space, which together shapes foundational assumptions about MAiD and punishment, and commenters' ethical judgements.

Using comment sections as the basis of qualitative inquiry aligns with Garland's (2006) call for the use of the tools of cultural analysis for making sense of punishment and penal techniques. Exploring the discourse of comment sections also aligns with Garland's (2006, 428) concomitant call for an exploration of

[5] https://www.cbc.ca/newsblogs/community/editorsblog/2016/03/reviewing-our-commenting-policy.html.

[6] https://www.ipsos.com/en-ca/majority-canadians-support-access-medical-assistance-dying-maid.

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"audience and interpretation" when thinking through the meanings and sensibilities wrapped up in punishment. Comment sections, then, can serve as a sort of venue for informative "societal conversations" surrounding penality (Smith et al. 2001, 400). We have by no means "tapped into the essential inner world" of our commenters, nor can we say with certainty who these people really are, but their potential anonymity, as well as the occasional discursive haphazardness of their contributions, in no way undercut the surprising analytic insights their comments stand to reveal. The monologues and dialogues in the comment section nevertheless represent cultural expressions of penal and legal sensibilities around MAiD, further reflecting what Garland (1990, 253) describes as punishment's "positive capacity to create meaning."

The Spectre of Capital Punishment

Capital punishment is a touchstone for many commenters, with several of them drawing on cultural images of executions to evaluate MAiD for prisoners. These cultural images of capital punishment occur despite its abolition in 1976 and the last executions in Canada taking place in 1962. Commenters associate death caused by MAiD with capital punishment, often with punitive emphasis. In other instances, capital punishment is not referred to explicitly, but commenters' rationales for MAiD coincide with those expressed historically in Canada.

For example, Lucia invokes the violence of an "electric chair" to describe MAiD, connecting MAiD to execution: "The electric chair sounds like a great option for assisted suicide of prisoners. This sounds like we should bring back the death penalty under the guise of compassion for the most heinous inmates."

In invoking the electric chair, Lucia appears to imagine the prisoner in pain, in opposition to the humane death so important to the American state's absolution of capital punishment (Garland 2011; Kaufman-Osborn 2001; Sarat 2001). The electric chair is a comparatively corporeal and spectacular reference. The electric chair's violence has required US courts, in contexts of judicial review, to obscure and diminish signs that the prisoner suffered unnecessarily to preserve the method's legitimacy (Kaufman-Osborn 2001) and necessitated additional means to "minimize the exposure of bodily fluids and flows" (Garland 2011, 778). Whether intentional or not, Lucia's reference to the electric chair strongly associates MAiD with such gore. Further, the physician or nurse practitioner, and their medicalized, therapeutic means of causing death, disappear in Lucia's image, replaced by technology that re-aligns MAiD with the commission of punishment through execution. And perhaps most interestingly, Canada has no historical precedent of using the electric chair, having only executed prisoners by hanging (Strange 1995). Lucia sees MAiD for prisoners as an opportunity to restore capital punishment—a kind that never existed in Canada—even if it appears outwardly, through procedures attendant to MAiD, like an act of compassion.

For Brian, the causal agent of death need not be spectacular, like an electric chair, nor risk the same pains. The causal agent coincides in MAiD and capital punishment through the use of the phrase "lethal injection," relating the two procedures through their shared transgression of the prisoner's living body: "ah I

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love it, lethal injection by request." But Brian's reference to lethal injection, especially paired with a flat, caustic affect ("ah I love it"), while not a spectacular method of execution, is not devoid of violence (Garland 2011). Lethal injection was rejected by a Joint Committee's final report in 1956, because the method fused medicine and execution, and as Strange (2001, 380) put it, "required close and intimate connection between the prisoner and the person who injected the needle." This close and intimate connection between executor and prisoner put the executor in a qualitatively different relation to the death caused than with the dispassionate execution by hanging, contrary to mid-twentieth-century sensibilities about killing (Strange 2001). This close and intimate connection is also drawn out when contrasting the lexical construction, "lethal injection," with that particular to MAiD. Section 241.1 of Canada's *Criminal Code*, in defining MAiD, describes the method, in part, as "a substance […] that causes their death," and is described in protocols of the Canadian Association of MAiD Assessors and Providers (CAMAP)—a voluntary association involved in the drafting of guidelines—as either a "lethal dose" or "lethal effect."[7]

Whereas the action-noun, *injection*, implies active, human intervention in extinguishing life, the passive construction of MAiD's legislative definition—"a substance […] that causes"—places the prescribing or administering physician or nurse practitioner at some remove from death. Brian, in less than two words, compresses this distance relating MAiD to an active form of lethality that was repugnant to politicians in the twilight of capital punishment in Canada. Further, the outward appearance of MAiD procedures—such as Brian's reference to "by request"—is overtaken by the imagined connection of capital punishment to MAiD through the mechanism of causing death. The *Criminal Code* establishes an array of procedural safeguards, which require a patient's capacity to consent, the absence of coercion or pressure, intolerable suffering of a "grievous and irremediable medical condition," periods for reflection, among other safeguards, dissimulated in Brian's characterization, "lethal injection by request."

Death, and the state's role in bringing about death, are also discussed in much more abstracted terms. Commenters invoke the argument, similarly raised in 1976 in favour of capital punishment, that supporting prisoners costs the Canadian government—and by extension, taxpayers—a lot of money,[8] so prisoners' premature death, through MAiD, would limit government spending. Humphrey writes: "Why not. It'll save us money." Joe writes: "We should thank them for saving US money!" Lucia, again playing with terminology, writes: "The death penalty is a form of assisted suicide and a good cost saver." Susan writes:

> Cons whine daily about money the Liberals spend but are OK with it costing $150,000 [to keep] an inmate that has major health issues alive a few more years.
>
> This is a way to save money and the end results are the same. The inmate who is going to die in prison dies.

[7] See e.g., https://camapcanada.ca/wp-content/uploads/2019/01/OralMAiD-Med.pdf; https://camapcanada.ca/wp-content/uploads/2020/05/IV-protocol-final.pdf.

[8] Hansard (Commons Debates), May 6, 1976 on p 13243.

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For Jason, the provision of care to prisoners is too expensive and could be avoided by facilitating MAiD, where MAiD is the prisoner's choice: "If this is asked for by the inmates. All the power to them. Let THEM make that choice. Especially if it can save 150G/year per inmate."

In these examples, rationales for MAiD coincide with rationales previously used for capital punishment. These comments use prisoners' deaths as a tool to critique government largesse, where largesse not only signals the unscrupulous use of the public purse but also something deeper about the nature of law and society. In the case of capital punishment, as exemplified in the 1976 speech of Kenneth Hurlburt, MP, in Parliament, prisoners' deaths reinforce law's hold over the hearts and minds of people, maintaining good order in awe of law's authority. According to Hurlburt, abolishing the state's "right to protect […] life by killing" and replacing it with a carceral-welfare state would lead Canada further into the excess and disorder of a criminogenic society. The "particular [historical and cultural] conjuncture" that lent support to capital punishment in the 1960s and 1970s for retentionists like Hurlburt was, as David Garland (2005, 357–58) notes, "shaped by fears about rising rates of crime and violence," "urban breakdown," and "moral decay."

Joe, for example, who, as noted above, celebrated that MAiD for prisoners saved taxpayers' money, was also critical of desires of some to ensure that MAiD was carried out compassionately. "Certain members of society" are seen as being too soft on crime and prisoners, which, it is implied, feeds criminal activity:

> When convicts who CHOOSE to break our laws and threaten, injure and in many cases kill (mostly) innocent people, they give up not only their privilege to "compassion"; but their rights as Canadians and even human beings as well.
>
> Certain members of society waste far too much energy on those who CHOOSE to break OUR laws. Quite simply, convicted criminal should pay the SAME penalty, plus costs and inconvenience, as they have "charged" their victims. They, or their estate, should also pay all court, policing and jail costs as well.
>
> THAT would be justice—and it would lead to a decrease in criminal activity!

Burt, also taking issue with parole as a means to ensure a more compassionate death, draws out concern for "moral decay" in more explicit terms: "Sorry…no 'compassionate' parole…the people they've hurt or killed do not get any compassion…So sick and tired of this country coddling criminals…They're criminals—we should be coddling the victims whose lives they've ripped apart…This country is going to hell in a hand basket pretty darn fast…"

Overall, where comments allude to or reference capital punishment, it is generally to imbed MAiD in a regime of punishment, bringing out its punitive or violent features or to encourage the movement to restoring the death penalty. Spectres of capital punishment thereby haunt conversation, cultural traces appearing in and shaping everyday sensibilities as commenters reconcile MAiD and punishment, and their image of the government, society and the CSC policy that operationalizes this "civilized" form of prisoner death.

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Pain as Punishment

Both where capital punishment is raised and where it is not, prisoners' bodies tend to occupy a central place in commenters' conversation. The centrality of the body is consistent with Alan Hyde's (1997) argument that the human body figures significantly in legal imagination. The body is simultaneously an object of regulation and a site of experience, which together mediate legal sensibilities (Hyde 1997). Further, as Roxanne Mykitiuk (1994, 84) argues, the body and its corporeal matters possess a certain "recalcitrance"—a capacity for agency or affection of its own—that shapes, while it is concurrently reconstructed in, law (also see Shaw 2021; Shaw and Mykitiuk 2022). Insights about law and the body have aided scholars like Sarat (2001) in attending to the sensibilities that shape punishment and the regulation of death. Following Robert Cover's (1986, 1601) observation that "[l]egal interpretation plays on a field of pain and death," Sarat (2001) and colleagues (e.g., Kaufman-Osborn 2001) argue pain, specifically the body in pain, is uniquely generative of sensibilities that sustain (or, potentially, challenge) different forms of state lethality. For example, the body in pain can be thought of as a record of state violence, whose existence can channel and magnify pleasure among those spectating and those invested in the continuation of these violent practices. Alternatively, pain signals an excess of state violence that demands others' empathy (Hyde 1997); or pain, like death, is a (ontological) limit to law's dominion that necessarily engenders resistance, to desperately seek escape from under the weight of the state's preferred *nomos* (Cheah and Grosz 1996; Cover 1986). Pain and death are the body's recalcitrance, which "live in and through various institutions and their linguistic practices, institutions and practices that are historically and culturally situated" (Sarat 2001, 7; also see Garland 2011).

The body in pain starts to emerge in the comments where MAiD is constructed as an escape of punishment. Anything less than the complete duration of the sentence is an erosion of justice; the prisoner must stay in custody, ideally suffering the deprivation of comforts and rights that protect the body from pain. Further, the sentence must be carried out to its end despite a pain-wracked prisoner's MAiD request, so even where pain is not explicitly acknowledged, it is implied. For example, Angela characterizes MAiD *and* capital punishment as a metaphorical escape: "If it is a murderer who showed no compassion to their victims you believe they should be allowed to escape by a compassionate comfy death? I'm against the death penalty for that reason."

Likewise, Jeff is dismayed by MAiD cutting sentences short; Hugh considers MAiD tantamount to freedom, to which prisoners should not be entitled; and Teddy refers to MAiD as an escape from punishment, although his opposition to state lethality, generally, creates additional discomfort:

> I think that's an escape route that should be banned. The prisoners lost the right to make that kind of determination when they were sentenced for the crime.
>
> It's also a step along a very nasty slippery slope. I don't want the state involved in killing prisoners, even letting them die is somewhat disturbing…

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Jack thinks punishment is best achieved through a "natural" death in prison, with which MAiD would interfere: "Why would anyone support assisted death for prisoners? They are in for life and need go by natural causes. They will get off to [sic] easy with assisted death. We should have a referendum on this issue with the next federal election by putting this on a ballot to check yes or no."

Jack's invocation of referendum echoes death-penalty retentionists' arguments during the parliamentary debate of Bill C-84, confident that a popular vote mirrors his desire. Elsewhere, his desire is expressed nakedly when he writes, "Leave these criminals alive so they can suffer their sentence until they die."

The presence of pain seems meaningful to such commenters "via its incorporation within a cosmological narrative," as Timothy Kaufman-Osborn (2001, 78–79) describes it, with respect to the commenters' proper place on earth: ordered, happy, and sovereign above an invasive and depraved Other. This is suggested by comments, like Beverly's, that portray prisoners accessing MAiD outside the prison as a compromise to their duly deserved sentence: a "bending" and "changing" of punishment by allowing the prisoner Other to move outside the penitentiary among a non-criminal population. "This option needs to be preformed [sic] in the prison…enough bending, changing the sentencing. There are medical people in prisons…use them."

As noted earlier, Burt connects parole, which is to facilitate some prisoners with obtaining MAiD, to affliction and decay: "[t]his country is going to hell in a hand basket pretty darn fast." Terri—who elsewhere expresses anxiety about murderous criminals causing disorder and violating Judeo-Christian values—lets slip the role of race into these binaries. She also sees MAiD as another right afforded to prisoners to the diminishment of incarceration: "They have even more rights than people on the outside paying for the service. Karla Homolka got free tuition and free language training in jail. Students on the outside graduate with huge debts. In the US, many inmates get a free tuition law degree so that they can challenge those who put them in jail for murder, etc."

Further, dismayed with the state of society, Terri implies that punishment of the Other is not painful enough: "Palliative care, limited as it is, should be prioritised for non-criminals. Otherwise, why does anyone even bother to go to work and pay taxes if those at Club Fed get all the benefits? We are the fools. I have already dropped out of this evil society and stick to my own demographic and will continue to do so."

In her many comments, Terri delineates between herself and others like her ("my own demographic") and the "evil society" defined by crime, disorder, and the transgression of Judeo-Christian values; her comments are suggestive of a racialized Other as distinct from and dangerous to law and order (Ahmed 1995). Terri's desire for incarceration is inextricable from, as Henrique Carvalho and Anastasia Chamberlen (2018, 218) describe, the "pleasure of punishment […] directly linked to the specific kind of solidarity that punishment produces": a white, lawful, and ordered society mediated through pain and punishment of the Other.

The pain of prisoners is appropriated in these images *as* justice, which stands in contrast to law's official narratives historically in Canada (Strange 2001) and presently in the US, according to which capital punishment fulfills "the sentimental

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ideal of death that involves no pain" (Kaufman-Osborn 2001, 80; also see LaChance 2017). It stands in contrast to the abolition of corporal punishment as a necessary part in a civilized and modern Canada (Strange 2001), even if punishment continues to be experienced corporeally (Chamberlen 2018; Garland 2011). And it stands in contrast to how sentencing law, which treats the prison as a "black box," renders prisoners' corporeal experience unknowable, deferred to the remit of administrators (Kerr 2019).

As Sarat (2001) notes, the retention of violence in punishment relies on its reconstruction as humane and controlled; the sentimental ideal emerges as a "civilizing process" to make punishment, including death, more civilized, painless, and implicated in projects of reform (Strange 2001). Pain, in modern medicalized discourse, is no longer anything but neuro-physical activity perceived by the mind; pain is not, as Christian theologies at times insisted, expressive of any moral economy or fundamental justice (Kaufman-Osborn 2001). The sentimental ideal exists in tandem with the disembodiment of the prisoner, so that punishment is understood to act principally on the body-less legal person, an immaterial subject of law, rather than through the body itself (Garland 2011; Kaufman-Osborn 2001). But the commenters turn the law's official narratives on their head. Pain obtains meaning again as punishment. And MAiD, to the extent it cannot be reconciled in commenters' sensibilities as a means to effect punishment, reflects an intrusion upon that pain.

Refracting Sensibilities through the Body in Pain

Alan Hyde (1997, 193) describes the "sentimentalized body" as a body that invites people to relate to each other, specifically by inviting someone to experience another's suffering and pain as "a figure of empathy." The "sentimentalized, empathized[-with] body" in pain thereby compels one to treat another as more than a disembodied or abstracted legal person (Hyde 1997, 195), potentiating different relationships between people. In the alternative to the hostile comments so far documented, some commenters identify prisoners' pain as similar to their own because of old age or illness, in this form of sentimentalized or empathetic relating. For example, Pete emphasizes that the prisoner is an individual in need of care, comparable to any individual outside the prison: "If an individual has a terminal disease and chooses medically assisted end of life care, who cares if the individual is in prison or not. The government should not interfere in the right of an individual to decide when to end their life when facing a terminal disease."

Glen similarly notes that prisoners should be entitled to a dignified, painless death like anyone else:

> Hard not to agree to ANYONE's wish for medical assistance in death (MAID) to end an agonized existence.
>
> Those with strong religious or moral beliefs are free to eliminate MAID from their own end of life situation…but, just as they are free to choose the option of their choice, they cannot impose their limitations on the choices available to others.

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> For those who suggest palliative care can make MAID less desirable, while I (somewhat) agree with their view, it has to be recognized that the powerful drugs associated with palliative care cannot possibly be administered in a prison environment. I mean really, it would be like storing fresh meat in a tiger's cage.

Others, like Danny, frame the idea of prohibiting MAiD for prisoners as an extension of punishment: "There is no reason to stand in their way especially at this point in a prisoner's life. If they are that sick, why prolong their punishment? It seems a tad extra cruel to me, we're not that kind of society… are we?"

And another: "Does one kind of pain cancel out another? The sentence itself is the punishment; anything beyond it is gratuitously cruel. I am not pleading leniency or clemency for the vast majority of criminals who, being healthy, are still a threat."

Keith writes:

> I don't see any reason why inmates should not receive medical assistance to die if they meet all the criteria. To suggest otherwise is just unnecessarily cruel. And if necessary perform the procedure outside of prison under the hands of qualified medical professionals. You wouldn't allow an inmate to die of appendicitis by denying treatment, so why would you deny one MAID?

While the prisoner's body in pain demands interrelation *qua* their experience as a patient, some commenters nonetheless construe prisoners as abstracted legal personalities. The recipient of MAiD is split into an embodied patient entitled to medical care and an imprisoned person who must be deprived of abstracted rights. This might necessitate for commenters that MAiD be provided in the prison, without parole. For example, one person writes, "I agree that the care be provided by a doctor and not prison staff and it should be carried out in a hospital or care center but I disagree it is a reason for parole. Let's not forget these individuals in prisons carried out crimes, many violent, against innocent victims."

Jason writes:

> However we are not talking [about] the difference between suicide and MAID. MAID is only given to a terminally ill patient. It is not like the other inmates can talk a regular person into going to ask for MAID. It has to go through the same screening process style that anyone other person in normal public would have to go through. However I don't believe the terminally ill person requesting the MAID having a life sentence should get the benefit of tasting freedom. Even for a short time period. IMO the public hospital beds should be kept for those who have not broke[n] the law.

In other cases, parole is understood as a legitimate option for a prisoner, where the prisoner's release is appropriate. This is especially so where the prisoner is understood as frail or weak due to their intolerable suffering, thereby posing minimal risk to the public. For example, Philip writes:

> If these inmates are no threat to society I do not see why the Correctional Services do not have their own palliative care facility where the offender and their family can be together to ease the death for everyone.

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> There would be little physical security required, it would be more like a remote hospices with facilities for family or friends to stay and be with the person.
>
> There would need to be an assessment of risk in each case, as anyone can cause harm and act violently regardless how ill they appear to be. Also this facility would not be an option to prison where the prisoner may live for several months, potentially years, though it could be a step to a parole to community care if it is available.
>
> Assisted dying should not be a protracted issue for anyone, when a person asks for help in dying and meets all the acceptable conditions to be allowed to do so, the entire process should take no more than days or hours from that point. One assumes the prisoner's relatives have been involved in the process as soon as the person asks for help in dying.

Elsewhere, in reply to someone else, Vern writes, "Wow! It's like you didn't even read the article. They're talking about inmates who are too sick and frail to get out of bed, They're talking about releasing them to palliative care centres where they would be heavily sedated to manage their pain. So you REALLY think they could pose any risk?"

These commenters' sensibilities perhaps share most with law's official narratives of the legal subject, incarceration, and the ideal candidate for MAiD, even though their sensibilities involve relating to the prisoner's empathized-with body. For example, these commenters treat pain as irreconcilable with punishment; pain exceeds what these commenters expect of the prisoner's sentence, which is instead thought to reflect an archaic form of retributive justice. Further, prisoners, like others who age or become ill, are seen as entitled to a painless, dignified death. As Victoria states, inasmuch as the person is an inmate, punishment should be exacted against the prisoner as a legal subject through the deprivation of rights like freedom of movement. But as a patient, the prisoner's pain is intelligible as a terminal or otherwise grievous and irremediable condition, which entitles the prisoner to MAiD like any other patient. As a patient, the prisoner becomes, as Hyde (1997, 199) described, a "sympathetic body" "that is the uniquely differentiated home of a unique human person, the body that is the sole medium through which that person has a world, relates to others, others who can enter relations with that person precisely because they feel that body's pain."

These commenters appear to split the prisoner into different legal persons (i.e. the inmate and the patient) and engage concurrently in a selective *presencing* and *absencing* of the body (Leder 1990) with respect to these different personalities. Spatially and temporally, the body in pain is *presenced* within the immediate bounds of the patient entitled to MAiD, whose mental decision-making about bodily integrity is prioritized unless they are a class of person for whom this legal personality cannot be convincingly maintained. The prisoner's pain as an inmate, which potentially underlies or contributes to the prisoner's desire for MAiD, is *absenced* when the commenter identifies the prisoner as a patient. In other words, by disembodying the prisoner *qua* their status as an inmate, and attributing pain to

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the medical condition for which MAiD is sought, these commenters selectively relate to the prisoner as a patient, averting their eyes from the active involvement of incarceration in acting on the body (Chamberlen 2018). A "civilized," "non-carceral" death for prisoners by MAiD thereby becomes permissible through the alternation of embodiment and disembodiment in discourse, affecting how commenters relate to the prisoner's body. Commenters can thereby maintain the notion of legal personality vital to liberal legal thought on the subject of rights and incarceration generally, as well as with respect to their perception of the ideal candidate for MAiD.

Conclusion: Aesthetic Mediations

Evi Girling and Lizzie Seal (2016, 269) characterize prisoners experiencing "life without parole" as "sentenced to slow death by imprisonment, with no one 'deciding death,' no technologies of death, no rituals of execution." Slow death is "the physical wearing out of a population and the deterioration of people in that population that is very nearly a defining condition of their experience and historical existence" (Berlant 2007, 754). The slow death of incarceration can be contrasted with capital punishment, which often entails—especially historically—a different approach of the state to the death caused. Historically, capital punishment entailed the spectacularization of death, where the state-power that effected death was configured through the sovereign who made highly visible life-and-death decisions over subjects (Foucault 1977; Povinelli 2009). To some extent, this spectacular death persists in contemporary examples of capital punishment, namely in the United States, even though death has been "humanized" through the "medicalised aesthetics" of lethal injection (Girling 2016, 355). Namely, legal challenges to capital punishment, and the "ensuing spectacle of mitigation, delay, mercy (and its denial)" (Girling 2016, 354) can re-focus penal sensibilities among the US public on capital punishment.

The possibility of death being slow or spectacular (or becoming one or the other) matters in the formation of ethical judgements, in part because the character or quality of a particular death has consequences for the framing of responses to an injustice. The manner in which a person is made or allowed to die flows from the condensation of power relations implied aesthetically in the character or quality of death. For example, Girling (2016, 356) argues that the anaesthetization and medicalization of death in the "staging of modern executions" renders the spectacular appearance of prisoners' pain in discourse "meaningless." By meaningless, Girling is describing how a popular discourse intermittently consumed by the pains of capital punishment is ill equipped to conceptualize the slow violence of the state that an anaesthetized and medicalized execution has become part of. Contemporary capital punishment has generally become like MAiD, according to Girling (2016, 356), in that both are emblematic of "[the] search for dignified and painless death," "in which the taking of life 'assume[s] the character of a depoliticized humanitarian (non) event.'" As a result of decades of civilizing processes, the death penalty has become a form of death like the slow deaths of prisoners generally, and so to

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spectacularize the execution focuses attention on the botched death, the means of execution, or fidelity to procedure, as opposed to the lethal structure of carceral institutions. From Girling's (2016) perspective, the non-spectacular death of contemporary capital punishment and slow death of incarceration generally require different sensibilities and different strategies than those enabled by these deaths' fleeting spectacularization (e.g., legal challenges of capital punishment) if abolitionists are to succeed in putting a stop to prisoners "doing life" (and "doing death") behind bars (Girling 2016, 358).

Our case study similarly demonstrates the aesthetic mediation of ethical judgement: a non-propositional form of ethics emerging in a place and time inflected by certain penal and legal sensibilities. But our observation of MAiD in the context of the comment section differs from what Girling takes for granted in her comparison of capital punishment and MAiD. Girling treats MAiD as a non-event, which serves as an analogue to contemporary capital punishment. But for commenters, the provision of MAiD to prisoners is not a non-event. Discussing MAiD for prisoners appears to implicate a specific set of relations between the commenter and prisoner, which reposition the commenter in relation to the lethality of the prison. Generally, prisoners, old and young, die in prison without stirring affections among the public. These deaths go unnoticed, uncared for and un-mourned. Prisoners die "slowly." But by discussing the CSC's policy, dying and pain in the prison take on different meanings, exemplified by the range of sensibilities expressed in the comment section. The deaths become noticed, cared for and mourn-able, or in place of mourning, become desirable. Commenters tend to relate with, or *lean into*, the prisoner they imagine in pain or death, which appears to spectacularize the prisoner's death by MAiD.

In the case of the comment section, the bodies of prisoners (and of anticipated or actual victims) play a fundamental part in staging MAiD. Prisoners' bodies exist in commenters' imaginations as overflowing in pain that invites culturally formative relations between commenters and prisoners, commenters and victims, and commenters and prisoners' deaths. Such relations enable a range of interpretations and ethical judgements for commenters; but in the time and place of this comment section, this tended to be realized in at least two different ways. On the one hand, relating fomented sensibilities amenable to hate, revulsion, and a desire to kill, evidenced in the hostility of some comments. Significantly, the spectre of capital punishment and its spectacularized image of the body in pain materialized in these kinds of comments. Commenters' sensibilities could alternatively be redirected through empathetic relations, rendering prisoners' deaths and state lethality more humanized to commenters. These generally operated through a mode of *presencing* and *absencing* the body, prioritizing the prisoners' sentimentalized, empathetic body in pain as a patient over pains of imprisonment.

Both modes of relating to prisoners enabled commenters to take notice, in their imagination, of prisoners' dying by MAiD. What might otherwise be a non-event—a medicalized procedure undertaken to eliminate meaningless, debilitating pain—was transformed into a distinctive event in the process of its spectacularization. Whether MAiD was viewed as advancing capital punishment, diminishing the pain

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that should be suffered in punishment, or responding to the pains delimited as satisfying the patient's status as the ideal patient, the prisoner's body formed part of commenters' ethical judgements, affecting how the prisoner, their death, and the circumstances of their incarceration came to matter to the question of justice at stake.

Commenters seemed to dismiss other prisoners, pains, or deaths that were incompatible with the bodies they imagined were eligible for MAiD. Further, although we can only offer this comment speculatively in the absence of any comparative data, the medium of the comment section and its placement under a news article seemed to amplify its spectacularization. The reductive framing of the policy in the article (as opposed to structural histories of incarceration), the dramatization of polemic discourse between commenters (e.g., Liberals versus Conservatives), and ephemeral significance (e.g., the attention of commenters is short as novel news stories come out and shift discourse) likely reinforced shallow engagement ill-suited to the challenge of identifying and responding ethically to prisoners' deaths. Accordingly, irrespective of how commenters imagined prisoners eligible for MAiD, slow deaths under incarceration were left unnoticed, uncared for and un-mourned in their discussion. The "civilized," humanitarian form of death offered by MAiD deflects from the pains and deaths that prisoners otherwise endure, leaving intact incarceration's lethality.

It is conceivable that the discussion of MAiD for prisoners could take place without the spectacularization of death, allowing for commenters to consider both the pain caused by prisoners' medical conditions and that effected by the slow death of incarceration, and frame their commentary on legal rights and entitlements accordingly. The *presencing* of the prisoner, as both an inmate and a patient, *in addition to* their other relations, could open the commenter to multiple deaths caused: the death which is slow according to structural conditions of incarceration, life course and medical illness, and that which occurs acutely. This concurrent presencing would seem to complicate the sensibilities by which commenters approached the question of MAiD for prisoners, inviting critiques of incarceration itself and consideration of less harmful alternatives, as well as attention to those structures that take effect over a longer durée.

Deeper interrogation of foundational assumptions might thereby enable a more equitable study of MAiD for prisoners, as well as incarceration. Consistent with the cultural approach to penality and legality we have undertaken, such an interrogation should attend to how referents and affects are made in a given place and shape discourse and social action, allowing the commenter to take careful, slow and stumbling steps with others in the deliberation over foundational assumptions.

But penologists and legal scholars ought to take online sites like comment sections seriously, and not wish them away simply because their content may be discomfiting or toxic. Comment sections are venues for meaning making, which have been known to affect the formation of public opinion, and individual and collective behaviour. Further, commenters in online fora take form within our cultural milieu and so the conditions under which their sensibilities emerge must have *some* connection to our offline worlds, even if digital infrastructures allow for and facilitate differences in the expression of penal and legal sensibilities. To

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examine foundational assumptions without regard for the contribution of online fora, where we increasingly spend more time and where so many of our interactions are mediated, risks excluding formative dimensions of social life. For that reason, examining commenters' discussion of MAiD for prisoners serves as an important case study of legal and penal sensibilities, bringing us closer to appreciating how individuals *can* orient to prisoners' deaths generally, and with respect to MAiD specifically. The comment section demonstrates how penal and legal meaning can be made, as well as the effects of these meanings upon ethical judgement.

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