Law, Immunization and the Right to Die:

On Legal Fictions and the Governance of Assisted Dying

by

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Abstract

This thesis charts and explores the effects of a basic socio-political logic of English and Canadian case law on assisted dying. It focuses specifically on a problematic paternalism within such law and questions why judicial decisions consistently refuse to recognize so-called 'compassionate motives' for assisted death. When one ventures beyond judicial *ratios*, focusing instead on cases as discourses in relation to wider power-knowledge relations, one glimpses how law helps to shape and support a political rationality of neoliberalism in explicit and subtle ways. In particular, an analysis reveals how specific cases draw on concepts such as enmity, vulnerability, inviolability of persons, security of persons and of society, dignity and dependency, which feed two legal fictions – immune persons and an immune society – that reflect the individualizing, privatizing and divisive ethos of a neoliberal rationality. Referring to Esposito's (2008, 2010, 2011, 2013) insights the following thesis describes how a person may be immunized from outside interference and from an obligation toward others, just as an immune society becomes a totality of reciprocally immune persons. In this context, legal discussions centred on calls for assisted death are paradoxical. On the one hand, they draw on concepts to feed fictions that reflect a neoliberal ethos, which presents appellants as the right kind of subjects for death (i.e., they are abject enough because they threaten to challenge the legal fiction of immune persons in an immunized society). On the other, the law's concepts and fictions simultaneously makes the act of killing these subjects illegal by developing a universalizing logic of immunity that ensures subjects are divided

from one another, ‘protected’ from any outside interference – no matter their requests. This divisive neoliberal ethos of law annuls a vibrant politics of assisted death because it is unyielding in asserting that any form of assistance for death cannot be legal, rendering its acknowledgment of how and why some persons are appropriate subjects for death somewhat beside its legal point. In conclusion, the thesis suggests how the law and legal processes might be amended as part of an ‘affirmative politics’ that responds to requests for assisted death differently in lieu of the critiques sets forth.

Preface

Elements from chapter three of this thesis and the theoretical ideas developed throughout have been published in two journal articles: Hardes, J. (2013). Fear, sovereignty and the right to die, *Societies*, 3(1), 66-79, and Hardes, J. (2014). Biopolitics and the enemy: On law, rights and proper subjects, *Law, Culture and the Humanities Journal*. Forthcoming. Online before print.

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INTRODUCTION

Immunized Life

"Whose body is this? Who owns my life?" Canada's Sue Rodriguez demanded an answer to these stark questions as she engaged in what has now become known as a landmark legal battle in cases colloquially dubbed 'the right to die' (*Rodriguez v. British Columbia* (Attorney General), [1993]). Rodriguez was diagnosed in August 1991 with amyotrophic lateral sclerosis (ALS), also commonly known as motor neurone disease. ALS is a debilitating and degenerative illness that weakens the muscles and eventually leads of a loss of bodily movement. Realizing that this malady would eventually leave her unable to move and entirely dependent on others, Rodriguez felt that she was left with two decisions: she could either end her life legally by way of suicide, which was decriminalized in Canada in 1972, or she could await a time at which she would be unable to end her life herself and thus risk living a life 'trapped in her own body' given that at this late stage it would be illegal for another person to provide her assistance in dying. For her, the latter prospect of a life confined to a body that she could not move was unfathomable.

Others, too, have shared Rodriguez's convictions. In 2012, England witnessed the emotionally charged appeal from 58-year-old Tony Nicklinson, a formerly active man who, after experiencing a stroke in 2005, was left paralyzed from the neck downward. He described his remaining life as his own "personal purgatory", trapped, as Rodriguez had also noted, between life and death. Indeed as Nicklinson's daughter, Lauren, noted: "If a prisoner were held in these conditions in a prison, there would rightly be accusations of torture. Dad's prison was of a wholly more tortuous nature."[1] "If the legal consequences were not so huge i.e. life imprisonment, perhaps I could get someone to help me", commented Nicklinson: "As things stand, I can't get help" (*Nicklinson V MOJ*, para. 3). Despite a series of appeals from Nicklinson and from his wife, Jane, asking the law for the right to allow a physician to help end his life compassionately, Nicklinson's legal case, like Canadian Rodriguez's before him, was denied. The law could not allow the prospect of "compassionate killing" from a physician or from any other subject: the law simply did not recognise the "compassionate motives of the 'mercy' killer" (*Nicklinson V MOJ*, para.54, s7.7).

These appeals from Rodriguez and Nicklinson are most broadly considered appeals to 'assisted death'. Acts of assistance in death differ: one may appeal for a physician to administer a lethal injection in order to end one's life, which is termed 'voluntary active euthanasia'[2]; on the contrary assisted death can also be interpreted and sought as 'assisted suicide', whereby a physician provides the

appellant with the means to administer his or her own death (Lemmens & Dickens, 2001). With assisted suicide the doctor will not physically inject the subject or administer a lethal dose, but instead will provide the means for the subject to do so themselves (Lemmens & Dickens, 2001). When this thesis refers to 'right to die' legal appeals, it refers to a group of legal appeals that emerged in the 1970s (Lavi, 2008) that have asked the law to respond to the prospect of assisted dying practices more broadly, including appeals to voluntary active euthanasia as well as assisted suicide. I often use the terms 'right to die' and 'assisted dying/death appeals' interchangeably throughout the thesis.

Earlier appeals to the 'right to die' also encompassed other acts of assistance—or, as the law will claim, and as this thesis will emphasize, encompassed other 'omissions'— that have since been legalized, including practices of palliative sedation and passive euthanasia. The former, also sometimes called 'terminal sedation', refers to the use of medications that induce an unconscious state; its aim is to "relieve the burden of otherwise intractable suffering in a manner that is ethically acceptable to the patient, family and health-care providers in patients that are imminently dying" (Churney & Radbrook, 2009). Palliative sedation has long been a medical practice, with no legislation having directly addressed it and with no court cases that have directly tested it as a practice in England and Canada (Dean et al, 2012). The latter, passive euthanasia, is defined as the removal or withdrawal of life sustaining treatment, which includes turning off a respirator or removing a subject's artificial nutrition (Garrard, 2005). Practices of passive

euthanasia were set as a precedent in England in 1993 in the case of *Airedale NHS Trust v. Bland.* In Canada, in 1992, the case of *Nancy B. V Hotel-Dieu de Quebec* dealt with a passive euthanasia case, but it did not set a precedent because it was decided in a first-instance court (the judge's decision was not appealed), despite being cited in the later 'active' *Rodriguez* case. The legalization of some of these acts, the manner of overlooking others, and the continued denial of other acts still, has been a source of controversy for appellants and for scholars writing on this topic area (e.g., Tanssjo, 2004; Lemmens & Dickens, 2001).

Despite the increased popularity of appeals to assisted death that have continued to make news headlines in various countries, only three places in the world have open legislation regarding the prospect of 'voluntary active euthanasia'. These countries are: the Netherlands, since 2002; Belgium, since 2002; and Luxembourg, since 2009. Other countries have opened legislation that allows 'assisted suicide'; these countries include: Switzerland, since 1941; and the United States (Oregon, since 1997; Washington since 2008; Montana, since 2008; Vermont since; 2013; and New Mexico since 2014). Some countries do not have laws regarding assisted suicide or euthanasia (e.g., Sweden, Finland, Germany, France, Denmark, Uruguay). The legal treatment of the act differs between these countries. For example, in Sweden, law treats assisted suicide as manslaughter (Humphry, 2005; Yuill, 2013).

In other countries such as England and Canada, which form the focus of this thesis, while suicide was legalized in 1961 and 1971 respectively, and while passive euthanasia has also been legalized, the law continues to prohibit voluntary active euthanasia and/or assisted suicide, and can grant up to 14 years imprisonment for either of these acts. Law in these countries has, however, responded to the prospect of seeking assisted death in another country. Cases such as England's *Purdy* challenged the law that until 2006 had prohibited this act. This case set a precedent in England that a loved one could assist the appellant to a destination where assisted death is legal without fear of prosecution in one's home country. Despite this marginal headway, the law continues to deny what it has framed as 'acts' of assistance that involve taking the life of another person or 'actively' providing the means for this person take their own life.

England witnessed a surge of right to die appeals in the early 2000s, and England and Canada have since witnessed several high media profile appeals between 2012 and 2014. Various 'Assisted Dying Bills' were also recently proposed in these countries, such as Lord Faulkner's UK Bill presented to the House of Lords in May of 2013 and Bill 52, *An Act Respecting End of Life Care* tabled in Quebec in June 2013. The latter Bill 52, which was considered dead after a dissolution of the National Assembly when the Quebec Premier, Pauline Marois, called for a new election, has recently been debated and passed on June 5th 2014. This has been referred to as 'right to die' legislation, though it does not formally claim to permit voluntary active euthanasia or assisted suicide per se, both of which the

federal government claim to be contra to the Canadian Criminal Code. Bill 52 instead claims to provide 'end of life palliative care' for those who are deemed terminally ill under a series of carefully crafted provisions.[3] Other countries have also recently been pulled into this debate; for instance, a recent Irish legal case challenged the law's denial of assisted suicide and voluntary active euthanasia (*Fleming V Ireland,* 2013). Likewise, toward the end of 2013 a French couple, Georgette and Bernard Cazes, aged 86, made news headlines for engaging in a double suicide in a hotel, leaving a letter appealing for the right to assisted dying and the prospect of 'dignified death' that has since stirred assisted dying debates in France. President François Hollande recently set in motion a recommendation to legalize assisted suicide that was part of his pre-election pledge. Even countries that legalized practices of assisted dying some time ago such as Belgium have recently reopened debates to extend the prospects of assisted dying to children; the Belgium senate voted to legalize this act in December of 2013, which Parliament passed in March of 2014. Given the recent waves of appeals to the law to open up its prospects for assisted suicide and active euthanasia, scholar Thomas Tierney's (2006) earlier comment has proven to be even more pertinent: of all the bioethical dilemmas to have emerged in the 21st Century the 'right to die' has truly become one of the most "visible and divisive".

One could tackle this issue of the law and its response to appeals to allow assisted dying from any number of angles. Indeed scholars have done so, addressing the subject matter from the lens of medical ethics and bioethics; from the vantage of

liberal political leanings; from historical trajectories; as well as from the contemporary theoretical lens of 'biopolitics', discussed later. My own approach to this subject matter most broadly addresses the question of assisted dying from a socio-legal perspective with an emphasis on English and Canadian case law.

The thesis is primarily concerned with 'right to die' legal appeals in these countries, particularly regarding appeals to assisted dying by way of voluntary active euthanasia and/or assisted suicide (including physician assisted suicide). In particular I focus on the legal decisions on assisted dying and the legal fictions that the law uses to support these decisions. My socio-legal interest in right to die appeals and the politics of assisted dying led me to examine twelve legal appeals from England and Canada, as well as a further eleven appeals from the United States and Ireland as secondary, supporting evidence. These cases were self-selecting: my analysis comprised of all relevant English and Canadian cases. US and Irish cases were called upon alongside those from England and Canada not only because some of them emerged at the same time as English and Canadian cases were covered by media (e.g., *Fleming V Ireland*, 2013), but also because these other cases were often drawn on as 'evidence' or as points of discussion within English and Canadian legal cases.[4]

The topical nature of right to die appeals spurred my initial interest in the subject matter: while appeals had sporadically appeared since the 1970s, throughout the 1990s, and still in the early 2000s, in 2012 before the dissertation came into

fruition right to die appeals again took centre stage in the English and Canadian media. In 2012, Gloria Taylor of Canada appealed to the prospect of assisted death alongside the family of Kay Carter. During this time, England's Tony Nicklinson alongside 'Martin' (known only by pseudonym) took to the Court of Appeal, followed later by Paul Lamb in 2013. With the publicity these appeals attracted, and what seemed to be a large public outcry around the issue, the reasons the law provided for its continual denial of legal appeals became of particular interest. What precisely was the 'problem' according to the appellants and advocates of assisted dying, and what was provided as the legal rationale to refuse these appeals?

A more personal interest also underscored this topical one. When Nicklinson's appeal emerged in England and when Taylor's appeal emerged in Canada, my grandmother was also implicated in some aspects of the larger debate around assisted dying. After suffering from an unsuccessful surgery, she was kept for a week in a state of palliative sedation. Palliative sedation has long been questioned as a medical technique: some like Tanssjo (2004) argue that it is one step away from euthanasia and the active taking of life. While the law suggests that palliative sedative techniques do not actively 'kill' patients, they are known to 'hasten death'. Yet, some argue that this hastening of death is unnecessary and prolonged: the degree to which a patient suffers in these states is unknown. Some also question whether these techniques are ethical when other options like voluntary active euthanasia might be a viable alternative were the law to permit

such an act (Tanssjo, 2004). My grandmother's state, and the commentary of right to die appellants who have claimed similar problems with the law leaving subjects in a space of limbo, trapped in their own bodies unable to be killed, spurred a significant question regarding law and its logic: why might practices where subjects are near-death be 'maintained' in a living death state? Why is 'taking' life sidestepped in favor of 'letting' subjects die?

The 'Problem'

My analysis of English and Canadian legal cases, as well as the secondary cases and supporting documents listed in chapter two, revealed two common questions and problems that emerged from appellants and from those in support of assisted dying: first, why does the law impose a problematic paternalism upon appellants such that they cannot receive assistance in death? That is, why does the law refuse the prospect of assisted death and impose what subjects regard as a tyrannical 'life sentence'? Even more specifically, why does this life sentence seem to be imposed on particular kinds of subjects who are typically categorized as 'vulnerable'? Second, why does the law refuse to recognise compassionate motives for killing? In particular, why does the law declare as illegal the act of assisting a subject with their death when this subject has requested death and when the assistance is framed as a benevolent act?

My thesis folded these broader questions into a 'fundamental problem' that emerged within the cases examined. This fundamental problem was grounded in

the semantics of assistance itself. It was not simply that the law could not recognise compassionate motives, nor was it that the law imposed a problematic paternalism per se; rather, the fundamental problem was that both the law's inability to recognise compassion and the law's enforcement of paternalism were grounded in a divisive, individualistic idea of human behaviors and human relationships: the law did not recognise relationships between subjects that could in any way be deemed 'open' but instead operated on a series of assumptions (and indeed the law produced these very assumptions) that subjects were closed off from one another and required protection from one another. The problem of assisted dying was attached to a broader problem regarding the limits imposed on acceptable human relations. In the instance of assisted dying the law could only recognise relationships that were divisive and closed.

Thesis Statement

Taking this fundamental problem as its point of departure the following thesis argues that when one ventures beyond the *ratio decidendi* — that is, when one ventures beyond the internal legal ratios of cases and instead examines the cases as discourses that play into wider power-knowledge relations — this problem regarding the semantics of 'assistance' in dying and the limits that law places on the possibilities of human relationships is precisely what is at issue. In particular, a sustained analysis of the wording of right to die legal appeals reveals how the law operates as a discourse and technology of governance that produces 'legal fictions' about human subjects and their relations toward one another. These legal

fictions are historically specific and emerge as an enunciation of a larger rationality of governance called 'neoliberalism'. A neoliberal rationality of governance emerged in England and Canada in the 1970s and has proliferated into the present day.[5] At base, neoliberalism is a political rationality that emphasizes competitive, divisive and self-interested human behaviours that manifest in an emphasis on and proliferation of dissociated, individualistic relations between human subjects (Brown, 2005; Read, 2009). As Wendy Brown (2005) comments,

> The model neoliberal citizen is one who strategizes for her- or himself – among various social, political, and economic options, not one who strives with others to alter or organize these options. A fully realized neoliberal citizenry would be the opposite of public-minded; indeed, it would barely exist as a public. The body politic ceases to be a body but is rather a group of individual entrepreneurs and consumers (2005, p. 43).

The individualizing, dissociative ethos of neoliberalism that divides individuals from one another is also part of a totalizing ethos that claims to unite these dissociative individuals through a shared goal of what I call 'reciprocal dissociation': what neoliberal individuals share is their common dissociation from positive obligations and duties toward one another in favor of minimal interference not only from the state but also from other individual neoliberal subjects.

The legal fictions that law creates reflect this neoliberal ethos. Indeed, legal decisions on assisted dying create two key legal fictions that emphasize the divisive, dissociative relations that neoliberalism requires to operate effectively as a rationality of governance. One of these legal fictions that emerges in the legal

cases on assisted dying is the 'immune person': this is the individual neoliberal subject who is framed as a 'bounded', 'immunized' subject of law – a subject who cannot be interfered with by outsiders. The fiction of the immune person is created through the perpetuation of concepts in legal cases on assisted dying that sustain the belief that subjects are neoliberal individuals who are sovereign over themselves (self directing) and who are private persons.

The second of these legal fictions is the 'immune society'. This is the depiction of a neoliberal society, which is the totality of immune subjects, held in common by their reciprocal dissociation. Legal decisions on assisted dying draw on and create concepts in the legal cases that shape a view that a good and well-operating society is a totality of immunized persons, who are best supported in their individual aims for life by removing barriers that impose positive obligations on said persons and by creating a society where persons do not obligate others. Immune persons in the immune society are related to one another by virtue of their lack of interference with one another: they are reciprocally immune. A simple example that illustrates this double legal fiction of the immune person and immune society is the shift away from a welfare model of society that obligates us toward helping others, toward an individualistic society where drawing on the liberal pot is seen in a negative light. The immune society operates through an ideal of reciprocal non-interference of immune persons with one another: the law and other mechanisms that protect the immune society are there to protect the totality of immune persons from the threat of singular immunized persons who

would interfere with the equilibrium of this totality (i.e. the immunized society is to be protected from immunized persons who would challenge tenets of non-interference and other privative concepts and would threaten the society itself as a reciprocally dissociative society, or who would threaten other immunized persons comprising this society). People who threaten the immune society are people who can no longer function as immune persons and instead obligate others toward them in some ways.

The thesis argues that legal cases typically construct appellants as particular kinds of subjects who would impose a positive obligation onto others. Appellants, framed as elderly, disabled, and terminally ill, are also framed as subjects who threaten the neoliberal order because they are more of a burden and interfere with the reciprocal freedom and dissociation of others in the immune society. Likewise, it argues that appellants also internalize this neoliberal ethos and often seek assisted death through the same concepts and fictions that the law uses to deny them. Appeals to die often replicate a neoliberal ethos by invoking legal 'rights' and drawing on concepts such as 'dignity', 'sovereignty' and so on that generate the same fictions that are also potentially divisive, closed off, and immunizing.

The law, and sometimes appellants themselves, draws on concepts such as enmity, vulnerability, inviolability, security, dignity, and dependency to create the fiction of the immune society and immune person: by drawing on vulnerability for

example, and by framing some subjects as dependents, the law operates as a conduit of neoliberalism and feeds fictions of an immune person and immune society that precludes the prospect of some forms of assisted death. This helps explain why certain legal decisions on assisted dying are made possible and others are not: those that are made possible (e.g., passive euthanasia) comport with the underpinning political rationality that is able to sustain the fiction of the immune subject and immune society.

The thesis, however, also reveals how this logic of legal fictions might seem odd: why would the law not simply allow practices of assisted dying in order to preserve the immune society per se? It presents a certain paradox: on the one hand the neoliberal rationality might be better served if it were to allow the subject, framed as a dependent and burden on other immune persons and immune society (i.e. on the immunization of other subjects, and on the immunization of the totality) to die; after all, these subjects are said to interfere with the operation of neoliberalism that demands all subjects are individualized and do not impose on the freedom of other individual subjects. On the other hand the neoliberal rationality seems committed to maintaining the unit of the individual and closing off this individual from the intrusion and interference of others, so the act of assisted death becomes impossible. I argue that, to date, a neoliberal political rationality has dealt with this problem as best it can by drawing on or creating concepts that allow some forms of assisted death (passive euthanasia, palliative sedation) only if they can be framed in a way that comports with its logic: these

acts are rationalized through the use of concepts that feed the legal fiction of the immune person. For instance, the law will draw on the concept of inviolability to create the fiction of the immune person that will license passive euthanasia as an 'omission' and as a form of 'letting die' that comports with the neoliberal norm of non-interference. Arguably the law has yet to find a way to sustain the fiction of the immune person and immune society that would allow the acts of assisted death that current appellants have aimed for; this, however, might not be impossible.

The intent of the thesis is to expose the operation of legal fictions emergent in case law on assisted dying, with a particular emphasis on the legal decisions and the arguments put forth from appellants to show how the fictions of the immune person and immune society that both legal decisions that deny assisted dying, and legal appeals in favor of assisted dying, (embedded in the same neoliberal rationality of governance) rely upon and feed an individualistic, uncompassionate, and closed-off politics. In framing the problem of assisted dying as a problem of a political ethos that is divisive and closed, I attempt to re-think a new 'affirmative' politics.

To be clear, this affirmative politics, as I shall – following Esposito (2008) – use the phrase, is not one that affirms assisted dying per se: it does not support outright a liberal call for a reversal of the current legal decisions in favor of 'the right to die'. Rather, it aims to reveal the fictions that law generates in denying the

prospect of assisted dying and in doing so seeks to shift the way we attempt to conceptualize assisted dying. If the following thesis frames the problem of assisted dying as a problem of an individualistic and closed-off political ethos, it also frames an affirmative politics as a prospect for a more communal and open political ethos. Speaking of assisted dying as a prospect for community in the affirmative sense does not mean imposing another, albeit different, dogmatic politics, this time replacing a neoliberal individualism with a form of communitarianism. Rather, it implies opening up the concepts and fictions that sustain our relations toward one another in fixed and prescriptive ways that are codified in law; it also means considering what other prospects for assisted dying might arise if we deconstruct these concepts and try to think otherwise. Finally, it means being cautious of apparently 'good' liberal outcomes such as the 'right to assisted death' if these legal changes, were they to appear, remain framed in a closed off, neoliberal divisive and non-relational logic.

Chapter Outline

In assisted dying legal cases the two legal fictions of the immune person and immune society that are enunciations of a neoliberal political ethos are fed through certain concepts that law invokes. These concepts are used to organize the main chapters of the dissertation and include: enmity; vulnerability; inviolable persons; security; dignity, and independence. Each concept that is articulated within the legal cases generates a legal fiction of the divided, neoliberal

immunized self in some form or another and the reciprocally divided immunized society of immune selves.

Before commencing with an analysis of these concepts, chapter one situates my thesis within and against the key literature that either attends to questions of assisted dying from sociological/political vantages relevant to my thesis, or attends to more theoretical or methodological aspects of the thesis (e.g., legal fictions, neoliberal political rationality, and so on). Following this, chapter two provides a short outline of the legal material drawn on throughout as supporting evidence for the arguments I develop; here I specifically detail each English and Canadian legal case, provide a summary of each case, and explain what other material is considered within the thesis. In addition, chapter two gives some methodological remarks about how materials were analyzed and why certain materials were selected.

Chapter three then begins the analysis section on legal fictions. It focuses on the first two concepts emergent in legal cases regarding assisted dying: enmity and vulnerability. The chapter concentrates primarily on the case of Nicklinson (England), where these concepts emerged most prominently, and it also draws on other cases such as Taylor (Canada) and Fleming (Ireland) as support for its claims. The chapter reveals how concepts of enmity and vulnerability are used to help the law generate legal fictions of the immune person who is a 'proper' subject, and also the legal fiction of the immune society that must protect, but

must also be protected from, proper subjects. These two legal fictions assume a necessary confrontation between a vulnerable requestor and the interests of surrounding persons (e.g., family). The decisions of law assume this confrontation in various ways in the different cases, but in each the concept of enmity and its associated vulnerability is used to frame subjects as fixed and knowable: drawing on these concepts allows law to fix as a truth the notion that humanity cannot be trusted and that behavior is universal and predictable. The concepts of enmity and vulnerability are articulated to feed the idea that 'man as wolf to man' which in turn feeds the two legal fictions that would rationalize the 'protection' and subsequent division and dissociation of subjects from one another sustained through law. The chapter argues that this use of enmity and vulnerability feeds legal fictions that support competitive, non-compassionate communal relations that frame neoliberal political contexts.

Chapter four reveals how, in other cases, law's fictions hold out a view that legal persons – whether vulnerable or not – are entities that cannot be violated in any way. In much the same way as concepts of enmity and vulnerability in chapter three, the concept of the inviolable person in chapter four is articulated in order to produce the fiction of law's subjects as divided and individualistic, who are necessarily dissociated and 'immunized' from one another. The chapter focuses initially on the case of *Bland*, and also draws on others like *Rodriguez*. It argues that the law makes a distinction between what it calls 'acts' of killing (making die) and 'omissions' that simply 'let die'. The former rationalizes what the law

calls ‘passive euthanasia’ while allowing law to deny ‘active’ euthanasia and assisted suicide. The law draws on the concept of inviolability to feed a fiction of an immune person whose body is not being interfered with when one simply ‘pulls the plug’ and ‘lets’ a subject die; however, this same concept of inviolability allows the law to deny an act of ‘killing’ or ‘making’ die that would indeed interfere with the fiction of the immune person as a bordered, private subject. This legitimates the death of some ‘abject’ subjects who would otherwise burden the neoliberal ethos by seeming to comport with this said ethos.

Chapter five argues that in other cases in England and Canada the concept of security feeds the two legal fictions in a dual sense. The chapter argues that the law draws on the concept of security to feed the legal fiction of an “immune society”, which is presented as a unified, whole community that is protected from individuals who would threaten this totality. This fiction is generated in order to discount law’s other fiction, established in other cases, of the “the immune person”, which also relies on the concepts of security and inviolable personhood (discussed in the previous chapter four) to underpin it. When these two fictions of the immune society and immune person come into conflict with one another the law will reformulate its fiction of the “immune society” by amending the concept of the “secure person”; it does so by drawing on concepts such as “fundamental justice” and “positive and negative obligations” in support of the immune society as a necessary totality of immune persons. In the same way that law licenses omissions to sustain a fiction of the inviolable person, so too does law license

another omission, this time articulated as a "negative obligation" to protect the person: the law folds the concept of the secure person within the legal fiction of the immune society, such that the individual subject of rights is understood as a legal person whose interests are bound to this whole.

Chapter six focuses on the way that cases use the concept of dependency to frame subjects who are dependent upon others as degenerate and abject subjects. The chapter argues that the law does not challenge this link between dependency and degeneracy but instead fixes this link through the legal fictions it feeds: while law appears to act benevolently (claiming to deny assisted death in the interests of the 'vulnerable'), it does not challenge social norms that construct certain persons as 'vulnerable' on the basis of their being dependent and thus the 'proper' appellants for assisted death (e.g., elderly, disabled, terminally ill); instead law fixes these subjects as the right kind of subjects for assisted death and therefore as inevitably vulnerable to outside interference. This is a problem because the law does not then challenge the idea that some lives are more worthy than others, but rather it confirms this idea and then claims to protect unworthy life from the interference of outsiders based on its legal fictions. In the process, the fictions reaffirm and shore up images of a private, independent person that founds neoliberal political rationales.

On the strength of the preceding chapters, the final concluding chapter considers an alternative way of approaching assisted death by way of a summary of the concepts and fictions addressed throughout. This affirmative politics focuses on

how concepts seem to feed legal fictions around closures and how these closures might be re-opened toward an ethos of reciprocity and dependency. In particular I outline three theses for an affirmative politics of assisted death: first, law as a practice of critique; second law as a third person politics; and finally third, law as an open and risky politics.

Summary

In short, the following thesis argues that several key concepts emerge to articulate two key legal fictions in cases on assisted dying: the first is the fiction of the immune person who is bounded, sovereign, and independent from relations with others; the second is the fiction of the immune society of which these subjects are connected to in their mutual dissociation from one another. These legal fictions in right to die cases enable the law to rule in specific situations as it does: legal fictions emergent in these cases reflect a neoliberal political rationality that is at once individualizing and totalizing, and has a privatizing agenda that pits people competitively against one another. Compassion is not one of its emphasised relations; nor is dependency; nor is relationality more broadly speaking.

This neoliberal emphasis on immunizing relations that are both individualizing and totalizing is problematic because it serves to maintain what de Tocqueville called a society in which subjects 'live side by side, unconnected by any common tie': a society in which we are reciprocally dissociated from one another (Oliva, 2006). The problem of assisted dying is also a problem with a closure off from

others, treating subjects as private, personal, proper selves. At base, the problem of assisted dying is attached to a problem of community.

CHAPTER ONE

Situating this Thesis in the Literature

Introduction

In his famous work, Durkheim (1897) suggests that the question of suicide is a sociological question. Until his insights, scholars had insisted that suicide was a religious and/or moral question but had not considered that society, and the norms and values that it purports, might shape people's decisions to end their lives. Durkheim's thesis on suicide has influenced my examination of assisted dying not only because of his sociological lens but also due to the affinity he noted between suicide and a shifting social terrain toward dissociative, divisive human relations of anomie and individualism (1979, pgs. 8, 11, 288-290, 321). In Durkheim's words, excessive individualism as well as insufficient individualism can both lead to suicide: taking one's life is closely associated with the relations we share with others and how well we balance these relations. Suicide is not simply a problem of the individual; rather, it is a by-product of larger sociological issue relating to how well we balance our relations with one another.

With this sociological lens in mind, my thesis positions itself most broadly within and against two principal areas of scholarship: the first is a body of scholarly work that has approached the question of 'assisted dying' from a 'sociological lens', which mainly encompasses key political philosophers/social theorists writing on assisted dying that inform my own work; the second is a body of scholarly work that is more specifically termed 'socio-legal' scholarship that focuses on the intersection of sociological scholarship with that of legal scholarship. With few exceptions, this latter area of socio-legal work has not tended to directly address my specific research topic (assisted dying) but nonetheless it informs my thesis particularly regarding how it conceptualizes law and society. What follows is a discussion of key sociological/political debates on assisted dying that this thesis is either informed by, responds to, or intersects with. The section explains how my thesis is situated within and against this literature, followed by a more in depth explanation of how the current literature in the field of socio-legal studies helped to shape my research questions and thesis statement that were outlined earlier in the introduction.

Individual Rights Versus Law's Protection

Two opposing arguments tend to encapsulate most sociological/political debates on assisted dying. On the one hand is the 'liberal' perspective that supports assisted dying and critiques the paternalism of the state; on the other hand is a 'critical disability studies' perspective that is primarily opposed to assisted dying

and critiques the liberal perspective's dismissal of the need for state protection of vulnerable populations.

Liberalism

Liberal scholars typically argue in favor of assisted dying on the basis of an individual's right not to be interfered with by state systems of governance (e.g., Dworkin, 1993; Dworkin et al, 1997; Singer, 1994; Huxtable, 2002). This allegedly 'liberal' social and political position tends to be asserted when an individual is said to be capable of articulating his or her own rational desires (e.g., Dworkin, 1993). One of the most well known public scholarly discussions on assisted dying that emphasised this matter was articulated in the *Philosopher's Brief*, published in 1997 by six renowned liberal philosophers including Ronald Dworkin, Thomas Nagel, Robert Nozik, John Rawls, Thomas Scanlon and Judith Jarvis Thompson. They submitted as *amici curiae* information to the Supreme Court in support of the respondents in the United States' legal case of Washington V Glucksburg [1997] regarding the legality of assisted suicide. Their brief brought together numerous arguments in favor of voluntary active euthanasia. Citing the 1992 case of *Planned Parenthood V Casey*, 505 U.S. 833, 851 they noted: "It flows from the right of people to make their own decisions about matters 'involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy'" (1997, p. 434). They further noted that subjects have the right to a "personal decision such as the timing and moment of one's death" (1997, p. 434). At base, their discussion

framed the question of assisted dying by way of a power struggle between a liberal desire for the freedom and autonomy of individuals versus the paternalistic, indeed odious, tyranny of the state (Dworkin, 1993). This liberal perspective is also discussed in legal cases on assisted dying themselves: liberal scholarly work that advocates assisted dying is often cited as 'evidence' or 'expertise' in legal cases (e.g., Dworkin is cited in *Rodriguez v. British Columbia* (Attorney General) [1993] 3 S.C.R. 519).

Critical Disability Studies

While liberal scholars and advocates of the right to die argue that the law's denial of the prospect of assisted death is tyrannical, others from a critical disability studies vantage claim that the law's denial of the right to die is necessary to protect life (e.g., Davis, 2004; Smith, 2006). This position that espouses the need to protect life claims that vulnerable subjects, particularly those who experience disability, are elderly, or terminally ill, require protection from persons who might want to harm them. Those who reject assisted dying typically base their arguments on the prospect that appellants might be coerced into desiring their own death. Their arguments are also based on alleged fears that other persons who have yet to appeal to the right to die but are depicted as members of vulnerable populations might, were the practice of assisted dying legalized, feel compelled to die based on a 'duty' conferred upon them (e.g. Davis, 2004; Smith, 2006; Cholbi, 2010; Hardwig, 1997).

This duty to die is not articulated as a covertly imposed duty; rather, it is a duty that some public voices have overtly articulated. Academics such as Kissel (2000), for instance, argue quite visibly that a duty to die ought to be inculcated from an early age. She suggests that individuals should be encouraged to sacrifice themselves if they are to otherwise burden their family. She also argues that children should learn the economic and social benefits of family member's deaths if these family members might otherwise burden the family (Kissel, 2000; Tong, 2000).

Likewise, Kissel (2000) suggests that children should learn that it is acceptable for siblings experiencing disabilities to be removed from life support given the medical costs and social burden associated with looking after persons with disabilities.[6] This type of rhetoric concerning disability and the social and economic burden associated with it bears remnants from remarks of social eugenicists such as Herbert Spencer whose thoughts emerged prominently within the mid 19th century (Turner & Stagg, 2006).

Baroness Mary Warnock, who is a member of the English House of Lords and a strong advocate of euthanasia, also voiced the opinion that elderly persons and those that are ill and that burden their families ought to "creep off and get out of the way". In an interview with the *London Times* she famously equated practices of euthanasia with sacrifice, noting: "in other contexts, sacrificing oneself for one's family would be considered good. I don't see what is so horrible about the

motive of not wanting to be an increasing nuisance."[7] This commentary has sparked much debate from those who instead claim that that these arguments in favor of a duty to die seem to be closely associated with the eugenics programmes brought into effect through, and culminating with, the atrocities of Nazi Germany (e.g., Davis, 2004; Smith, 2006).

Biopolitics and Assisted Dying

Some scholars can be situated between the liberal and critical disability studies perspectives. This middle perspective is referred to in some literature as 'biopolitics'. While the scholarly use of the term biopolitics varies between authors, in general it refers to the modern political relation between law and life that is said to have become increasingly more complex and concerning in contemporary society (Campbell, 2011). A biopolitical analysis shifts the debate on assisted dying to a different plane of thought: rather than simply view the problem of assisted dying dichotomously, either being in favor of individual liberal rights to die or in favor of the state's protection of vulnerable subjects, scholars of biopolitics argue that this dichotomy is misleading; not only is the state always tyrannical even when it alleges to protect vulnerable populations, but also subjective expressions of liberal human 'rights' that would claim to combat such paternal tyranny are themselves extensions of the same state-enforced biopower that can strip subjects of their lives at any point in time (Agamben, 1998; Hanafin, 2009). From this vantage a biopolitical analysis of assisted dying critiques the state and the rule of law that imposes a problematic paternalism onto

subjects who are kept artificially alive (e.g., Agamben, 1998; Hanafin, 2009); by extension, from this same biopolitical vantage scholars might also critique liberal 'right to die' appeals for being a handmaiden of the biopolitical state. The former critique of state enforced biopower over subjects of assisted death has been expressed in the work of Agamben, Hanafin and Zizek, noted below. The latter critique of liberal right to die appeals has not been broached from this particular biopolitical perspective, although a similar type of critique has been advanced from a governmental one (discussed later) (e.g., Tierney, 2006; Mihic, 2008).

Agamben (1998) argues that the politics of assisted dying provides a pithy example of state enforced biopower. Agamben's work draws on the American case of Karen Ann Quinlan to depict this terrifying state power. Her's was one of the earliest of these contemporary 'right to die' cases that arose in the early 1970s. It was an instance of the denial of what the law now calls 'passive euthanasia'. Her case of *Re Quinlan* [1975] describes how, at the age of 21, she, Quinlan, returned home from a party after consuming alcohol and lapsed into a state of unconsciousness. After a cessation of breathing, she entered into a persistent vegetative state (PVS). Quinlan's legal case described her as 'moribund,' kept alive only by way of a mechanical ventilator in a hospital bed (*Re Quinlan*, 70 N.J. 10, 355 A.2d 647 (1976)). While the living will, also termed Advanced Directive,[8] had been brought into effect in the 1960s in the US as one of the earliest legal tools to initiate patient autonomy regarding death and the right to refuse medical treatment and intervention (Kutner, 1969; Fine, 2005), Quinlan did

not have one. Her lack of a living will meant that Quinlan had not given a directive that would consent to her removal from life sustaining treatment; this spurred the subsequently painful and tense legal battle on the part of Quinlan's parents to the right to put an end to what they considered to be her artificially preserved life. Since Quinlan had just turned 21, her parents had to fight for guardianship in order to effectuate the legal right to terminate treatment. Only upon winning this appeal via a New Jersey Supreme Court decision could Quinlan's father decide her fate. After her removal from life support, Quinlan lived a further nine years on artificial nutrition before passing away from pneumonia. Her case set a precedent in the US concerning the rights of families to remove their loved ones from life sustaining technologies that artificially kept them alive.

While passive euthanasia is now acceptable in most Western countries and has been legalized in England and Canada, as noted before, the prison metaphor Agamben draws on is entirely apt with respect to the law's continued denial of assisted dying (that we now take to refer to voluntary active euthanasia and assisted suicide). He argues that her corporeality as a subject in a persistent vegetative state (PVS), kept alive artificially on a mechanical ventilator, incarcerated her between law and life. From his perspective as well as others (e.g., Hanafin, 2009; Zizek, 2005), the question of assisted dying poses a more fundamental question of biopower or biopolitics in which law and life come to be considered indiscriminate. Biopower or biopolitics from Agamben's vantage

refers to the point at which natural life (zoe) was integrated into the political sphere (bios) as the ultimate object of politics. This subjected life to politics. In the current political condition life is reduced to an almost non-human state; we live in a metaphor of a concentration camp where our lives can be taken at any moment. The politicization of life reveals an absolute sovereign or paternalistic power wielded over life, what Agamben and others also call a politics of death or 'thanatopolitics'. Quinlan's body represented a modern example of bare life and biopolitical power over life for Agamben. He noted that she was "death in motion" (Agamben, 1998, p. 186). Socio-legal scholar, Hanafin (2003), also commenting on Quinlan's case through a similar biopolitical lens, adds here that in instances of right to die appeals the law makes subjects who are dead in motion "die again" and law "freeze[s] the almost dead but too alive on the threshold between life and death" (2003, p. 101). From such analyses one garners a truly dystopian picture: the subject in the hospital bed wedded to the artificial life machine appears analogous to the subject wedded to Nietzsche's 'cold monster', the prosthetic state machine.

Zizek (2005) also relates the politics of assisted dying to the broader terrain of biopolitics. Drawing on the 2001 US case of Terri Schiavo who, like Quinlan, was kept alive artificially on a respirator and artificial nutrition, Zizek (2005) argues that Schiavo was like a tortured prisoner. He claims that while the prisoner was being forced to the brink of death through torture and Schiavo was given too much alleged protection, "What these two opposites share is a reduction to bare

life" wrote Zizek. "In the Schiavo case, this reduction is a biological reality, which is why her life deserves protection; in the case of tortured prisoners, this reduction is imposed by the state apparatus, which is why their lives are deemed unworthy of protection." We might extend this prison metaphor to subjects of active appeals who have, for instance, articulated themselves as similarly feeling "trapped" in their own body (e.g., Kay Carter in *Carter V Canada*, 2012). In short, while Agamben, Hanafin and Zizek do not assert a liberal ethic that supports individual choice and freedom, as liberal philosophers do, they both emphasize the problematic paternalism of law and the state through a 'biopolitical' assessment of assisted dying.

In contrast to these theses on assisted dying and biopolitics, a different variation of biopolitical theory is found in Foucault's (1997, 2003, 2008) work; the example of the law's denial of assisted dying is also drawn on to illustrate it. While Foucault (1990, 2003, 2007, 2008) refers to biopolitics, he conceptualizes it differently in accordance with a different approach to understanding power: from his perspective, biopolitics does not refer to a sovereign power over life that can take this life at any moment as with Agamben's (1998), Hanafin's (2009), and Zizek's (2005) interpretations; rather, it is understood as a historically specific kind of politics that broke with this totalizing sovereign logic. Instead of 'making die' and 'letting live', Foucault (1990) emphasised that biopolitics 'made live' and 'let die'. Such 'making' live must not be misinterpreted as a power being

exercised through sovereign force; rather this 'making live' was fashioned through new mechanisms of governance, discussed later.

One could say, as does Lemke (2011), that there are two key facets to Foucault's account of biopolitics: one facet being material where biopolitics is used as a conceptual tool to explain the new emphasis on biological life and the human body as the object of politics; the other is more political, focusing on the mechanisms of power and the techniques of governance that would make this new focus on the body possible. Foucault (1990, 2003, 2007, 2008) explicitly draws on both interrelated features of biopolitics with different emphases in different pieces of work.[9] Regarding the first matter, Foucault (1990, 2003) emphasizes in some of his works how the individual biological body had became the object and subject of politics. As Esposito (2011) notes: "he [Foucault] is referring to the only element that groups all individuals into the same species: the fact that each has a body" (p. 136). In the *History of Sexuality* as well as in *Society Must be Defended*, Foucault (1990, 2003) most explicitly draws on this feature of biopolitics; he emphasizes in these pieces the materiality of the body as the site of biopolitical power. In the former piece he refers to the example of sexuality to illustrate this biopolitical power exercised through the material body; in the latter he even speaks specifically to the instance of assisted dying to illustrate the exercise of biopolitical power. Referring to the death of the former Spanish dictator, Francisco Franco, in 1975, Foucault (2003) notes the dictator's terrified exclamation, "How hard is it to die?" As Foucault writes: "Franco fell under the

influence of a power that managed life so well, that took so little heed of death….he didn't even realize that he was dead and was being kept alive until after his death" (2003, p. 248-9). An instance of irony arose: even the sovereign who once had wielded power over life and who could 'make die' was to become a subject and object of biopolitics that would 'make live'.

These varying biopolitical analyses of assisted dying, such as those from Agamben, Hanafin and Zizek, as well as the above commentary from Foucault, might be pithy as they highlight the interesting point, albeit from different theoretical vantages, that modern life seems to have become subject to mechanisms of power that have forced it to be kept alive; however, the questions that my thesis raises are not fully realized within these biopolitical analyses. Perhaps this is because these scholars have a different focus or point of entry into thinking about the politics of assisted dying: their analyses seem to provide a theoretical description of the intersection between law and life, within which the bodies of Quinlan, Schiavo, and Franco are bound. Perhaps it is also, as one could more strongly assert, because these scholars have found the political instance of assisted dying to be an interesting metaphor to illustrate what they each conceive as biopolitical power, without fully considering the specificities of assisted dying per se. Discussions in biopolitical literature seem to focus on assisted dying as an instance in which subjects are made to live, but do not ask the more precise question that hones in on the relation of this politics of making live to the questions a politics of assisted dying also raises, which comes to the fore in the

semantics of assistance itself; hence, these biopolitical analyses do not ask why this life is made to live and cannot be killed in relation to others and outsiders; these analyses do not address the problem outlined at the beginning of the thesis, which is: why can the law allow/rationalize some forms of death (i.e. it does not keep all life alive, suicide was legalized, 'passive' forms of euthanasia were legalized) but it cannot, apparently, allow other forms of death, specifically it seems in relation to certain forms of 'assistance'?

Biopolitical analyses appear to focus more on the former aspect of what Lemke (2011) identified, namely, the 'materiality' of life. They use the metaphor of the subject who cannot die as a literal example of 'biopolitics' or the instance of the state/law keeping subjects alive; however, they focus less (or perhaps, more precisely, not at all) on the specifics of assisted dying as a problem of contemporary politics per se, particularly in relation to the specific rationality of governance operating in contemporary society (neoliberalism). Without focusing on the political rationality in more detail that underscores the politics of assisted dying and, as I will later explain, without focusing on the relation between the individual and totality that one finds in the roots of pastoral power and governmentality that is emphasized in the second feature of Foucault's biopolitics that Lemke (2011) identifies, one misses an important analysis of assisted dying.

I will give a brief explanation of Foucault's second feature of biopolitics because this underscores the main thesis that I advance, before I next explain the more

precise influence of the thesis, which is governmentality. This second feature of biopolitics that Lemke (2011) identified is the importance of considering how biopolitics arose as part of a broad rationality of governance. Biopolitics did not simply emphasize the material body as a site of politics; rather, biopolitics emerged as a mode of power that targeted the individual body in a precise context underscored by shifting social, economic, and political conditions. Foucault (1990, 2003, 2007) saw this political emphasis on life emerge with the decline of sovereignty politics in the 15th and 16th Centuries. Where sovereignty politics had reigned over a specific territory, the shifting social, political and economic conditions such as the transition from a feudal state to industrialization and the rise of the market economy that led to new political desires for less government interference with individual actions, generated the need to govern in a different way (Foucault, 2007). Sovereignty, alone, was no longer appropriate. New modes of governance emerged to govern more effectively. Discipline emerged as a technique in the 17th century that allowed governance to focus on individualization: to manage large populations without exerting direct force governance strategies had to inculcate behaviours into each individual subject (Foucault, 2007). It did so by taking the individual human body as its target. Biopolitical strategies emerged alongside and intertwined within disciplinary techniques throughout the 18th Century as political liberalism became even more rife into the 19th centuries as these started focusing more on the regularization of individual discipline within the larger whole: biopolitics was concerned with

managing each and all, and brought both individualization and totalization into a larger 'governmental strategy' (Foucault, 1991, 2007, 2008).

Governmentality

As identified above, biopolitical analyses deconstruct the binary emphasized between liberal scholars and critical disability scholars that posits a division between, on the one hand, the rights of liberal, independent subjects and on the other hand the tyrannous, yet allegedly 'protective,' paternalistic mechanisms of the state effected through its benevolent laws (Tierney, 2006); they do so by shifting the problem to a different terrain, noting that power does not operate over subjects by way of a tyrannical all-powerful state; they also do so by noting that political liberalism that alleges to curbs the state's power instead uses the state more tactically as a discourse and technology of governance to fulfill its political intents and rationalities.

Foucault (1991b) argued that a political rationality is an element of government that helps to create the discursive field of action in which the exercise of power is considered rational. The idea of 'governmentality' is that the political rationality of the time (i.e. that rationality that emerges as dominant in the social context—in our context, a neoliberal rationality) not only represents the contextual reality (i.e. reflects what appears to 'be'), but it also actively constitutes subjects through the truths that it purports (Foucault, 1991a): "it [the political rationality] produces new forms of knowledge, inventing new notions and concepts that contribute to

the ‘government’ of new domains of regulation and intervention” (Lemke, 2002, p. 8). A political rationality is therefore a mode of governing that produces a strategic representation of reality aligned with constructed beliefs and values (that are said to help govern effectively).

Pastoral Power

Foucault (1991b) argues that political rationalities were concerned with the governance of individuals and the totality (i.e. of each and all). He suggests that this concern with the individual and totality can be traced back to the political rationality of pastoral power that derived from Christianity (Foucault, 2003; Golder, 2007). He notes: “Political rationality has grown and imposed itself all throughout the history of Western societies. It first took its stand on the idea of pastoral power, then on that of reason of the state. Its inevitable effects are individualization and totalization. Liberation can only come from attacking not just one of these two effects but political rationality’s very roots” (1991b, p. 325). The metaphor of the shepherd leading his flock underpinned pastoral power. As Foucault notes, variations of pastoral power are still evident in the contemporary political rationalities particularly of political liberalism and neoliberalism. These later rationalities are rooted in pastoral power since they also emphasize the simultaneous individualization and totalization of the subjects they govern. Our contemporary society continues to exercise a rationality that seeks to (at least by way of appearance) “improve the lives of each and every one” within the total state (1991b, p. 235).

In *Security, Territory, Population*, Foucault (2007) writes of the shepherd's paradox as that which represented the fundamental requirement to oversee the one and the many under the Christian pastorate. Hence, "it is a power that individualizes by according as much value to a single sheep as to the whole flock" (2007, p. 364). This paradox, while arguably shifting from the goal of salvation to the goal of a more secularized vision of a predictable and stable population under governmentality, still focuses on political governance of the one as part of the whole. In Foucault's *Subject and Power*, we see a further emphasis on the modern day status of this paradox, whereby liberalism developing in the 18th Century represents a "modern matrix of individualization, or a new form of pastoral power" (2007, p. 214-5). Further, in his reflections on biopolitics, Foucault asks, "To what point do individual interests insofar as they are different and possibly opposed to each other, constitute a danger for the interest of all?" (2008, p. 65).

With its roots in Christian pastoral power, Foucault saw how liberalism emerged as a totalizing and individualizing mechanism of governance. It focused on the unit of individual subjective life (and therefore overlapped with his broader thesis on biopolitics) and it did so through new mechanisms of governance. Indeed as Foucault himself noted with reference to political liberalism, "I think the main characteristic of our political rationality is that this integration of the individuals in a community or in a totality results from a constant correlation between an increasing individualization and the reinforcement of this totality" (Foucault,

1988b, p. 161-162). It is this relation between the individual and community that most centrally informs governmental studies.

Some scholars writing on the right to die have broached the topic from the lens of governmentality (e.g., Tierey, 2006; Mihic, 2008; Hartouni & Pelaprat, 2012). Rather than considering liberal rights appeals to be emergent from independent, individual subjects who are divorced from the state, they, like others who have spoken about governmentality more generally (e.g., Pavlich, 1995; 2012, Lacey, 2007, 2008, 2009; Valverde, 2007; Rose & Valverde, 1998), have argued for the importance of considering how legal rights appeals and the laws they appeal against are bound to the larger social, historical, economic and political context in which they emerge. As noted, this situated-ness of assisted dying within the social context is important for my own thesis.

Neoliberal Governmentality

Only a few commentators have situated assisted dying in this contemporary governmental context. Writing with reference to the 1975 Quinlan case and 1990 Cruzan case, Hartouni & Pelaprat (2012) noted the "new kind of social, legal, economic and ethical actor" arose in the neoliberal era (p. 199). They argue that the right to die emerged as part of a 'neoliberal ontology' of freedom based on personal choice, personal interest and autonomy. In their opinion 'right to die' legal appeals provided evidence that a new subject of power had emerged who would exercise freedom in a way that was consistent with neoliberal

individualism. Hartouni and Pelaprat (2012) identify that appellants of assisted dying conform to neoliberal subjectivities.

Mihic (2008) also writes on assisted dying in the contemporary political context. She also suggests that subjective right to die appeals are not 'freely' made by liberal individuals; rather, the right to die appeal might be construed as the exertion of a freedom that is shaped by the social context in which the 'choice' emerges. One cannot simply claim that a liberal individual's appeal to the 'right to die' is entirely 'free' without also considering how this liberal individual's 'freedom' is constituted within a broader governance agenda (Tierney, 2006; Mihic, 2008). In this regard one must consider the prospect that freedom is not the opposite of governance but, on the contrary, is a mechanism of governance (Rose, 1999).

Mihic (2008) proposes that assisted dying emerges as a problem because subjects internalize a neoliberal ethos. Neoliberalism fosters subjectivities that believe themselves to be free and "unfettered by the state"; however, by contrast, Mihic argues that "this putatively free juridical subject is not autonomous as claimed but reconstituted to fit the socio-economic order in the form of human capital" (p. 167). With reference to assisted dying, Mihic continues: "…advocates of physician assisted suicide conceive of the self as human capital" (p. 170). The neoliberal subject is one whose value is measured as human capital on the basis of investment and productivity (Campbell, 2011, p. 73). From Mihic's vantage,

interpreting the right to die via human capital means that we must consider how

> …the supposedly autonomous dying patient is supposed to take into consideration the welfare of her or his loved ones. On the neoliberal human capital model, parents who love their children will try to close the self like a firm; they will try to die as efficiently as possible (p. 180).

From her vantage the neoliberal subject has a different drive than that which Hartouni and Pelaprat (2012) suggested. Where the latter argued that the neoliberal assisted dying ethos is one concerned only with one's self (i.e. one seeks to die because one considers it a way of asserting one's autonomy), Mihic seems to think there is a communal or social aspect to the problem. Mihic suggests for example that not only is neoliberalism concerned with being able to act autonomously and independently, but it is also an ethos that is concerned with respecting the autonomy and independence of others. In this regard the problem of assisted dying is implicated not only in an individualizing mode of governance (concerning one's own autonomy/self) but also in a totalizing mode of governance (respecting and ensuring the autonomy and self of everyone else). Appellants of assisted dying might be concerned with how their existence as a subject who can no longer act autonomously without assistance (i.e. trapped in their bodies and dependent on others, as Rodriguez and Nicklinson noted) presents them as a burden, and as an interference with the freedom of other neoliberal agents.

If one thing is apparent in a neoliberal era, it is that the pastoral governmental logic has not disappeared. In the current context pastoral power is associated with a political rationality of neoliberalism in which "improving the lives of each and every one" equates with making sure these lives are able to govern themselves

without interference from, and without the need to interfere with, other individual lives. As Foucault (2003) had noted "neoliberalism can accomplish the political aims it inherits from pastoral power – its attempts, that is to say, to provide for the 'salvation' of both one and all – only on condition that it 'first' produce a subject who conducts himself as an entrepreneur of himself" (p. 20).

Indeed a large body of work supports the claim that the contemporary political rationality is neoliberal (see, for example, Campbell, 2011, Foucault, 2008, Lemke, 2002; Rose, 1993, 1999; Beeson & Firth, 1998). Neoliberalism is typically defined in relation to a specific shift in the operation of society and economic policies emerging in the 1970s with Thatcherism in the UK and a Reagan governance agenda in the United States that sought to privatize Keynesian social welfare models of the state (Larner, 2000; Read, 2009). In general, the neoliberal mode of governance is associated with practices of privatization, deregulation, increased individual responsibility placed on citizens, the rule of law, and institutions that support free trade and market economies (Harvey, 2005). On this basis some scholars have even argued that we live in an "age of neoliberalism" (Saad-Filho & Johnston, 2005, p. 5).

Understanding neoliberalism as a political rationality is different to understanding it simply as an economic theory or as an ideology. From Rose's perspective the difference between neoliberalism understood as a political ideology or philosophy and neoliberalism understood as a political rationality is key: he argues that the

latter vantage emphasizes how neoliberalism is a strategy of governance. This means to suggest that neoliberalism is a form of 'governmentality,' spoken of earlier, which ultimately frames subjects' conduct (Hamman, 2009). Rose prefers to call this governmental account "advanced liberalism" as opposed to "neoliberalism", possibly to differentiate between these two ideas of governance (Rose, 1993, 2000). Neoliberalism or advanced liberalism as a governmentality takes its cue from the Foucaultian insight that claims the types of rule we are subjected to are not found in the state as an absolute source of power (Rose, 1993, 2000).

Advanced liberal rule is dependent upon different governance strategies or techniques than a neoliberal ideological rule. It uses experts in different ways. "It does not seek to govern through 'society' but through the regulated choices of individual citizens" (p. 285). It also seeks to "detach substantive authority of expertise from the apparatuses of political rule, relocating experts within a market governed by the rationalities of competition, accountability and consumer demand" (p. 285). The law becomes a regulatory apparatus or technology of this neoliberal political rationality. In doing so, the law acts as a norm (Rose & Valverde, 1998). While this thesis also broaches neoliberalism, and in particular neoliberalism's association with law as one of its central apparatuses or technologies from this governmental framework, following Foucault and other scholars it continues to use the original term neoliberalism as opposed to Rose's term advanced liberalism to describe this strategy of governance.[10] This is mainly

because it is more consistent with other literature drawn that generally refers to neoliberalism.

As a particular mechanism of governmentality, neoliberalism structures possible fields of action in particular ways. Foucault (2008) notes that one of the particulars of a neoliberal rationality is the ways in which it shapes conduct by articulating persons as economic subjects, *homo economicus*. A neoliberal rationality of governance shapes its subjects as 'entrepreneurs' of themselves and encourages—indeed makes possible—this entrepreneurship of the self by engendering fields of action that incite the pursuit of individual interests (Foucault, 2009, p. 228).

This view of a neoliberal political rationality as a governmentality that structures fields of action is different to the classic liberal idea of governance: where the latter believed that a self-regulating economy would curb state interference, the former operates according to a governance agenda that interferes with society and sets the very conditions for the possibility of a seemingly self-regulating market place to emerge (Foucault, 2008). It does so by forging the social, economic and political conditions to support the possibility of the emergence and intensification of economic subjects (Foucault, 2008).

Neoliberal political rationalities generate neoliberal subjects (Brown, 2006; Cruikshank, 1999; Rose, 1990). Neoliberal citizens discipline themselves

according to the political rationality that demands subjects treat themselves as business entities: social relationships are "defined in terms of market alliances" (Gershon & Alexy, 2011, p. 801). To do so, neoliberal rationalities of governance generate and inculcate values of self-interest, and establish the conditions such that self-interest can be pursued (Foucault, 2008). To do so, neoliberalism encourages disconnection. Disconnection is something "people labour to achieve" under a neoliberal political rationality (Gershon & Alexy, 2011, p. 802).
An individual's value is based on their ability to function as part of a larger whole (Brown, 2005); a neoliberal political rationality values subjects if they are increasingly entrepreneurial, self-sufficient and can take care of themselves economically, and if they do not burden the state or other private economic subjects (Brown, 2005). As per Brown's (2005) commentary cited earlier, a neoliberal subject strategically situates himself or herself as an individual entrepreneur who is increasingly divorced from public concerns in favor of private interest.

The shift away from a social welfare model toward new political emphases on privatization and individual responsibility (Wacquant, 2010) forges new neoliberal subjectivities whereby persons' worth and their internalization of this worth is measured according to how well they can function as independent economic subjects within the larger totality of the state (Mihic, 2008; Brown, 2005). To iterate, this is not a 'natural' condition (as some classic economic theorists had claimed), but is instead a manufactured condition shaped by

rationalities of governance (Foucault, 2008). Law plays a role in constituting this condition, and is also constituted by it (Golder & Fitzpatrick, 2009). As Brown (2003) notes, "Neo-liberalism is a constructivist project: it does not presume the ontological givenness of a thoroughgoing economic rationality for all domains of society, but rather takes as its task the development, dissemination and institutionalization of such a rationality."[11] Law is a conduit for such dissemination and institutionalization (Golder, 2010). Neoliberal rationalities of governance purport certain conditions as natural or necessary, despite these conditions being entirely constructed. As Gershon and Alexy (2011) note, a neoliberal rationality of governance emphasizes disconnection between its subjects; however, this disconnection is "a condition that people labor to achieve, not an entropic and inevitable end" (p. 802). Moreover, this political rationality of economic calculation comes to be inculcated in all aspects of society including law, politics as well as the structuring of human relations. A logic of competition and self interest is injected into all modes of social life (Gane, 2012; Read, 2009). Our own subjectivities, and our relations toward one another as subjects, are shaped by the neoliberal (or in Rose's case, advanced liberal) political rationality (Rose, 1999).

Where Hartouni and Pelaprat (2012) identify the individualizing aspect of the politics of assisted dying within a neoliberal political rationality, Mihic (2008) identifies the other important social and communal element: it is not simply that subjects become more individualized within neoliberalism and that the exercise of

subjective ‘rights to die’ are neoliberal in that they are simply reflective of a neoliberal rationality of individualism; rather, this individualization of subjects also has a communal element and has a social effect regarding the way we relate to one another within the larger community/ totality of persons. Assisted dying appeals might emerge not only because one is concerned with one’s own privacy and individuality, but also because one does not want to impose oneself onto others: individualization has a communal element in the sense that we are ‘reciprocally’ disconnected from one another under this totalizing logic. A good neoliberal subject is not simply self-interested but rather is socially interested in preserving the self-interest of other individual actors. Though neoliberalism might operate on the basis of individualization, its pastoral roots ensure that its logic is also totalizing and that neoliberal subjects operate as part of this totality and with this totality in mind (e.g., Oliva, 2006; Esposito, 2008, 2010). This is an aspect of neoliberal rationality that other scholars have commented on more broadly, not in relation to assisted dying, but with reference to the politics of community.

Neoliberalism and Community

One of the effects of this neoliberal rationality on subjects is that the increased emphasis on privatization, self worth based on human capital, and the ability to look after oneself and not burden the ‘system’ detracts from prospects of community (Mihic, 2008; Esposito, 2008). Communitarians have claimed for instance that under liberal and increasingly neoliberal governance agendas we find ourselves in an increasingly ‘individualizing society’ or a society of

'possessive individualism' in which subjects bear less responsibility toward one another and are increasingly self interested (e.g., MacPherson, 1962; Olssen, 2010; Peredo, 2011; Putnam, 200; Lasch, 1991; Friedland & Robertson, 1990). Neoliberal rationalities of governance lead to a dissociation from values of community (Parkinson & Howarth, 2008; May, 2012), or perhaps better put they reshape values of community to conform to the rationality itself: a good community or a good subject acting in the name of said community is one in which individuals take care of themselves and do not burden the 'whole' (May, 2012; Olssen, 2010).

As McNay (2009) notes, neoliberal governance agendas and dispositifs reorient social relations around enterprise and are highly contentious: "The orchestration of individual existence as enterprise atomizes our understanding of social relations, eroding collective values and intersubjective bonds of duty and care at all levels of society" (p. 64). As noted, such dissociated and self-interested human behavior, and such a shift from communal values—or toward different ideas of what constitutes communal values— is not a natural condition but it is a symptom of this particular neoliberal rationality of governance (Foucault, 2009; Lemke, 2002; Rose, 1999). Furthermore, these behaviours are perpetuated through discourses that instill and inculcate "a particular anthropology of man" (Read, 2009); that is to say that the way we relate to one another is shaped by discourses, enunciated through mechanisms of governance, that construct certain

truths about human nature and human behavior in order to codify how we relate to one another in line with the rationality of governance.

Campbell brings the discussion of neoliberalism directly into conversation with the prospect of community. From Campbell's vantage, (2011) a pastoral logic of power in neoliberalism also has not dissipated but rather has intensified by increasingly emphasizing individualization within the larger totality. According to Campbell (2011) a neoliberal governmentality structures fields of conduct in ways that increasingly divided subjects from communal relations; neoliberalism is problematic because it emphasizes and inculcates technologies that sustain the protection of individual interests and a symbiotic dissociation from communal interests, and in turn is tied to the manifestation and erection of "a defense of the self and its borders" (Campbell, 2011, p. 119). More specifically, drawing on the insights of contemporary Italian philosopher, Roberto Esposito, Campbell (2010, 2011) argues that a neoliberal governmentality establishes human relations in increasingly 'immunized' ways. By immunized Esposito means that human relations have become more divided from one another and closed off. His thesis on immunization can be situated within the larger aims of this thesis because he, too, is interested in how contemporary neoliberal society is shaped by mechanisms that are divisive, privatizing, and individualizing. His thesis on immunization is also historically contextual, like our discussion on political rationalities of governance: immunization emerged, from Esposito's vantage, in the 17th Century through the rise of the political rationality of liberalism, and has been intensified in the present neoliberal era: liberalism, and increasingly

neoliberalism, emphasizes the ethos of the individual 'self' who is divided or immunized from other selves.

Roberto Esposito and Community

A pastoral rationality similarly underpins Esposito's historical account of immunization. His thesis on immunization is focused on the relationship between the individual and community; he notes that an increasing governmental emphasis on mechanisms of individualization (or immunization) has a result of drawing us away from relations of a communal nature. While biopolitics influences his thesis (because mechanisms of immunization are driven by the governmental (and biopolitical) emphasis on the protection of individual 'life'), arguably his account of immunization reflects more so on the pastoral relation between the individual and totality, emphasized in his works *Communitas* (2010) and *Immunitas* (2011). His thesis is concerned with how this political emphasis on individual life's protection comes at the expense of the prospect of community (Esposito, 2010, 2011). In this regard Esposito's thesis is broadly underpinned by what we might describe as a communitarian inflection. He is concerned with the increasingly privatizing tendencies of modern society that take us away from communal potentials, or the prospects of living together. His thesis is particularly insightful for the following dissertation, which is also concerned with how the politics of assisted dying is bound to a larger problem regarding the protection of individual life and how this protection of life is implicated in the question of community. Like Durkheim (1979) had noted of suicide being a 'social' problem related to

one of anomie and egoism, both associated with a growing individualism and a declining integration of an individual within society, so too does my thesis argue that legal appeals to assisted death cannot be understood without considering the social context, revealed through what Esposito calls a growing 'immunization' of society away from communal bonds.

The background of Esposito's theorizing is salient for the present thesis in considering how individualizing techniques that emerge through a neoliberal rationality of governance are attached to larger questions about community. This is particularly the case because, as noted from the outset, the thesis is concerned with how assisted dying laws and the legal decisions that declare assisted dying to be illegal cannot be thought outside the question of community.

Immunization and Community

At base, Esposito (2008, 2010, 2011) depicts community as significant, reciprocal obligations imposed on individual members, whose participation in community entails gift giving. In his etymology of community, Esposito (2010) traces community to the root word *munus*, which denotes an obligation to gift-give, fundamental to the heart of community. The *munus* is an expropriative demand; it is a "gift that one gives, but not that one receives." (2010, p. 5). "…It isn't having, but on the contrary is a debt, a pledge, a gift that is to be given and that therefore will establish a lack. The subjects of a community are united by an obligation, in the sense that we say 'I owe you something', but not 'you owe me something'"

(Esposito 2010, p. 6).[12] As an expropriative demand, the gift is a type of duty in Esposito's terminology (2010, p. 4-5). It is a "gift that one must give and because one cannot not give…It doesn't by any means imply the stability of a possession and even less the acquisition of something dynamic and earned, but loss, subtraction, transfer" (2010, p. 5). "What predominates in the munus is, in other words, reciprocity or 'mutuality' of giving that assigns the one to the other in an obligation" (2010, p. 5). What unites us in this obligation is not some 'thing', or 'property'. Relations are not constituted through something additive that is shared such as blood, birth, or common identity but "a lack, a limit that is configured as onus" (Esposito, 2010, p. 6).

This notion of community is historical: *communitas*, in all neo-Latin languages has referred to "what is not proper"; what is common "begins where the proper ends" (2010, p. 3). Humans have always lived in common. It is a fundamental aspect of humankind to be in common; to have an obligation to one another. Indeed, "We need community because it is the very locus or, better, the transcendental condition of our existence, given that we have always existed in common," notes Esposito (2013, p. 14). Esposito thus reveals a 'law of community' (2013, p. 14) that he says sustains the appearance of what is held in common as a distinct entity (that is, as a proper community) by placing unyielding demands on individuals to give themselves out to/ to support others. The law of community is thus "the exigency according to which we feel obligated not to lose this originary condition" (2013, p. 14). For him, being in community is necessary;

nothing is more important or necessary than this question of community. Given its underscoring 'donative obligation' and a 'law of care' toward others', community has an affirmative meaning (Esposito 2012c, p. 59).

While communal being is necessary, Esposito also speaks of its paradox. Community can never be fully realized because it is founded on a debt or a lack. It is founded on the demands that it places on individuals and because of this community always threatens to undermine the agent who is giving. "We inhabit the margin between what we owe and what we can do," says Esposito (2013, p. 15), because to fulfill the possibility of community it will always undermine the one from which it is constituted. Community will always undermine the possibility of the individual subject. It is for this reason that community "presents us with an enigma: impossible and necessary" (2013, p. 26).

For this reason, community does not exist per se; that is to say that community is not some 'thing' but rather is "the 'relation' – the 'with' or the 'between' – that joins multiple subjects" (2013, p. 29). It is not an "entity" but rather is a "non-entity" "that precedes and cuts every subject, wresting him or her from identification with himself or herself and submitting him or her to irreducible alterity" (2013, p. 29). Because community is not something that can be forged through the unity of individuals, but rather demands that the unit of the individual itself is opened out to heterogeneity rather than identification, demands for community or from the community are always demands that individuals cannot

fully respond to, for if they do they risk themselves, which in turn risks the very subjects from which the possibility of community derives. The communal lack, or a negatively defined community, is thus articulated as a danger to the possibility of individual identity. The dependence of the *munus* on the subject, and the subject's obligation to community, forever threatens the possibility of a 'self' or identity. Campbell neatly states this point. He writes:

> …this debt or obligation of gift giving operates as a kind of originary defect for those belonging to a community. The defect revolves around the pernicious effects of reciprocal donation on individual identity. Accepting the *munus* directly undermines the capacity of the individual to identify himself or herself as such and not as part of the community (Campbell 2008, p. x).

Immunity

The mechanism of protection of the individual from this donative obligation is described as community's opposite form, immunity. Immunity is a concept that occupies a place across the biological and medical sciences, as well as the political sciences, referring in the former to a defense against disease and infection or biological invasion, and in the latter to a political exemption or a form of safe passage, a protection from prosecution (Esposito, 2008, 2010). Like communitas, immunitas derives from the *munus*, meaning gift, duty, obligation, but where communitas is affirmative, "immunitas is negative" (2013, p. 59). Immunity emerges given the threat of community to individual identity and thus *immunitas* (immunization) operates alongside community by granting a *dispensatio* from this obligation to gift give. Immunitas, therefore, takes on a negative meaning in which, through immunization, one no longer owes a debt to

the community in the form of gift giving, and instead merely becomes a beneficiary. Immunization is thus articulated as a protective endeavor, or as a mechanism that blocks the threat of the excessive demands of the *munus.*[13] As Esposito, notes, immune is "he or she who has no obligations towards the other and can therefore conserve his or her own essence in tact as a subject and owner of himself or herself" (2013 p. 39). Immunity is appropriative rather than expropriative, and allows us to forge instances of the 'proper', noted earlier.

According to Esposito, mechanisms of immunization have historically generated various prosthetic kinds of institutional or discursive political mechanisms that are said to protect life from its own excesses by forging proper ways of being. Law is one such instance of immunization and is arguably the most central and originary immunity apparatus. Modes of immunization are therefore political practices that are ultimately norms over life that designate ways of living in order to prevent risks to this life. Immunization is therefore a matter of individual security.

Crisis of Community

For Campbell, neoliberalism in its increasing emphasis on privatization and individualization signals a crisis of the current moment: a tightening and intensification of what Esposito calls immunity (2011, p. 72-3). Esposito, too, notes what he regards as a "substantial growth in immunization" in the contemporary neoliberal era (2013, p. 130). What Campbell points to is the ways in which the immunization of life— that is, the constitution of proper ways of

being and the protection of individual subjects that necessarily maintains divisions— take allegedly liberal politics even closer to the dangers from which said politics alleges to protect life. Campbell for instance claims that neoliberal immunizing protection of life is drifting toward what he calls the "thanatopolitical" tendencies of Nazism, the difference between the two becoming "smaller and smaller" (Campbell, 2011 p. 72). Indeed as Esposito notes, one of the problems with the immunization of life is precisely the problem that Pavlich (2002) has also mentioned: when law imposes protection on life according to certain kinds of proper truths, it closes life off to other possibilities and ways of being. For Esposito this closure of life is not simply one that confines life to particular norms; it also always risks the prospect of life itself. For this thesis the closure of life is found in the ways that the discourse of law reflects and reconstitutes neoliberal rationalities of governance that divide subjects from one another, and the ways that subjects come to internalize these norms, also dividing themselves from one another.

Rosella Bonito Oliva (2006) argues that in our current political moment with the heightened immunization we are living in an 'immune community'. She describes the emergence of an inverse of community's originary framework of a positive obligation toward one another. For her, the contemporary moment is reflective of a slow immunizing transition arising through Law. In seeking to protect life from the larger community, Law founds itself as an immunity mechanism that shelters life from excessive communal demands. In doing so Law formulates and

constitutes a new community that Esposito (2010, 2013) calls a 'proper community'. The proper community emerges as each individual receives a dispensation from the obligations toward one another. The proper community in the contemporary neoliberal arrangement is articulated as a community of divided, independent individuals. Esposito (2010, 2012a, 2013) notes that while immunity used to be a privilege in our contemporary society immunity is now instead something seemingly conferred upon all subjects. This is precisely why Campbell (2011) has claimed that in the contemporary climate in which we find ourselves, we have reached a zenith of immunization; we are all immunized from one another; we are in an absolute expression of an immune community (Oliva, 2006).

My thesis draws from some aspects of this theoretical insight, although is not transfixed by it. I use it as a heuristic device because it emphasizes the pastoral roots of governance that is grounded in the relation between the individual and community; it demands that an analysis pays attention to how the request and denial of assisted dying seem to replicate an immunization of the self from others. As part of my larger thesis articulated from the onset with reference to the operation of law, Esposito's insight will help me explain how law creates concepts to rationalize its judgments and how these rationalized judgments are part of a larger neoliberal political rationality that seeks to divide, or immunize, subjects from one another.

Law, Governmentality and Immunity

Very few scholars have offered a sustained engagement with Esposito's work in relation to socio-legal studies and critical thought on law (e.g., Barkan, 2012; Amendola, 2012; Goodrich, 2012; Lupton, 2012)[14]; some have instead considered his work more peripherally in relation to this area of scholarship (e.g., Hanafin, 2009; Pavlich, 2013; Hardes et al 2014; Wolfe, 2010). Likewise, though Esposito has drawn from Foucault to articulate his own philosophy, scholars have yet to explicitly emphasize the links between his approach and a Foucauldian governmental one, with few notable exceptions (e.g., Pellizzioni, 2012). Scholars have also not considered Esposito's work with reference to assisted dying at all (with the exception of a brief nod from Hanafin, 2009),[15] nor have they emphasised the role of law as a technology of governance and/or a mechanism of immunization on the topic of assisted dying in particular. Indeed even scholars who have addressed governmentality and assisted dying more broadly have not considered specifically the mechanism of law per se (e.g., Tierney, 2006; Mihic, 2008, Hartouni & Pelaprat, 2012). This is arguably one vital element of an analysis of assisted dying that is missing.

While literature has analyzed assisted dying from the vantage of a neoliberal rationality of governance and situated it as a problem of community and individual social relations (e.g., Mihic, 2008), a sustained analysis of law as a site through which this governance rationality is brought into effect has yet to be achieved. Despite Tierney (2006) and Mihic's (2008) use of governmentality with reference to the politics of assisted dying their work has focused on the abstract

relation between individual rights and the notion of governance without considering the institution of law as a site of investigation. Likewise, Hartouni and Pelaprat (2012) do not specifically analyze the legal appeals that they draw on as a source of evidence for their claims regarding the association between a neoliberal subject and the right to die appellant; they instead make more theoretical gestures toward this conclusion. In much the same way that those biopolitical analyses referred to earlier did not give a sustained analysis of the legal cases on assisted dying and simply referred to cases in passing to illustrate a theoretical point, scholars engaging in a governmental analyses seem to do the same. Scholars have examined the right to die without engaging with the content of the law or the content and reasoning given within legal appeals.

Rejection (or perhaps simply avoidance) of law as a site of investigation might be explained by a scholarly interest in the theoretical nature of biopolitics and/or governmentality; perhaps assisted dying jumps out as a seemingly 'obvious' example for scholars wishing to illustrate their theoretical points. However, perhaps scholars choose to avoid a sustained analysis of assisted dying with reference to law for another reason: scholars might avoid law as part of their analysis due to what others interested in the sociology of law have called the 'expulsion thesis' of law (Hunt & Wickham, 1994; Golder & Fitzpatrick, 2009, pp. 24-25; Golder, 2013, p. 22). Because Foucault had claimed that the juridical model of power was no longer predominant in the West, Alan Hunt and Gary Wickham (1994) questioned whether the law was a 'relevant' site through which

to investigate how modern mechanisms of power operate (Hunt & Wickham, 1994).[16]

In contrast to this expulsion thesis, others have persuasively argued that even through a Foucaultian theoretical lens, law remains a useful site of scholarly investigation: while legal analysis may be problematic when law is regarded as an independent governing body, a neutral or autonomous practice, or a handmaiden of the state, legal analysis is highly fruitful and necessary when law is understood as a discourse that is both shaped by the context in which it finds itself, and is also constituting of this very context (Smith, 2000; Valverde, 2003; Golder & Fitzpatrick, 2009; Rose & Valverde, 1998; Iveson, 1998). This is to suggest, as Pavlich (2012) has done, that law and legal judgments do not arise in isolation but must be understood as a "shifting product of local and wider power-knowledge formations" (p. 1); from this vantage the law is deployed discursively and tactically as a site of "governmental dispersal" (Golder & Fitzpatrick, 2009, p. 33). Golder and Fitzpatrick, for instance, refer to Foucault (1998) who had expressed quite clearly that in contemporary society "the law operates more as a norm" (p. 36). In presenting itself as a truth, and operating as a norm, law must operate discursively. For its part, the law operating as a discourse is a technology of governance that plays a role in constituting the political rationality of governance and thus is implicated in shaping these human behaviours and relations that are associated with it (and necessary to sustain it) (Golder & Fitzpatrick, 2009).

Echoing these sentiments, and refusing the expulsion thesis as well as rejecting literature that examines the scientificity of law and legal reasoning (e.g., Brewer 1998), my interest is not to reveal principles of law per se. Rather as my introduction has set out, I focus on the "the deployment of knowledges within and in relation to law, wherever that occurs, prioritizing questions of epistemological authority and sidelining doctrinal questions" (Valverde, 2003). With this view of law as a backdrop I seek to re-conceptualize the problem of assisted dying, focusing instead on law as a site of analysis that is enframed within a broader logic of governance.

Valverde argues that case law is an excellent site through which to analyze these questions. Case law is part of the common law legal system, also known as 'judge made law'. Case law is based on judge's interpretation of statutes that have emerged in previous cases known as precedents. Precedents are legally binding, and the more they are affirmed in law, the more they become entrenched. Case law also draws on opinions, beliefs, and research from 'experts' such as medical practitioners, lawyers, academics, politicians and others who have contributed to a body of knowledge, presenting a number of different viewpoints on the subject area (Smith, 2000; Valverde, 2013).[17] The variety of viewpoints gathered within cases is particularly useful because of the thesis's underpinning assumptions regarding the constitution of knowledge. Valverde argues that case law is an overt site in which one can examine such knowledge constitution. As she suggests, "the

parties to a legal case can be said to constitute knowledge in the very process of using it, while courts and tribunals can be usefully regarded as further constituting knowledge in the process of examining evidence and drawing conclusions from it" (Valverde, 2003). Others like Smith (2000) also concur with these sentiments.

From these vantages, law (e.g., Golder & Fitzpatrick, 2009; Rose & Valverde, 1998; Iveson, 1998; Pavlich, 2012), and more specifically case law (e.g., Smith, 2000; Valverde, 2003), is not a site of truth, but instead is a site of constitutive knowledge; one ought not simply to take for granted the *ratio decidendi*- or the reason of the decision at face value- and instead ought to consider law as a discourse (Tadros, 1998). Discourse refers to systems of thought and ready-made syntheses (Foucault, 1972, p. 24). Law is referred to as a discourse (Goodrich, 1984; Golder & Fitzpatrick, 2009; Tadros, 1998; Smith, 2000). To consider law as a discourse means to consider how law is comprised of different constructed concepts that legitimate law as an authority of truth (Pavlich, 2012). The constructed concepts are historically specific because law operating as a discourse emerges in a particular context that shapes what discourses become more dominant than others. Because legal discourses are enunciative of a broader political rationality of governance they are also understood as 'governmental technologies', which means they bring into effect the political rationality.

Law as a Technology of Governance

A political rationality serves to construct its reality and maintain itself by producing ideas about human behavior and nature that are complicit with its logic. From the vantage of this thesis, political rationalities use the discourse of law as a technology of governance. Law and legal decisions are able to help realize and sustain a political reality by producing various fictions about human nature that help support the political ethos. Law does this by constructing concepts, or drawing on previously constructed concepts, in order to generate these 'legal fictions'. These fictions appear as truths via the discourse of law. Judgments of law appear as judgments of 'truth', despite these judgments being discursively constructed according to the particular political rationality of the time. In short, law is comprised of various concepts that generate narratives that the feed legal fictions, which express a truth of some kind or are understood as ready-made syntheses. Law is a site in which various concepts, beliefs, notions and knowledges are invented, amended, or disregarded. Law is not a passive practice but rather continues to redefine itself and redefine the social context in and through which it emerges (Smith, 2000; Golder & Fitzpatrick, 2009).

Earlier I drew on scholarly work that explored how the current neoliberal era emphasizes divisive relations between subjects (e.g., Campbell, 2011; Brown, 2005, 2006; Read, 2007; May, 2012); my thesis takes this insight and argues that a neoliberal political rationality is perpetuated and encompassed in concepts that emerge as the building blocks of law and law's fictions.

This insight into the use of concepts, legal fictions, discourses and political rationalities is particularly useful for my thesis, which does not present a legal analysis per se, but rather focuses on the *wording* of cases. Examining the wording is important because I aim to address what concepts emerge within the wording of cases and how these concepts are the building blocks of particular kinds of narratives that frame specific judgments. Giles Deleuze (1988) argues that philosophy is the creation of concepts. Jurisprudence, or the philosophy of law, is also the creation of concepts. Concepts are abstract ideas and imaginary constructions. To focus on wording and concepts in cases is to focus on imaginary constructions in legal cases. If concepts are imaginary and yet they also underpin legal judgments then they are, as some scholars have called them 'fictive' (Picciotto, 1999): the narratives that law produces through its uptake or production of concepts (or its extension of concepts to areas in which the concept has yet to be applied) is a "legal fiction".

Legal Fictions

The literature examining legal fictions is vast and many scholars differ in their use of the term. According to Henry Maine (1861) the concept of the legal fiction derives from the Roman "fictiones". In old Roman law, 'fictio' referred to a term of pleading (Maine, 1861; Knauer, 2010-2011). It was a false allegation or statement that the law would not allow the defendant to contest. Fuller (1967) defines a legal fiction as "…either (1) a statement propounded with a complete or partial consciousness of its falsity, or (2) a false statement recognised as having

utility" (p. 9). Olivier (1975) similarly calls a legal fiction "the technical artifice of thought by which an assumptio contra veritatem is made" (p. 48). Advocates of legal fictions argue that they are necessary to correct injustices. William Blackstone has commented on such importance of legal fictions. He argues that even though fictions may "startle" students of law, one must note their necessity. Indeed in the defence of legal fictions he asserted the legal maxim "in fictione juris semper subsistit aequitas" (all legal fictions are founded in equity). From his vantage a legal fiction serves as a correction of an injustice or it filled a potential lacuna in law; it is therefore an equitable feature of modern law.

Other writers by way of contrast detested legal fictions. Writing earlier than Blackstone, Bentham had notably remarked that legal fictions were simply used to expand legislative power. He reviled them "as though they were fraudulent", noted Henry Maine (1861). From Maine's vantage, not too dissimilar to Bentham's, legal fictions were troublesome because they concealed a truth. Maine (1861) for instance, defined a legal fiction as "…any assumption which conceals, or affects to conceal, the fact that a rule of law has undergone alteration, its letter remaining unchanged, its operation being modified" (p. 26).

Contemporary scholars writing on legal fictions will often draw on one particular example that many of us can latch onto as a point of understanding: the concept of the "person" as it has been extended to corporations, institutions and companies (Schane, 1987), and as it has been extended to the state (Picciotto, 1999).

Regarding corporations, for example, scholars argue that this is an overt legal fiction: corporations are not 'real' human persons but the law has granted them a status of personhood for the purpose of extending law's reach. Treating corporations as persons allows the law to articulate particular judgments as it would when human persons violate the law (Schane, 1987; Fagundes, 2001). This generation of the person is fictive: it is a falsity declared and established in law to expand common law's reach by creating a fictitious concept that allows the law to define its object (corporate person) and declare a judgment on this object (Fagundes, 2001). A legal fiction is then law's "primary means of specifying its object" (Fagundes, 2001, p. 1746).

While many scholars discuss legal fictions with reference to more overt types of fictive enunciations via law such as corporate personhood, some scholars have also critiqued concepts in law that many of us would otherwise consider, at base, not fictive at all (e.g., Esposito, 2012a). For example, we might agree that the concept of the corporate person is a legal fiction, but many of us would also agree that the concept of the human person is a legal truth. The legal fiction (corporate person) relies on the legal truth (human person) to sustain itself as a fiction; one could not speak about a corporate person being a false or fictive person if one did not also believe the human person to be the true person.

This is where my thesis differs from the majority of literature on legal fictions. I do not consider concepts of law such as personhood to be true or false, but rather

consider all concepts in law to be to constructs that are constituted within particular contexts to serve particular purposes. This is to say, as Deleuze and Lefebvre have done, that all legal decisions are matters of 'jurisprudence': the creation of concepts sustains the truth of law (Lefebvre, 2005, 2008). From this perspective, law is discursive: it creates new concepts, or expands on old concepts, to weave a particular kind of narrative that it wants to generate as a truth that is then declared true in the legal judgment. These narratives or legal fictions are neither neutral nor innocent but rather are attached to and reinforce the wider political rationality of neoliberalism.

To be clear, this view of legal fictions differs to that of someone like Bentham's. Bentham, for instance, sought to reveal the fiction and in doing so also sought to reveal the truth of law. The difference between my perspective and Bentham's is akin to the distinction made earlier regarding the corporate person versus the real human person. Once the fictive corporate person was revealed the true person remained as the proper subject and object of law. Likewise, Bentham regarded such an 'uncovering' of truth to be a critical analysis of law. Following the influence of Bentham, H. L. A. Hart (1973) famously noted that the intent of a critical analysis of law is in part a 'demystification' of fictions. As he wrote:

> …unjust, anachronistic, inefficient or otherwise, harmful social institutions, including laws, are frequently protected from criticism by a veil of mystery thrown over them… mystification consists in the propagation of a belief: the belief that legal and other institutions of society are infinitely complex and difficult to understand, and that this is an invincible fact of nature, so that longstanding institutions cannot be charged without risk of the collapse of society."[18]

The reference to legal fictions from this perspective thus seeks to demystify an ideology and uncover a different truth behind the law (Fuller, 1967; Lanza-Kaduce & Bishop, 1986).[19] Bentham's idea of the legal fiction relied on a dichotomy between fiction and truth.

Other writers on legal fictions have recognized a differentiation between types of fiction: "Big Fictions" as some write, are more obvious and are more frequently reflected on in scholarship than less overt fictions of the everyday (e.g., Fuller, 1967; Packer, 1968; Lanza-Kaduce & Bishop, 1986).). Fuller (1967) for instance suggests that the autonomous person is a legal fiction that often goes unchallenged. Indeed even Bentham and Beccaria, the former whom publically articulated his abhorrence toward legal fictions, seemed to articulate his own legal fictions in the form of the autonomous, willed, rational independent man (Wilson, 1975). "The law treats man's conduct as autonomous and willed," Packer writes, "…not because it is, but because it is desirable to proceed as if it were" (1968, p. 74-75). This insight into legal fictions is more useful for the present study that considers the operation of less overt legal fictions alongside more overt ones.

One can bring Packer's commentary in line with that noted earlier via Esposito regarding immunization: to be immune is to be constructed as though we share nothing in common with one another and as though we have no obligation toward others (Pellizzoni, 2012). In many ways this reflects similar commentary on legal fictions that Packer notes from his ideological lens when he recognizes that legal

fictions inculcate as truths ideas about human persons as individual, dissociated, and autonomous selves. From Esposito's perspective the construction of this divided, individual self, is the construction of a "proper" subject of law (and subsequently, a proper object of law, because 'being proper' means that one can 'be' defined and fixed). The proper subject is articulated in concepts that create the broader legal fiction of the divided, dissociated self: proper subjects are articulated as appropriated and appropriating subjects; they are conceived as bounded, whole, or sovereign— disconnected or dissociated from the obligation to relate to others (Esposito, 2008; 2012a; 2013).

Fuller (1967) noted that legal fictions not only produce injustices because of their production and perpetuation of untruths, but also that legal fictions serve as an ideological structure to enable a rationalization of law maker's decisions (Lanza-Kaduce & Bishop, 1986). This is an absolutely key point for the forthcoming thesis, which also considers how legal fictions produce a sense of reality that permits decisions to pass as truths. Likewise, Picciotto's (1999) account of legal fictions refers to a neoliberal context in which forms of statehood must consistently be reshaped in order to deal with new emergent issues. He speaks to the emergence of "offshore statehood" as one particular new legal fiction: it draws on "artificial transactions and persons" to justify its emergence (p. 1). In short he suggests the state is a legal fiction because it is historically contingent despite appearing timeless. He suggests that the legal fiction of the state emerges through laws and regulations that are "defined by abstract, and hence fictitious,

categories" (p. 3). Others like Crouch (2013) also refer to the legal fiction of the state. He speaks specifically to the "firm" (business) and its relation to the state. He argues that state creates a legal fiction of itself as an authority and firms as "private entities" that are subject to this authority. From Crouch's perspective and from Picciotto's, the legal fiction of the state is ideological. Picciotto makes especially clear that the legal fiction of the state is bound to a neoliberal ideology of "deregulation": perpetuating the ideology of deregulation allowed the state to rationalize the fiction of the offshore state on the basis that it was good for the 'free market'. It is a top-down source of power emergent from "those social groups and classes with the greater power or ability to organize on an international scale…[who] have been able to play a dominant role in the remodeling of the international state system, along neoliberal lines" (Picciotto, 1999, p. 15-16). From this vantage, similarly to Fuller's (1967) and Lanza-Kaduce & Bishop, 1986), legal fictions rationalize the decision of those in dominant positions of power.

While useful for my forthcoming thesis, these analyses of legal fictions remain bound to an ideological theoretical framework. An ideological approach is underscored by a set of epistemological assumptions incompatible with the legal discursive framework this thesis follows. For one, this thesis does not consider lawmakers or social groups and classes to 'hold' power but rather it considers lawmakers' decisions to be enunciations of a larger power knowledge arrangement of which they are a part (see earlier discussion on advanced

liberalism and Rose). Second, where authors from an ideological perspective assume that once the fiction is revealed the truth can be established, from the vantage of this thesis the distinction between fiction and truth is tenuous: the truth is always a narrative of fictions. From this latter vantage a legal fiction is better understood as that which is constituted out of a series of concepts, assumptions, knowledges, and so on that allow law to operate discursively (i.e. as an apparent truth).

Though Bentham did reinforce a dichotomy between truth and fiction, the former being what the latter concealed, his notion of legal fiction is useful for the present thesis because of this association between the appearance of fact and law. In particular, legal fictions are useful because Bentham had revealed how law operated in a normalizing and regulatory way. He could explain the prescriptive aspect of fictions: he highlighted the regulatory power of fictions that could encourage people to conform to norms.

Colin Dayan's (2011) work on law and personhood appears to take on the concept of legal fiction in a similar manner, although she does not explicitly state her theoretical affinities. She examines how legal thought has always "relied on fictions that rendered the person shifting and tentative" (p. xii). What concerns Dayan about legal fictions is how they make legal decisions and statutes appear natural and uncontroversial, as if they are based on fact, when in reality these fictions allow such facts to constantly be re-shaped. Like Faguntes (2001) she

focuses on the way that fictions of law turn persons into objects in order to allow modes of depersonalization.

While this thesis agrees that fictions rely on the manipulation of concepts such that these concepts can be used in shifting and tentative ways, (for instance, as I will argue, one such example is the concept of security which is used to shape the fiction of the 'person' and the fiction of 'society') the following thesis also emphasizes how legal fictions are always *consistently* used in a fixed way in accordance with a political rationality of governance. This is to suggest that fictions are also bound to political rationalities. Dayan does not examine this aspect in her work. One could add to Dayan's account of legal fictions by examining how, within a neoliberal rationality, legal fictions do not just render concepts shifting or tentative, but rather tend to fix these shifting or tentative concepts in particular ways in accordance with the political rationality of neoliberalism. There is a fixed or predictable pattern to the neoliberal legal fictions, of which the concepts that frame and feed such fictions sustain. Thus, as Bentham had noted that there is a normalizing and regulatory power to legal fictions, this thesis notes that the normalizing and regulatory power is attached to the political rationality of governance.

Foucault and Legal Fictions

Foucault has also appropriated the concept of legal fiction (or what he calls juridical fiction) in a similar way regarding its normalizing and regulatory power.

He refers to how law constitutes knowledges as truths, which are enunciative of broader historically specific power-knowledge regimes. It is not surprising that Foucault draws on legal fictions given his clear association with other aspects of Bentham's work, particularly his appropriation of the panopticon. Foucaultian scholars have widely cited this uptake of the panopticon, praising the insight this gives us into normalizing and disciplined society (e.g., Mathiesen, 1997; Vaz, 2003). It is surprising, however, that fewer scholars have taken up the concept of the legal fiction as a site through which to explore normalizing and regulatory power, particularly from a Foucaultian lens, given that Foucault himself notes its relevance in his own work (see Brunon-Ernst, 2013).

Even those scholars who have readily dismissed the expulsion thesis and have noted the importance of law for a Foucaultian analysis seem to have focused on other aspects of law rather than emphasizing the operation of legal fictions (e.g., Golder & Fitzpatrick, 2009). The lack of attention to legal fictions seems odd considering this is an apparent instance in which Foucault's insight into power-knowledge and the idea of law being not simply a sovereign site of power but also a site of constituent and constituting knowledge is explicit. In 'The History of Sexuality', Foucault (1990) declares natural, heterosexual sex to be a juridical fiction: it has been fixed within the judicial system by way of fiction, even though it is ultimately baseless. There is no truth to be revealed of sexuality: it is not that the juridical fiction reveals a deeper truth that is being concealed; rather it is that the juridical fiction reveals the fictive nature of law itself: the idea that all law is

jurisprudence (i.e., is grounded in concepts that are 'made up'). Fictions sustain fictions.

Some socio-legal scholars note the use of the legal fiction and its relevance for contemporary discussions of knowledge-power. For instance Pavlich (2013b) notes in his work on legal personhood that elements of legal positivism and/or legal realism that adopt the idea of the constitutive fiction of the person are not overly far removed from a Foucaultian analysis that attends to power-knowledge relations that shape ideas of personhood. Elsewhere Pavlich (2013a) alludes to the operation of legal fictions without explicit reference to the concept but also in the context of a Foucaultian inspired analysis of criminal law. Here he emphasizes the fictive aspect of law as it has fed various images of politics. In his work on criminal law at the Cape of Good Hope he argues that law's distinctive idioms fed and generated an image of colonial sovereignty (Pavlich, 2013). The logic behind his thinking informs the logic behind the uptake of the legal fiction in this thesis: both approaches to socio-legal scholarship recognise the contingent and historical grounding of different versions of politics (in his case colonial sovereignty; in this case the neoliberal political rationality), and both approaches recognise that fictions, idioms, metaphors, concepts, and so on are articulated in particular ways in order to generate what appears to be a unified legal discourse (i.e. 'the Law') that fosters the emergence of and manifestation of the political 'institution' that the Law is said to sustain/support. This political institution is also fictive in the

sense that it is generated and sustained by these various legal fictions. In Pavlich's example, the law sustained colonial sovereignty as its political institution.

Pavlich's (2013) work shows how images of the colonial sovereign expressed in criminal law fostered this institution of sovereignty: criminal law's idioms shaped sovereignty politics. In his example, the law established the colonial sovereign as he who wielded absolute power through criminal law's idioms: the consistent use of idioms such as 'commanding proclamation', 'crime focused legal procedures' and so on made this possible. Each idiom emergent in criminal law affirmed the sovereign's power. The articulation of various idioms, which created a unified legal discourse, supported a political image of colonial sovereignty as an all-encompassing power. In my example, legal decisions on assisted dying are supported through legal fictions that generate and sustain a neoliberal rationality of governance. Where Pavlich's colonial sovereign relied on idioms and fictions that reified the totalizing power of the sovereign, my thesis posits that the fictions emergent in assisted dying laws instead are enunciations of a neoliberal ethos (e.g., individualizing, privatizing, and so on). The fictions generated in law are historically contingent and will vary depending on what type of political logic they serve to generate. Legal fictions therefore not only create and feed a narrative that supports a judicial decision, but they also shape a fictive image of a broader mechanism of politics of which this judicial decision is a part (Pavlich, 2013).

Esposito (2012a, 2012b, 2013) also does not use the language of legal fiction in his work, but he does seem to point to the fictive base and the regulatory and normalizing power of particular legal concepts. As noted earlier, Esposito's thesis on immunization is particularly insightful because it reveals how concepts emerge in ways that create divisive fictions that are part of a broader operation of power-knowledge (what he calls immunization, or what Foucault calls governmentality – both of which are concerned with the relation between the individual and society/community). Mechanisms of immunization emerge to articulate and reinforce concepts that feed legal fictions at the core of a neoliberal ethos. They are, at base, operative in the generation of legal fictions in a neoliberal era.

Esposito, Immunization, and Legal Fictions

Immunization is a helpful theoretical construct to draw on in addition to Foucault's thesis on governmentality to think about the operation of legal fictions in assisted dying law. In particular it is useful because it focuses on how legal concepts feed legal fictions that share in common the erection of defensive borders around the self and other. Esposito's analysis on immunization prioritizes this as a central feature of modern systems of governance. Considering the mechanism of immunization then allows one to more precisely locate the concepts in legal cases that generate fictions and feed a neoliberal ethos that share in common divisive and individualizing strategies. It also allows us to consider the process by which law is able to identify its precise object of governance (in the way that Fagundes (2001) noted) by articulating its object as what Esposito calls

'proper'. To be proper is to give the form of a totality, or an absolute unity; to be proper is to be a fixed subject under law. From Esposito's vantage nothing is ever absolutely proper; it is a fiction of immunization mechanisms in neoliberal politics. For us, the law, which is a technology of governance, articulates its fictions in accordance with this idea of the proper in order to establish its fictions as truths.

Earlier I noted a concern regarding the link between the problem with assisted dying laws and the prospect of community. Esposito shares a similar concern albeit a broader one regarding the relation between individuals and others and how immunization mechanisms shore up the limits of these relations via the constitution of the proper. My thesis examines similarly how concepts emerging as legal fictions shore up limits of our relationships that precludes the possibility of assistance in death unless this assistance is articulated in ways that are complicit with the neoliberal ethos of division and individuality.

Esposito's work is also useful because it sets itself apart from other work exploring legal fictions on the specific topic of personhood. Where we had noted earlier that most scholarship comments on the fictive nature of corporate personhood, Esposito also comments on the fictive nature of personhood as a broader concept. He argues that the concept of the 'person' has, historically, been constituted as a legal concept in order to allow some 'types' of humans to be included in law and protected, and to permit others to be excluded from law.

Fagundes (2001) has noted a similar use of the concept of the person that he describes sometimes as a legal fiction and sometimes as a legal metaphor, but both times with attention to the social emphasis on the meaning of the uptake of personhood: this is what he calls the "expressive" dimension of law. Law's uptake of personhood reveals not only law's reflection of social ideals that get incorporated into the use of concepts that feed narratives and fictions, but also reveals how law shapes these social ideals through the generation of these fictions. As Bentham had also noted, legal fictions are constitutive of norms and are also constituting of them.

For Esposito, the concept of personhood, like the concept of sexuality from Foucault's vantage, is a tactically constituted and constituting concept (it is produced but it also produces) that feeds narratives and ideas about human behavior/ human nature/ 'who' one 'is'. It also feeds narratives about who one can become, and how one can be. This feature of allowing law to define its object and rule in ways that conform to a political rationality also allows the law to operate according to other divisive mechanisms. Socio-legal scholars such as Nicola Lacey (2001a, 2001b, 2007), Ngaire Naffine (2003), and Pavlich (2007, 2009, 2013) have also recognized the importance of paying attention to the articulation of the concepts of persons and personhood within law. They have noted that legal processes play an important role in ordering the social realm, allowing law to fix its gaze on a particular subject who becomes the very object of law and the legal judgment (e.g. Pavlich, 2013). How law fixes its gaze has much to do with the

political rationalities enunciated within the context in which legal judgments are given (Pavlich, 2013), and cannot be understood apart from a wider contextualization of socio-political, economic and historical factors influencing and intersecting with law (Lacey, 2007).

In the current social climate, the use of legal rights and personhood effectuated through law (such as the corporate person, human rights, and so on) that allege to protect subjects are also dividing mechanisms. They are dividing in the sense of who can access legal protection, and they are also dividing in the sense that they constitute the notion of who belongs to the proper community and how one must perform as a proper subject if one wants to belong to this community. In order to belong to the proper political community, one must perform as subject who can access rights, which means that one must perform as an individual bounded subject. The neoliberal subject of rights is the subject who belongs to an 'immune community' or proper community that is held in common by its reversal of *communitas*: it is held in common by a reciprocal *non-obligation* and reciprocal independence and immunization. For Campbell (2011) one can find a heightened instance of this immunized community in our current 'neoliberal era' which is understood as an increasingly privatizing, individualizing, and dividing political rationality. What holds us in common in this community is not an obligation toward one another that is expropriative (i.e. that asks us to give to others and obligate ourselves to them) but rather one that is continually appropriative, whereby we are bound by an imperative not to interfere with or to obligate one

another.

My reference to and use of the legal fiction draws mainly from these insights of Foucault and Esposito who examine how certain concepts emerge as the building blocks of the narratives that create legal fictions. My thesis considers how these legal fictions are enunciations of discourses of law that generate specific judgments that reinforce the wider neoliberal political rationality. My uptake of legal fictions is consistent with the epistemological assumption that law operates as a discourse: legal decisions and judgments are not truths per se but are constructed through a variety of concepts and fictions that reflect a prevailing governance ethos. To understand law as a discourse that operates more as a norm means to understand law to be comprised of various concepts that generate certain fictions, which sustain truths about how law governs. These narratives sustain law as a ready-made synthesis: law operates discursively; legal judgments draw on legal functions as justifications that in turn feed a broader rationality of governance, the governmentality, that seeks to rule in particular ways.

As a site of knowledge constitution, case law produces 'legal fictions'; because different parties are involved in constituting knowledge, and because these knowledges are shaped by and shaping of the broader political rationality of governance, reasons outlined in case law for its denial of assisted dying cannot simply be taken as truths since law is neither objective nor neutral; rather, law's reasoning is discursive, meaning that what it presents as truths or facts are

contextually established ‘ways of knowing’, or ‘juridical fictions ‘constituted within specific ‘regimes of knowledge’ (Foucault, 1981, 1991a, 1991b).

This understanding of legal fictions and political rationalities is used to shape my thesis. I specifically use the concept of legal fiction to show how law draws on concepts to create narratives and fictive images to shape and justify its decisions; these fictive images in turn make assumptions that support and shape the surrounding neoliberal political rationality that is discussed. Pavlich and others writing on governmentality define a political rationality as “an element of government itself, which helps to create a discursive field in which exercising power is ‘rational’” (Lemke, 2002, p. 8). Legal fictions are sustained because they seem, from within the context in which they emerge, to be normal or true—they do not seem ‘fictive’, even if they are. This is ultimately how discourse operates: discourses seem true; they have a truth like feel, or a verisimilitude.

From the vantage of this thesis the problem is not with the fiction itself, so much as with the fiction becoming a dogmatic, prescriptive one that closes off other ways of being and other decisions being made in law in open, responsive ways. Law will always be comprised of fictions: this does not mean we ought to ‘get rid of law’; rather, one might consider revealing how fictions create subjects and subjectivities in fixed, prescriptive ways. In terms of assisted dying, this would mean considering how the law creates fictions via the articulation of concepts that

fix certain subject positions, and how these concepts and fictions might be opened up in new, perhaps more ethical or affirmative ways.

Affirmative Politics

The final part of my dissertation draws from what Esposito calls an 'affirmative biopolitics'. I drop the bios angle Esposito emphasizes and focus precisely on an affirmative politics in line with my underpinning emphasis on pastoral logics that feed fictions of the immune person and the immune society, the particular and the universal. I follow Campbell (2011, 2012) who suggests this affirmative politics must not do the 'dirty work' of neoliberalism. This means that I also work against some other political suggestions advanced through governmental scholars already discussed, such as Rose's notion of 'biological citizenship' that he advanced with his colleague Carlos Novas (2005). I also argue against theses advanced by Hanafin who suggests something similar to Rose and Novas in the form of what the former calls a 'becoming bios'. Both of these approaches are problematic because they advance a politics in which individual subjects can claim legal rights as a practice of 'resistance' to norms of life imposed on subjects. Rose (2001, 2007) in particular links this practice of resistance via rights claims to what Foucault had called practices of 'self care' or 'technologies of the self.' This is not to discount Foucault's ethical practice as one that is merely affirming of neoliberal norms of life, but I argue that Rose, Novas and Hanafin's appropriation falls into the trap of an individual's 'free choice,' without considering how this free choice is attached to broader governmental norms of life that have

pronounced these lives as not worth living and have subsequently been internalized by subjects (Campbell, 2011, 2012).[20]

In contrast, Esposito's affirmative politics derives from his thesis on immunization that considers the *munus* to be an affirmative opening toward community. His affirmative biopolitics that does not gesture toward closure, but instead attempts to reverse mechanisms of immunization toward openness to what the prospect of community might yield. Esposito calls this, contra to a personal politics, or a proper politics, an "impersonal" one. Such an impersonal politics appears to conceptualize relationality as that which constitutes us *a priori* such that our being in relation is what makes it possible for us to forge space for ourselves: 'being' as a singular (and not individual) subject is only thus possible on the basis of the ontological 'with' (Nancy, 2000). This seems to be precisely the point that Esposito speaks about with regard to community and the originary *munus*. Indeed, when Esposito speaks of the 'improper community' and 'impersonal,' which is a 'community of nothing' and a community of 'non-persons' that he gestures toward in his affirmative politics, he refers to the gap or spacing as the being-in-common:

> This means that we should identify at least two meanings, or levels, of the nothing, which must be kept separate in spite of and within their apparent coincidence. While the first level is, as we have seen, that of a relationship—the gap, or the spacing, that makes the being-in-common a relation, not an entity—the second is, on the other hand, that of its dissolution: the dissolution of the relationship in the absoluteness of the without-relation.[21]

One might note as per Esposito that the immune individual can only be understood in relation to the community, and the community in relation to the

munus. This is to suggest that any mechanism of immunization is never complete, but rather is always tied to the originary munus that is a relational way of being to which the subject can be re-exposed by "bringing the outside in" that inevitably occurs with any and all processes of immunization (such is the 'nature' of biological immunity itself). As Jean Luc Nancy warns, one must not confuse this relationality with "a revival of a certain Christian and humanistic emphasis on 'sharing,' 'exchange,' or 'others'" (in Lopez, p. 21). Rather, in being-with, in the *munus*, what we share is a void, or the 'spacing' that provides the very possibly of being (Lopez, 2013).[22] The community "isn't the *inter* of *esse* but rather *esse* as *inter*, not a relationship that shapes being [*essere*] but being itself as the relation" (Esposito, 2010, p. 139).

Yet, from Esposito's perspective, the exposure to the *munus* is dangerous and is what drives immunity. This being-in-common that is relationally constituted is a state that is always both one of contagion and relation. Exposure to the *munus* is always that which places us at risk because the *munus* expropriates; it takes us outside of ourselves. Yet this is the meaning of existence itself; the exposure to the outside that we find in an originary relational *munus*. It is under immunity mechanisms that we are protected from this exposure, but to the point that "one is deprived of the exposure that is existence itself" (Lopez, 2013, p. 21).

Esposito's version of an affirmative biopolitics intends to reverse the immunitarian drive. He imagines an affirmative biopolitics in which immunity

holds within it a contagion, such that the process of immunization is always opening and shifting rather than static. If a dangerous politics endeavors to remove all contagion- that is, the belief that the other will contaminate whereby contamination poses a risk to one's own self—e.g. idea of needing to immunize oneself from the other (Esposito, 2013 p. 85), then an affirmative politics for Esposito is to consider a contagion that does not lead to immunity that closes us off but to a contagion that can instead relate us. He describes this as a relational-contagious experience (Lemm, 2013; Esposito, 2013). This is the point that Esposito raises in his account of common immunity.

Common Immunity

In *Immunitas*, Esposito puts forth the notion of a 'common immunity' that opens up the possibility of an affirmative biopolitics, or an opening of the self to the other. One can note here that Esposito states two readings of biological immunization; the first is configured on account of the idea of immunity operating as a military device that rationalizes the "violent defense in the face of anything judged to be foreign" (2011, p. 17). The second is a more recent account of immunization that offers "another interpretive possibility" that situates it in association with community and openness such that "once its negative power has been removed, the immune is not the enemy of the common but rather something more complex that implicates and stimulates the common" (2011, p. 18). The first reading is a misinterpretation of how immunity operates. It is within the latter reading of immunization that notes the indissociable relation between immunity

and community that reveals the space for an affirmative politics, one in which recognition of the other – but not the other that one 'knows' (or who is made known as a private other like Arendt had warned) but the other who is a stranger to us) as part of our constitutive makeup can take over "from the lexicon of war" (Esposito, 2011, p. 165-166).

A particular example Esposito draws on the illustrate this process of becoming through immunization is that of pregnancy. He asks:

> How can the fetus, encoded as 'other' based on all normal immunological criteria, be tolerated by the maternal antibodies? What is the protective mechanism which, except in rare cases, allows or encourages its development as an exception to the natural principle of allograft rejection? As for all tolerance phenomena, the answer to this question firstly involves the blind spots of the immune system: namely, a kind of block that inhibits the normal expression of histocompatibility antigens in the cytrophoblasts of the mother. Women develop certain types of antibodies permitting the embryo to survive by hiding the signals it secretes indicating that it is foreign (2011, p. 169).

In this regard, he notes that

> …far from being inactive, the immunity mechanism is working on a double front, because if on the one hand it is directed toward controlling the fetus, on the other hand it is also controlling itself. In short, by immunizing the other, it is also immunizing itself. It immunizes itself from an excess of immunization. …antibodies are still what block or 'fool' the self-defense system of the mother (2011, p. 169).

Esposito manages to shift the immunitary horizon not from one that grants the proper to what is same, but what grants the proper to the stranger, or other (see also O'Byrne, 2013). Esposito's thesis suggests that through birth something complex happens within the immune condition such that it is not sameness that protects the fetus and the mother from one another but it is their very difference

that allows the child to be born. He writes: “Only as a stranger can the child become proper” (2011, p. 170). One might read this here as a disruption of the idea of who can count as proper and who cannot; through difference we can recognise the proper of others.

Esposito’s analogy of the common immunity in pregnancy is a useful heuristic device to consider a more important point specifically pertaining to the association of difference with what is proper, which is to challenge the common association of the proper with sameness or heterogeneity (see also Derrida, 2000). In affirming the stranger or other as proper (or perhaps better, by not affirming those who are the same as us or known to us as the only subjects who are proper), one can start to get to the point of a shift from what Esposito calls norms over life to norms of life whereby difference emerges. For example, from the vantage of community or the neoliberal political ideas about what life counts as good and proper, it would mean opening up this idea to generate different norms of life (Esposito, 2008). As Esposito suggests: “Once again it is the ‘norm of life’ that is in play, but according to an order that, rather than circumscribing life within the limits of the norm, opens the norm to the infinite unpredictability of life” (Esposito, 2008, p. 190). As Esposito recognizes, the “maximum deconstruction” of the immunitary paradigm rests precisely on the prospect of creating “continually new norms” (p. 190).

Third Person Politics

One can also consider here what Esposito calls his impersonal politics, or a politics of the third person. This might help us think about a different way to conceive of relationality that breaks down normative discourses regarding the good life and opens up the prospect of creating multiple, new norms. Esposito explains that the third person differs to the first person that refers to the pronunciation of 'I' that divides one from another and the second person, 'you,' which, like the first, is reversibly also an 'I' in relation to oneself (2012a, p. 105). "As much as the I may want to respect the you in its independence, preserving it in its transcendence, the I cannot help but exert an effect of mastery over it, since that alterity is logically dependent on the definition of the I itself," says Esposito (2012a, p. 105-6). In this regard, the 'you' can never be anything but a non-I and vice versa because "…only one can occupy it – the one who calls itself I—the subjectivization of the first term automatically desubjectifies the second, until such time as it acquires subjectivity in its turn by desubjectifying the first" (p. 106). Esposito's point is to suggest that personhood as well as law relies on divisions between subjects—the former relies on a division between the subject himself or herself such that he or she is personalized by controlling the animal part; the latter relies on divisions between subjects some who can occupy a place of the first person 'I' but only on account of making others a second person/you and desubjectifying them. An affirmative biopolitics cannot, therefore, rely on this division that the dispositif necessarily maintains between I and you, self and other.

In breaking down these binaries Esposito seeks to show how an impersonal datum must recognize how 'I' and 'you' are constituted by the same shared being-in-relation. This is what he calls the third person, which he understands as the absence of the subjective quality or the idea of personal identity. As he writes, "the only person that has a plural, even when it is in the singular—or rather, precisely because it is in the singular—is the third" – because it is a non-person and it is neither singular nor plural but both (2012a, p. 108). When Esposito (2012a) says that the third person is a 'non-person' (p. 108-9), what he seems to suggest is that to be in the third person or to act in the third person is to multiply the norm of life in such a way that it breaks down binaries between what is normal/abnormal, who is personalized/ depersonalized. Where technologies of governance like law divides subjects between the animal part and human part, the abnormal/degenerate and normal, those who are immune and those who are not, the multiplication of norms of life would break down such that all life would be respected in its singularity as life itself. It is in consideration of these key aspects of Esposito's affirmative biopolitics that my thesis also advances a similar affirmative politics in relation to assisted death in the concluding chapter.

Conclusion

This chapter has situated my thesis within the relevant literature in socio-legal studies more broadly, and socio-legal studies on assisted dying more specifically. It identified several key gaps. First, literature on assisted dying either a) considers

cases as discourses within wider power knowledge relations but does not focus on multiple cases or explicitly on law or b) focuses on law but does not consider it in the context of wider power-knowledge relations. My thesis focuses on case law as a discourse and technology of governance and examines the wording in legal cases that fills this particular gap. Second, I draw on literature on legal fictions and appropriate the concept through a post-structural lens to fill the first void. Third, most socio-legal scholars drawing on Foucault and Esposito tend to emphasize the concept of biopolitics; however, fewer focus explicitly on the pastoral underpinnings that emphasize questions of community in relation to the contemporary political rationality. My thesis focuses on this pastoral element, combining Foucault and Esposito's work to examine law as a technology of neoliberal governance that is implicated in particularizing and totalizing techniques of governing. In particular I focus on assisted dying in relation to a politics that is excessively individualizing at the expense of community. The next chapter provides an outline of the cases analyzed and the procedures for dealing with these cases.

CHAPTER TWO

The Cases

Introduction

As noted, in what follows the thesis examines eight English and four Canadian assisted dying cases (both active euthanasia and assisted suicide), which range in length from 10 pages to in excess of 200 pages. Cases from England included: Anthony Bland in *Airedale NHS Trust v. Bland* [1993] AC 789; Dianne Pretty in *R (Pretty) V DPP* UKHL 61 [2001] and *Pretty v The United Kingdom* [2002] ECHR 427; Debbie Purdy in *R (Purdy) V DPP* EWCA Civ 92 [2008]; Tony Nicklinson in *R (Nicklinson) v Ministry of Justice* (2012) EWHC 2381 (Admin), (2012) MHLO 77; Nicklinson with Paul Lamb in *R (Nicklinson) v Ministry of Justice* (2013) EWCA Civ 961, (2013) MHLO 65; and 'E' in *Re E (Medical Treatment: Anorexia)* [2012] EWHC 1639 (COP). Cases from Canada included: Sue Rodriguez in *Rodriguez v. British Columbia* (Attorney General), 1993 CanLII 1191 (BC CA) and *Rodriguez v. British Columbia* (Attorney General) [1993] 3 S.C.R. 519; and Gloria Taylor in *Carter V Canada* (Attorney General) [2012] BCSC 886 and *Carter V Canada* (Attorney General) [2013] BCCA 435. I followed the insight of Ian Dobinson and Francis Johns (2007), who had noted

that in legal scholarship "relevant documents are self-selecting because law is precedential and hierarchical" (p. 31). Since my focus for this thesis is on 'right to die' appeals in which individuals request that another person assist with their death, cases that fit this criteria were selected.

Between 2012 and 2013, appeals to 'the right to die' in Canada and the United Kingdom generated somewhat of a media spectacle: Gloria Taylor, a woman who like Rodriguez who preceded her, suffered from ALS, became somewhat of a household name in Canada; she began as a plaintiff in a case in the Supreme Court of British Columbia that the Federal Government later appealed. Likewise, England saw the appeal from Tony Nicklinson, alongside another appellant known only as Martin, and later the case of Paul Lamb, all of whom received considerable media attention. The thesis also draws primarily on England and Canada as its point of focus. While there are numerous differences between these two countries they do share a similar economic, political and legal context that is central to this thesis: England and Canada are economically developed countries run by conservative neoliberal governments; both are members of the commonwealth; and both apply common law principles (precedent) to discussions on assisted dying. Drawing on both allows one to broaden the scholarly range of possible cases whilst maintaining some consistency due to the socio-economic and legal similarities. In addition, an examination of these legal cases reveals that English law cites Canadian precedent set on assisted dying and vice versa. Since

both countries draw on each other's cases to articulate legal decisions it is logical that this overlap can be used consistently within my analysis.

While the thesis relies on these sources as evidence for my argument regarding the problem of assisted dying in the contemporary context in England and Canada, it also draws on select 'passive euthanasia' appeals in order to round off its scholarly range. These passive euthanasia appeals tend to precede the later 'active' euthanasia or assisted dying appeals, or have emerged alongside them and drawn on as a point of comparison for the purpose of building an argument regarding the very issue of 'assistance' and relationality as it emerges as part of the thesis's central discussion. This is particularly the case because law now typically regards passive euthanasia as an 'omission' whereby mechanisms of life support are removed; this is contrasted to active euthanasia and assisted suicide where active steps to end the subject's life are taken either directly from another or through assistance from another (Birnbackher, 2007). The reason for drawing on both sets of cases is that a number of scholars have argued that the rationalization of the differentiation between passive and active cases, while codified in case law, is tenuous at best (e.g., Birnbacher, 2007).[23] Also, whilst analyzing the legal cases it became clear that legal decisions to rationalize active euthanasia drew heavily on precedent set in these earlier, 'passive euthanasia' cases. It was therefore essential to engage with these cases.

Categories of Cases

In general the legal cases examined fall into one of three broad categories: cases that either (1) seek clarification on the particularities of statutory law that prohibit assisted dying (e.g., the UK's 1961 Suicide Act, the Canadian Criminal Code, the Irish Criminal Law Suicide Act of 1993, as well as state-by-state penal codes and statutes in the US). These appeals ask whether an act would be prosecutable (e.g., *Purdy V DPP*, 2006; *Pretty V DPP*, 2001); (2) seek a declaration that a particular act would not be unlawful (e.g., *Nicklinson V MOJ*, 2012); and/or (3) challenge the constitutionality of a particular statutory law and/or section of this law (e.g. *Rodriguez V B.C* (Attorney General), 1991; *Carter V Canada*, 2012; *Pretty V the United Kingdom*, 2002). For instance, on this latter point, in English law Nicklinson's recent case appealed specifically to a change in common law; he claimed that common law must "develop or change to provide a lawful route to ending his suffering" (*Nicklinson V MOJ*, 2012 paragraph 18). This was the first time that English law sought a partial legalization "through the development of the common law" (Michalowski, 2013, p. 339).[24]

Supplementary Material

The focus on legal appeals does not preclude from analysis the consideration of other attempted amendments to statutory law such as parliamentary bills advanced in England such as Lord Joffe's 2006 *Assisted Dying for the Terminally Ill Bill* to the House of Lords, and the more recent Lord Faulconer's *Assisted Bill* tabled in 2013 to the House of Lords, as well as Canada's Bill C-384 *An Act to Amend the*

Criminal Code (right to die with dignity), 2nd Sess., 40th Parl., introduced in the House of Commons in May 2009 and Quebec's *Dying with Dignity Report* in 2012, followed by its most recent Bill 52, tabled in June 2013, *An Act Respecting End of Life Care*. However, the thesis mostly focuses on case law because within these cases one can identify precisely what arguments are put forth regarding the appeals to assisted dying, and also what arguments are used to either deny (or in Gloria Taylor's exceptional case of *Carter V Canada* [2012], allow) the legal right. As noted earlier, case law also presents a number of different voices within the debate (Valverde, 2003). Parliamentary bills that have been rejected by peer vote tend to offer little explanation for the rationale behind rejection and do not generate the rich insight that judge-made law gives us into the process of judicial decision-making.

In addition to drawing on passive cases of euthanasia, I also draw on nine legal cases from the US and two from Ireland as supporting evidence. The two Irish cases examined are: *Re a Ward of Court (Withholding Medical Treatment)* 2 IR 79 [1995] and the most recent case of Marie Fleming in *Fleming v. Ireland* IESC 19 [2013]. Finally, the nine US cases are examined: Karen Quinlan in *Re Quinlan* [1975]; Nancy Cruzan in *Cruzan v. Director, Missouri Department of Health* [1989]; *Compassion in Dying v. Washington* [1996]; *Vacco v. Quill* [1997]; *Washington v. Glucksberg* [1997]; Terri Schiavo *in Schindler v. Schiavo* (In re Guardianship of Schiavo), 780 So. 2d 176 (Fla. 2d DCA)(2001) (Schiavo I); *Schindler v.* Schiavo (In re Guardianship of Schiavo), 792 So. 2d 551 (Fla. 2d

DCA 2001) (Schiavo II); *Schindler v.* Schiavo (In re Guardianship of Schiavo), 800 So. 2d 640 (Fla. 2d DCA 2001) (Schiavo III) and *Bush V Schiavo* SCO4 925 [2004]. As my thesis developed I found that English and Canadian legal cases often drew on these latter cases, not as a precedent, but in support of the appellant or in defence of law's denial of assisted dying. These cases were therefore examined to broaden my analysis, and to develop my arguments regarding the operation of legal fictions in assisted dying case law.

While the historical context of the countries in question is imperative to consider the ways that political rationalities take shape, it can be noted that Canadian and English law often invoke similar precedent (given the former derives somewhat from the latter). Moreover, the Canadian legal system with the exception of Quebec is grounded in English common law given its former colonial status. The thesis also incorporated the recent Irish case of *Fleming V Ireland* [2013] into discussion given its interesting intersection with another recent Canadian case (*Carter V Canada* [2012]); the Irish judge in the former responded directly to the latter case, arguing against its decision.

Case Overview

I have endeavored to analyze all cases that have emerged in case law regarding the right to assisted death. While I am primarily concerned with cases in which an individual seeks death at the hands of another (e.g., assisted suicide and/or voluntary active euthanasia), as noted, some cases analyzed have set a precedent

for this particular situation and therefore have been included. For example, England's Anthony Bland case of 1993 in *Airedale NHS Trust v. Bland* set a precedent regarding the right to end life-sustaining treatment. Bland's case articulates the appeal on behalf of Bland who was subject to the horrific Hillsborough disaster at a football match between Liverpool FC and Nottingham Forest in 1989. During the game a ruckus ensued that resulted in a crush between a number of fans and the fencing at the game. Bland sustained serious injuries, which led to a condition of Persistent Vegetative State and later Permanent Vegetative State (PVS). Unlike brain death, in PVS one is still considered 'alive' by medical standards. In PVS a person may respond to some stimuli, but do not regain consciousness; hence the reference to these persons being 'vegetables'.

I speak later about how this case of Bland differs from contemporary assisted dying cases, but also note how it informs many arguments made regarding the latter. Debbie Purdy's (2009) case of *R (On the application of Purdy) V. DPP* also set a precedent somewhat outside the parameters of the current question at hand. Purdy, who suffered from progressive multiple sclerosis, wanted to focus on the terms for suicide 'assistance'. Although a number of Britons had previously traveled to Dignitas, a suicide assistance clinic in Switzerland, Purdy sought legal clarification regarding exactly how the law would respond. Previously, spouses of those assisting loved ones on their travel to Dignitas had been threatened with legal action, though were not charged. Despite legal action not being previously taken up, Purdy wanted to know whether her spouse, Omar Puente, could take her

to Switzerland to end her life, or whether this would be considered 'assistance' in dying and therefore criminally prosecutable. Purdy's appeal for the right to assisted suicide was spurred initially by her debilitating illness and her desire to end her life at a point of choosing. Concerned that Puente might suffer from intolerable cruelties at the hands of the English justice system should he have assisted her with her journey, Purdy and Puente sought legal clarification regarding the rules for a spouse helping a loved one travel abroad for assisted suicide, and whether this could be reprimanded by English law. Purdy firmly noted that not only was this of concern, but more deeply she was worried, as she stated in a media interview that "he's a foreigner, he's black, he's got a name like Omar. I wouldn't be there to argue on his behalf. English is my first language. It isn't his. Those are not things I want to think about, and worry about."

Purdy's story is not one in isolation. Most right to die cases detail some kind of compassion for a loved one, which is underscored by a deep concern that the loved one will suffer the consequences of assisting suicide and may be prosecuted for murder. Dianne Pretty's story that broke news headlines in 2001 spoke to the desire for her husband of 25 years, Brian, to be able to help her die articulated in her two legal cases of *Pretty V DPP* (2001) and *Pretty V UK* (2002), the latter of which took her case to the European Court of Human Rights. Pretty was diagnosed in 1999 with motor neurone disease, which is a progressive neuro-degenerative disease of the central nervous system. Unlike Purdy she did not want her husband to assist her to Dignitas; rather, she was the first in the UK to challenge

the existing law regarding the right to have her life ended by another person within the UK.

Tony Nicklinson's case followed *Pretty* in 2012. *R (Nicklinson) v Ministry of Justice* (2012), filed alongside 'Martin' – a pseudonym for another anonymous appellant. Nicklinson appealed also on the basis of a disability, this time from a stroke that led to paralysis below the neck. As a formerly active man, Nicklinson claimed he could not tolerate a paralyzed life confined to a wheelchair. Nicklinson's form of communication was through eye movements alone and he relied on around the clock care giving, which he described as intolerable. He sought the legal right for his wife to be immunized from prosecution should she help him end his life. Like Nicklinson, 'Martin' also suffered a stroke- of the brain stem- and was also left unable to move, except small eye movements; he also required full time care. As a nurse, Martin's wife did not want to help him end his life, so he sought the legal right for a physician to assist him in his death.

The most recent appeal in England has been made by Paul Lamb in application with Jane Nicklinson, the deceased Tony Nicklinson's wife in the case of *R (Nicklinson) v Ministry of Justice* (2013). Lamb was left paralyzed after a severe car crash. He is also seeking physician assisted death since he has no function in any of his limbs and therefore cannot, like other right to die campaigners, take his own life as is currently permitted by law under the English Suicide Act of 1961.

Prior to Dianne Pretty in England, Canadian Sue Rodriguez was the first to initiate an appeal to the right to die in 1993 in the case *Rodriguez V. British Columbia* (Attorney General). As noted from the first pages of this thesis, Rodriguez suffered from amyotrophic lateral sclerosis (ALS), more commonly known as Louis Gehrig's disease, or motor neurone disease. Her case, which was denied, set a precedent and was referred to in Dianne Pretty's case and those that have followed. Following *Rodriguez*, Gloria Taylor's case emerged as the most recent in Canada. She also suffered from ALS. In her case of *Carter V Canada*, Taylor appealed for the right to physician assisted suicide in 2012 and was the first in England and Canada to be granted a constitutional exemption, meaning that she was allowed by law to end her life at the point in time she should so desire (which was later overturned by a superior court ruling). The most recent Irish case is that of *Fleming V Ireland*, whereby the plaintiff, Marie Fleming, suffering from multiple sclerosis, lost her appeal to die with the help of her husband, Tom Curan.

Analysis and Organization of the Cases

My analysis responds to the research question established in the introductory chapter: when one ventures beyond the judicial *ratios* of the cases and explores these cases as part of wider power-knowledge relations, what does this tell us about legal decisions that currently deny some forms of assisted death? In responding to this broad question my analysis considers the neoliberal ethos that emphasizes relations of privacy, closure and what seemed to be a desire to ensure

that subjects were closed off from one another. With this in mind I analyze the legal cases on assisted dying by focusing on the concepts that each legal case seem to invoke either overtly, or perhaps more subtly. I not only note what is present in these cases, but also note the absences, to "survey what [they]…eclipse, ignore, reject and expel" (Pavlich, 2007).

My method might broadly be considered a discourse analysis influenced by the works of Foucault and Esposito, as well as others outlined in chapter two. Consequently, I analyze case law as a discourse and technology of governance. However, when analyzing these cases I do follow a grammar of method such as a '5 step approach' to discourse analysis that might be interpreted, for instance, from Foucault's (1982) text *The Subject and Power*. Methodology can itself be regarded as a sustained discipline that relies on its own normative schemas for operation. Instead I focus on a broader analysis style that emphasizes my main purpose for the thesis: to consider how legal decisions and the discussions in case law deals with the question of assisted dying not in isolation, but as part of a larger power-knowledge regime.

Keeping this aim in the back of my mind, my analysis focuses on the wording of the cases to consider what central concepts emerge. I read and analyzed the texts both individually and alongside one another. Working across cases I asked whether similar patterns and logics emerged. For instance, Taylor's case may be interpreted as invoking the concept of vulnerability in a very particular way.

Nicklinson's case used the concept similarly, indicating a shared logic. Rodriguez's, Pretty's and Fleming's were similar. I not only noted what concepts appeared in the cases but I also asked how these concepts were used. For example, in chapter four I explain how the concept of inviolability emerged in legal cases. However, I also note that this concept did not emerge in isolation. The legal cases also extensively discussed concepts of sanctity and quality of life alongside inviolability. Where other scholars have focused on sanctity and quality as key concepts in their analyses (e.g. Dworkin, 1994; Singer, 1999; Huxtable, 2002), I argue that when one analyzes cases as discourses playing into the wider power knowledge regime, inviolability emerges as the key concept that is used to feed legal fictions that are enunciations of a neoliberal ethos. Without such an emphasis on the way that law operates in relation to power-knowledge one misses such aspects of an analysis.

Through my analysis I began to recognize how concepts were invoked to feed two key legal fictions (the immune person and immune society) that reflected this broader political rationality. Each concept analyzed supported this thesis. I drew this conclusion because my analysis focused not only on describing emergent concepts, but also because it: (1) considered how cases were discourses that reflected a wider political ethos; and (2) asked how legal cases used concepts in particular ways that, through my analysis, showed how they seemed to feed fictions that supported this ethos.

I have organized my chapters of the thesis according to the key concepts that emerged throughout my analysis. The next chapter, chapter three, begins with the concepts of vulnerability and enmity. Chapter four follows by examining the concept of inviolability, while chapter five discusses the concept of security, and finally chapter six turns to the concept of dependency.

CHAPTER THREE

Vulnerable Persons and Relations of Enmity

Introduction

Two concepts simultaneously permeate right to die legal appeals: 'enmity' and 'vulnerability'. Focusing on the former and its interrelation with the latter, this chapter argues that the concepts of enmity and vulnerability are articulated in legal cases in order to generate two key legal fictions that allow the law to rule in ways that denies assisted dying. The first of these legal fictions is the 'immune person': concepts of enmity and vulnerability emerge in legal cases on assisted dying to feed a fiction that subjects must be protected from one another as 'proper' bordered, individual persons. The concept of vulnerability enables the law to target a subject by fixing this subject necessarily as an immune person; it does so by also invoking the concept of enmity to feed the fiction that the vulnerable subject needs protection from law. Concepts of enmity and vulnerability allow law to claim that it must create the subject as an immune person through law to protect said subject; this rationalizes its decisions to deny assisted dying. This is problematic because the legal fiction 'fixes' the appellant as a certain kind of person who is known as 'vulnerable' and in need of protection

from the other person who is fixed as an enemy and who would otherwise kill the burdensome appellant (i.e. the evil family member who wants the inheritance, the medical practitioner who wants to free up a bed, or the state that wants to get rid of a social and economic burden).

The second legal fiction that the law creates is the immune society. This legal fiction is also created through the concepts of enmity and vulnerability; the law uses enmity and vulnerability to feed a fiction that we all need protecting from one another if we are to live in a functioning totality of immune persons who are private, bordered and individualistic. Concepts of enmity and vulnerability allow the law to claim that it can know traits of human behavior in advance that can legitimate legal fictions that divide subjects from one another; this allows law, at least by way of appearance, to 'benevolently' protect such (vulnerable) persons from other enemies. Neoliberalism as a political rationality operates best through this divisive society. It needs subjects to be divided from one another and so legal decisions that are enunciations of this rationality create fictions that sustain its divisive and totalizing appearance.

One of the chief points emerging from this chapter is that concepts of vulnerability and enmity are necessary for a (neoliberal) governmentality that operates on the basis of a totality of bordered subjects who are self-interested and privative. Where the prospect of assisted dying in some forms might break these barriers down (i.e. one might consider a practice of assisted dying as a

deconstruction of the limits neoliberalism places on human relations), law shores up these barriers by articulating concepts of enmity and vulnerability that reify proper divisions between subjects that separate each subject from one another within a larger whole (immune society).

Enmity and Bioethics

The concept of enmity does not figure prominently in socio-legal discussions of bioethics issues. Hanafin's (2007, 2009) work is an exception here. His analysis of 'right to life' legal cases in Italy noted – albeit in passing reference— how the law constructed a concept of enmity to rationalize legal restrictions placed on in vitro fertilization. In particular, the tenuous grounds upon which Italian law dealt with the question of the legal status of the embryo concerned Hanafin. He asked how Italy, which considers itself a nominally liberal pluralist state, had negotiated its Catholic culturalist underpinnings within its legal structure. The passing of a new act in 2004 that regulated assisted reproductive technology (ART) was particularly contentious. This act stipulated, quite contrary to the Constitution of the Italian Republic, that the embryo had legal rights (to life and to protection) independently of the mother. Hanafin noted that the Catholic Church played a significant role in shaping this act, such that it employed the embryo "as a weapon in the war" against what it called a "culture of death" (Hanafin, 2007, p. 6). Most interesting for the present discussion is the notion that this act not only articulated the embryo as a sovereign entity within law (or, established it at the very least as a 'potential' sovereign), but also that the law established this sovereign status of the

embryo by constituting the mother as a necessary *enemy* of this 'embryonic sovereign'. The mother was thus conceived as a monstrous other who threatened the embryo's life (Hanafin, 2007, p. 99).[25] But why did the law rely on an articulation of enmity? What does this reference to enmity in Hanafin's example of a right to life case tell us about how enmity operates as a concept in right to die appeals?

Enmity and the Right to Die

It is not only in 'beginning of life' decisions like those identified in Hanafin's scholarship that enmity is invoked in law. In right to die cases that appeal to voluntary assisted suicide or active euthanasia, the concept of enmity is frequently constructed: it is used to feed a legal fiction of an immune person whom the law benevolently protects from an outside enemy. The recent case of *Nicklinson V MOJ* (2012) demonstrates one such example.

Tony Nicklinson was certain that he wanted to end his life, so much so that he noted prior to the hearing of his case in 2012 that "I have wanted my life to end since 2007 so it is not a passing whim…A decision going against me condemns me to a life of increasing misery" (para.14.). His narrative was well broadcast across the English and international media; it depicted Nicklinson as a formerly active man: he was a rugby player and an avid skydiver. Following a business trip where he suffered from a devastating stroke, Nicklinson was left paralyzed below the neck and unable to speak. Able to move his head and eyes only, Nicklinson's form of communication had since been through a computer that he controlled

through eye blinking. A statement recorded in the judgment on his case shares Nicklinson's thoughts:

> My life can be summed up as dull, miserable, demeaning, undignified and intolerable…it is misery created by the accumulation of lots of things which are minor in themselves but, taken together, ruin what's left of my life. Things like…constant dribbling; having to be hoisted everywhere; loss of independence, … particularly toileting and washing, in fact all bodily functions (by far the hardest thing to get used to); having to forgo favourite foods;…having to wait until 10:30 to go to the toilet…in extreme circumstances I have gone in the chair, and have sat there until the carers arrived at the normal time (para.13).

Despite Nicklinson's appeals to be allowed to end his life through voluntary active euthanasia—which would have meant that someone else such as his wife, Jane, or a physician, could have ended his life— his case was denied in August of 2012. The court report acknowledged that in other countries, such as Switzerland, the right to assisted death had been legalized. However, while England had advanced some laws regarding end of life decisions— for instance, the Suicide Act of 1961 that decriminalized individuals who attempted to commit suicide— it did not recognise voluntary active euthanasia as lawful. Thus, Nicklinson, who the court recognized could not end his own life (other than through self-starvation), required the assistance of another. This remains an act that is not currently immune from criminal conviction in England (*Nicklinson*, 2012, para.15). Although a number of advocates for Nicklinson's position have advanced forms of appeal, including Lord Joffe who has presented Parliament with several amended bills regarding the right to die, English law appears to be bound to the belief that voluntary euthanasia—which in this case seems to have been conflated with the term 'mercy killing' to encompass the notion of a

'consented death' – should in no way be decriminalized. Instead, the law stipulates that the actor who ends a life is inevitably a 'murderer', regardless of whether the act was committed in full accord: "It has been established for centuries", stated the court, "that consent to the deliberate infliction of death is no defence to a charge of murder" (*Nicklinson V MOJ,* 2012, para.57, s.7).

In Canada's Sue Rodriguez's case, many of the same points were raised regarding the association between assisted death and murder. The dissenting opinion given by Justice McLachlin noted that the assenting opinion of Justice Sopinka denied assisted dying due to the latter's belief that any "... active participation by one individual in the death of another is intrinsically morally and legally wrong" (*Rodriguez V. British Columbia* (Attorney General)*,* p. 601, para 209, p. 616). McLachlin noted in turn that this blind belief in, and universalization of, the moral depravity that one suffers (and that a community suffers) when one takes the life of another has justified the blanket "…prohibition on assisted suicide…because the state has an interest in absolutely criminalizing any wilful act which contributes to the death of another" (p. 616).

In Nicklinson's case, law deferred to an existing precedent to make this point. It argued the relation between mercy 'killing', voluntary euthanasia, and murder was 'inevitable'. The legal case clearly outlined a link between mercy killing and the notion of a bellicose relationship with the other. This warlike relation was defined through the historical legal example of the duel:

> …this proposition is established beyond doubt by the law on dueling, where even if the deceased was the challenger, his consent to the risk of being deliberately killed by his opponent does not alter the case (*Nicklinson V MOJ*, para. 57, s.7).

The duel, deemed analogous to mercy killing in Nicklinson's court judgment, might prompt some sort of response here. Dueling was deemed analogous because it replicated a scenario in which even if a person consented to his or her own death, the person who committed the consented act was not exonerated. Drawing on the duel by way of example enabled the law to cultivate an image of two subjects embedded in a 'theatrical presentation' of power, or a war-like 'event' (Foucault, 2003, p. 92); it constructed subjects as enemies of one another. By perpetuating the belief that we are all enemies of one another – i.e. that 'man is wolf to man'— and therefore that we should fear death at the hands of the other, the law appeared to assert its authority as the necessary protector and guarantor of life. In the case of assisted dying, this appeared to occur by framing compassionate death in the context of a criminal act whereby the other is always, inevitably, a 'murderer'. In doing so the law invoked the concept of enmity to feed a legal fiction of an immune person whom law must protect from all of those who exist outside of him or herself.

The Commission in Nicklinson's case also deferred to a precedent set in the case of *Re A (Children) (Conjoined Twins Surgical Separation)* 2 WLR 480, [2000]; this provided another example whereby case law drew on concepts of enmity and vulnerability to feed a legal fiction of an immune person whom law's 'protection' defended from a necessary enemy. Nicklinson's case drew on *Re A* as an example

in which death (i.e. killing) was deemed acceptable when granted 'in favour of life' (para. 70). In *Re A*, twins, Jodie and Mary, were born conjoined. Mary was reliant on an artery that connected her to Jodie; however, she would not survive as a singleton. If doctors did not separate the twins, neither would survive, but if they did separate them Mary's life would inevitably be lost. The ruling concluded that the twins could be separated and, ultimately, that Mary's life could be 'let go' for the sake of saving Jodie. The case had pleaded that the doctors were "coming to Jodie's defence and removing her from the threat of fatal harm to her presented by Mary's draining her life blood" (*Nicklinson V MOJ*, 2012, para.70). Even though this case dealt with two newborn twins, who one would typically regard as innocent, the law invoked the concepts of enmity and vulnerability to articulate its decision. It argued that Jodie suffered by virtue of a fear of her twin "draining her life blood" (7.7). Mary directly threatened the life of her sister. The law invoked the concept of enmity when it articulated the decision to allow the death of one twin, who was an enemy, to save the other twin, who was vulnerable, on the basis of 'self-defence.' The law constructed Mary as Jodie's enemy. The decision to allow Mary's death through self-defence to protect Jodie fed a fiction of Jodie as an immune person who was merely protected from the threat Mary posed.

From the onset one might question this relationship between self-defence and the legal appeal to life and to death. To what extent are these two things related? The Commission in Nicklinson's case drew on self-defence to articulate when it would be deemed acceptable for a subject to take the life of another subject; however, it

does seem somewhat peculiar that in an instance of two conjoined twin babies the law appeared to rationalize its decision to kill one on the basis that the other twin appeared to be a threat and an enemy. As with Hanafin's example of the monstrous mother, the articulation of the concept of enmity seems to figure as a central tool to feed the fiction of the immune person who must be protected from all others whom he or she would otherwise fear as a direct threat to his or her life.

The law operating as a discourse and technology of governance also operates as a norm: the law seems to be able to use concepts of enmity and vulnerability to articulate legal fictions around the life that it chooses to protect. It could have sought to protect Mary as an immune person, but instead it used vulnerability and enmity to articulate her as a threat to Jodie. Likewise, it was not simply that Mary threatened Jodie in the sense that she threatened her life; Mary also obligated Jodie. Mary could not be articulated as an immune person because she drew from Jodie's lifeblood; she could not live independently, on her own, as her own immune person within an immune society that respected the immunity of other persons (i.e. Jodie).

We can see a shared logic in this case of *Re A (Children) (Conjoined Twins Surgical Separation)* that is echoed in the case of Nicklinson: despite compassionate motives established for killing in the latter's case, and despite the desire from the subject himself to die at the hands of a trusted other, the law

responded by calling upon a precedent that invoked a rationalization of the other as necessarily an enemy.[26]

In Nicklinson and Rodriguez's case, the absolute association of the act of taking life with unlawful murder as if this were 'inevitable' is curious. In assisted dying cases such as these, this appears to occur by framing compassionate killing in the context of a criminal act whereby the other is always, inevitably, a 'murderer'. This inevitability of judgment lies at the very heart of Esposito's critique of immunization. Deciding on a guilty verdict in advance of an act, "regardless of whether the circumstances merit it" is how governance mechanisms are able to immunize subjects from one another (Esposito, 2011, p. 32). Law fixes subjects as enemies of one another to make these enemies known in advance; it must be able to make enemies known to one another such that it can feed and maintain its legal fictions of immune persons and an immune society that claims to protect subjects from these enemies. As Esposito (2011) further notes: "Life is not condemned because it is guilty but in order to make it guilty" (p. 32). If the "stated aim of law is to preserve life…life can be preserved only if held in the fold of an inexorable anticipation that judges life to be guilty even before any of its acts can be judged" (pp. 32-33). The central point here for the thesis is that the law must create truths about human nature through concepts such as enmity that feed legal fictions in order to judge some forms of humanity as guilty and condemn an act before it has even been performed.

Deferring to examples such as the vampiric twins and dueling in case law when dealing with the prospect of assisted dying are two instances in which we see the law create legal fictions of the immune person (that is, the bounded, individual, person protected from what exists outside himself or herself) and the immune society (i.e. the totality of immune persons). Law used the concepts of enmity and vulnerability in ways that sustain and feed these fictions by generating beliefs about the possible limits of human relationships that requires "shoring up" by reifying a binary between friend and foe. Within a regime of governance that advances the values of liberal individualism – that is, freedom of self-determination, and therefore an individual 'sovereignty over oneself' of sorts— an immune person—the law appears to need to cultivate the notion that one's neighbor is to be feared through recourse to the 'essence' of human nature as wolf-like. Indeed this is the kind of governmental approach to 'conducting conduct' that Foucault (1991) had noted: the concept of enmity is articulated to perpetuate a particular truth of human relationships that rationalizes the legal fiction of the immune person, and also rationalizes the fiction of the immune society, both of which operate through a legal divisions between subjects on the basis of knowable behavioural 'traits' and a particular 'anthropology' of humankind (e.g., Joronen, 2013; Read, 2009). The following commentary in Nicklinson's case also makes this clear:

> …recognizing a partial excuse of acting out of compassion would be dangerous. Just as a defence of necessity 'can very simply become a mask for anarchy', so the concept of 'compassion' – vague in itself— could very easily become a cover for selfish or ignoble reasons for killing, not least because people often act out of mixed motives (*Nicklinson V MOJ*, para.54, s7.7)

Thomas Hobbes and Carl Schmitt also noted this necessary deferral to the concept of enmity that defined man's essence to legitimate a legal fiction of an immune society. Their fictive immune society operated through a sovereign rationality that divided subjects reciprocally from one another on the basis that subjects were part of a totality of immune persons who could not be trusted. Sovereignty emerged as a political mechanism of protection that demanded "a pessimistic anthropology, which has a vision of man as bad, corrupt, dangerous, fearful and violent" (Derrida, 2009, p. 44) in order to ground and legitimate itself. Derrida (2009) has written on this aspect of Hobbes and Schmitt's theorizing: he recognized, like them, how sovereignty politics relied on deferrals to the idea/belief that human nature is wolf-like (and that we are all enemies of one another) in order to legitimate itself as a mode of governance by creating the unit of the individual immune person who is part of an immune totality. We see here emerging in this discussion of sovereignty the same underpinning logic; it operates on the same basis of an individualizing and totalizing logic sustained through fictions of an immune individual and an immune society which is a totality of immune individuals.

Continuing with Hobbes's sovereignty as an instance of immunization, Esposito further describes this intimate relation between protection and the constitution of the proper. He notes that when we are brought into 'unity' with one another under the sovereign contract we are not brought into relation as friends, but instead

remain enemies. In being brought together in unity under the immune mechanism, we are held in a certain non-relation. Thus, he writes:

> The relation that unites men [through immunization] does not pass between friend and enemy and not even between enemy and friend, but between enemy and enemy, given that every temporary friendship is instrumental…with regard to managing the only social bond possible, namely enmity (Esposito, 2010, p, 27).

Here, Esposito means to suggest that the immunity mechanism of sovereignty did not offer us protection and bring us together as friends in relation to one another; that is, immunization did not offer us protection such that we would live in relational harmony together. Rather, through immunization we are brought into what he calls "reciprocal dissociation" or a "unity without relation" (Esposito, 2010, p, 28). This is also why Esposito suggests the immunization mechanism both totalizes us and divides us from one another. Without this recourse to man's nature as corrupt or bad and something to be feared, we might question the very role of law and legal sanctions. The friend/foe distinction underpins and sustains law as a mechanism of protection (Esposito, 2008). With reference to case law on assisted dying one might note that the law seems to discursively establish itself as a mechanism of protection of individuals through the construction of compassionate cases as inevitably sinister.

It is not simply under sovereign regimes of governance that this kind of immunizing mechanism operates. This thesis has already also made this point. Through political rationalities of liberalism (Esposito, 2008), and increasingly neoliberalism (Campbell, 2011), we witness an intensification of immunization

mechanisms. The 'totality' of sovereignty is, like the totality of neoliberalism, only a totality in the sense that it is a society of immune persons protected from one another. The state of being immune, which we so 'enjoy' to this present day, can be summarized by the de Tocquevillian adage whereby we live "side by side unconnected by a common tie" (Esposito, 2008, p. 76); this maxim has arguably become an even more pertinent under neoliberal rationalities of governance that continue to shape subjects in ways that are increasingly divided from one another (May, 2012; Olssen, 2010).

Speaking to the prospect of solidarity that might break from the individualizing tendencies of immunization more generally and neoliberal immunization more specifically, Todd May adds to this conversation: "Because of the individualizing tendency of neoliberalism we often find it difficult to think in terms of solidarity…we don't possess ways of thinking in terms of solidarity, because we are discouraged from thinking these ways" (2012, p. 135). Solidarity and other reciprocal and relational concepts are unable to emerge on the very basis that borders have been shored up between "the same (of friendship) and the other (of enmity)" (2012, p. 135). It is the constitution of and perpetuation of the concept of enmity that plays a role in creating legal fictions of immune persons and an immune society that makes this reciprocally dissociative relation between immune persons possible.

Vulnerability

As noted from the start of this chapter, another concept that emerges in association with enmity in right to die legal appeals is that of vulnerability. This concept emerges most prominently in the recent 2013 case of *Fleming V Ireland & Ors*, I EHC 2, [2013] in which Marie Fleming, the appellant, requested an assisted death. In this case vulnerability emerged in association with a concept of burden in order to frame a symbolic type of enmity.

It is important to contextualize Fleming's case because it overlaps with a decision made (and discussions thereof) in the 2012 Canadian appeal from Gloria Taylor. The judge of the latter case, Justice Lynn Smith, had been the first in Canadian and English law to consider the right to assisted death favorably. In her decision she granted Taylor a constitutional exemption that allowed Taylor the right to seek physician assisted death within a year while Parliament could take steps to reconsider legislation on the matter. Taylor's case considered whether the appellants, were they to remain alive, would necessarily internalize a belief that they would burden loved ones. The law considered whether assisted death could be legalized on the basis of this internalization of burden; after all, the law argued that subjects seeking death due to a fear of becoming a burden on others would always pose a potential risk for vulnerable persons. Indeed, in other cases like *Rodriguez*, judges had claimed that appellants were vulnerable and required protection from law because even if they outwardly seemed to appeal to die on their own accord the appellant might instead do so out of a fear of burdening

family members. However, in her judicial decision Justice Smith ruled out the concern that Taylor had internalized a belief that she was a burden on her family, and therefore ruled out the argument that this internalized burden would coerce Taylor into seeking an assisted death that she might not otherwise have desired (*Carter V Canada* (Attorney General), BCSC 886, 2012).

In direct response to Justice Smith's ruling, Ireland's Justice Nicholas Kearns articulated his own position on this prospect of burden and coercion in Fleming's case. Kearns provided 'evidence' that the threat of burden was still an ever-present possibility; on account of this he dismissed Fleming's appeal to die. Kearns' judgment summary notes:

> The evidence from other countries shows that the risks of abuse are all too real and cannot be dismissed as speculative or distant. One real risk attending such liberalisation is that even with the most rigorous system of legislative checks and safeguards, it would be impossible to ensure that the aged, the disabled, the poor, the unwanted, the rejected, the lonely, the impulsive, the financially compromised and emotionally vulnerable would not avail of this option in order to avoid a sense of being a burden on their family and society. The safeguards built into any liberalised system would, furthermore, be vulnerable to laxity and complacency and might well prove difficult or even impossible to police adequately (*Fleming V Ireland & Ors, Judgment*, I EHC 2, 2013).

Not only did the case summary constitute Fleming as a vulnerable subject, but it also constituted her vulnerability in relation to the conditions of enmity and immunity. Kearns argued that right to die appellants would conceive of themselves as burdens due to the direct pressure they would place on their families and caregivers. To support this claim he drew on what one witness, Professor George, called 'care fatigue' whereby:

> …as a clinician treating patients in the final stages of their lives I have come across it in the most loving family environments. It is easy in such circumstances for seriously ill people to feel a sense of obligation to remove themselves from the scene (*Fleming V Ireland & Ors, Judgment*, para 66).

While the concept of enmity may not appear to be immediately apparent in this case, it is implicit in the rationale through concepts of burden and vulnerability. These concepts feed both legal fictions discussed earlier—the fiction of the immune person and the fiction of the immune society. On the one hand, George's statement noted above rationalized the tenets of a neoliberal political rationality that requires good subjects to be self-responsible and not to burden the freedom of others. Here we see the concepts of burden and enmity frame the legal fiction of the immune person—this time, feeding a fiction of the family members as the immune persons who require protecting from Fleming who would be a burden and 'enemy' in the sense that she would infringe on the freedom of her loved ones (hence, causing them 'care fatigue') (Glasgow, 2012).

This reference to self-responsibility is typically associated with neoliberal governance rationalities that push individuals to take care of themselves (Glasgow, 2012; May, 2012; Brown, 2005; Olssen, 2010). On the other hand, the statement from George also rationalized the need to protect and immunize Fleming from the possibility—indeed, the inevitability—that this care fatigue would lead to a state of tension or a 'war' of the household, thus coercing Fleming into desiring a death out of fear and obligation. In a political climate in which care is frequently pushed onto families of individuals to remove the burden from the

state (Larner, 2000), arguably Fleming's case set in motion new ways that enmity could get introduced as a rationale for increased legal 'protection' (or 'immunization'), which penetrates law to protect us, even when we do not desire it, from those often deemed most 'close' to us: our loved ones.

In this instance, the concept of self-responsibility fed a fiction of Fleming as an immune person and independent subject: she was framed as an immune person, since she ought to be self responsible; however, her immune person status was simultaneously called into question as the concepts of burden and vulnerability framed her as someone who could not take care of herself as an immune person and who would unavoidably/necessarily impose herself onto others. This framed her as an enemy of others (and of neoliberal immune society itself) but also as a vulnerable requestor who, because of her enemy status, needed protecting from the immune community of individuals that she would otherwise burden and that would then become her enemy.

Nicklinson's case also realized this problematic of vulnerability as it operated alongside legal protection from the constitutive enemy who was alleged to deliver harm. As Nicklinson clearly stated:

> By all means protect the vulnerable. By vulnerable I mean those who cannot make decisions for themselves just don't include me. I am not vulnerable, I don't need help or protection from death or those who would help me. If the legal consequences were not so huge i.e. life imprisonment, perhaps I could get someone to help me. As things stand, I can't get help (*Nicklinson V MOJ,* 2012, para 3).

Writing in the context of restorative justice, Pavlich (2002) notes the problematic uptake of ethical arguments used to defend certain legal decisions. In the context of the discussion of vulnerability this is particularly pertinent; Pavlich argues that ethical claims such as those said to 'protect' the vulnerable "operate in the name of supposedly universal principles of harm, or absolute conceptions of general community interests" (p. 5). For him, this assumption is damaging because it does not allow us to "seek out ways to envisage entirely new forms of social life" (p. 5). It also narrows the very possibilities for considering what indeed constitutes 'harm' or, in this case, to consider what we imagine by vulnerability. In the instance of right to die appeals, this commentary is absolutely germane: one must surely note the ways that a law based on an uptake of the concept of vulnerability that claims to be an ethical universal norm reflecting community interests instead does much damage to many members of this community who do not subscribe to the same account. Those persons appealing to the right to die such as Nicklinson certainly do not consider themselves within the same universal context of vulnerability, nor do they wish to be considered thus. Indeed, rather than considering themselves vulnerable to other persons, whom the law establishes as proper enemies that it claims to protect them from, right to die appellants such as Nicklinson instead typically articulate themselves as being vulnerable to the law itself that they claim sentences them to a fate worse than death: life. Not only does Nicklinson's statement give us insight into the problematic that Pavlich (2002) outlines above, but also it speaks more specifically to the implications of law acting as a discourse and technology of a neoliberal political rationality that

divides subjects from one another. By perpetuating the concept of vulnerability that feeds the fiction of the immune person who is a proper type of person (a vulnerable person) who inevitably requires protection, this protection is grounded in a division that reflects and sustains the particular logic of the political rationality itself.

Despite the relatively different ways that the cases of Nicklinson, Rodriguez, and Fleming invoked the concept of enmity, each fed a necessary 'immunization' of life that forged artificial parameters around the self and other. Law's construction of the presence of a possible enemy, (either a direct enemy or the enemy of the community that had pressured persons to die in particular ways), was necessary to constitute the fiction of the immune person as an enunciation of a divisive neoliberal ethos. The creation of enemies and vulnerable requestors had the effect of fixing subjects and also fixing the kinds of relations subjects could have with one another. There was no other way of conceiving of society and persons other than as individuals who must be protected and divided from one another; the prospect of assisted dying could not be brought to bear because it was compromised by the very 'fact' articulated through legal fictions that human subjects required protection from one another and acts of compassionate killing could not be recognized within this ethos of governance.

On the other side of this divide however we must also ask in what ways the refusal of vulnerability (i.e. Nicklinson's claim that he was not vulnerable) and

the depiction of law as a mechanism of communal force or violence imposed on subjects might also be considered complicit with another type of immunizing function, this time by way of the articulation of legal rights themselves. In Nicklinson's case we see a simultaneous rejection of the fiction of the immune person and a reinstatement of it. This presents a paradox. On the one hand he rejects his immune person because he rejects the surrounding concept of enmity that shores it up (i.e. he rejects the idea that others want to kill him); on the other hand he brings the immune person back into being because he asserts himself as a bordered, proper subject who is self-directing and self-responsible, and who can make his own decisions independently of others.

Judith Butler (2004) challenges the rejection of vulnerability as a way to establish and legitimate a violent self-centered subject. It is important to bear in mind that she is speaking in a very different context to the subject matter in question, and that she is also speaking to a very different subject per se (specifically that of the nation state as a subject). However, her insights are still apt. She writes that the denial of vulnerability (in the context of the nation) is a way to re-instill boundaries and to erect defensive apparatuses around the subject. In what ways might the rights claims of appellants themselves also be invoking a denial of vulnerability to both shore up the enmity of the other – in this case the law itself or the community of persons who seek to deny assisted dying – and also to shore up the subject's own prospects as a self-directing individual sovereign subject? Describing the violent, self-centered subject, Butler notes:

> Its actions constitute the building of a subject that seeks to restore and maintain its mastery through the systematic destruction of its multilateral relations ... It shores itself up, seeks to reconstitute its imagined wholeness, but only at the price of denying its own vulnerability, its dependency, its exposure, where it exploits those very features in others, thereby making those features 'other to' itself (2004, p. 41).

Indeed, Derrida (2009) also notes a similar point regarding the liberal individual who attempts to immunize him or herself against the violence of the state. He writes, "There are different and sometimes antagonistic forms of sovereignty, and it is always in the name of one that one attacks the other" (p. 76). One might note the ways that the subjective appeals to the right to die, particularly as they refuse a status of vulnerability, are not simply neutral or innocent but also are inscribed in the shared neoliberal political rationality that serves to close off the borders around the self. One must therefore consider how such liberal rights appeals also, to some degree, endeavor to fix a 'proper' subject through constituting a legal fiction of an immune person. In denying vulnerability and appropriating a self-directing subjectivity, liberal right to die appeals seem to be complicit with the constitution of a subjectivity that is complete, protected and defended from the enmity that the other allegedly poses (Mihic, 2008).

Upon noting this centrality, indeed necessity, of enmity it becomes clearer as to why the law seems unable to respond affirmatively to the prospect of compassionate killing. The reason lies here: law cannot (or refuses to) recognise compassion as a motive given that the concept of compassion would contradict the political rationality that depends on a particular legal fiction of a reciprocally

dissociated society shored up by an anthropology of humanity as self-serving, self sufficient and properly individual. In Nicklinson's case, the Commission interestingly posits this 'problem' of mercy killing as it relates to compassion:

> Under the current law, the compassionate motives of the 'mercy' killer are in themselves never capable of providing a basis for a partial excuse. Some would say that this is unfortunate. On this view, the law affords more recognition to other less, or at least no more, understandable emotions such as anger (provocation), and fear (self-defence) (para.54, s7.7).

This passage highlights two important, interrelated points. First, it identifies that 'compassion', framed as a more positive virtue, is not recognized in law. Second, it contrasts this compassionate motive to less virtuous reasons for ending a life that are framed in terms of fear and anger. Thus, the Commission recognizes how 'lesser emotions' or negative precepts like anger and fear can be considered acceptable motives for the taking of a life that lessen a conviction from murder to 'manslaughter'. For instance, acting out of a fear for one's life can be considered self-defence and therefore not murder of the first degree (*Nicklinson V MOJ*, 2012, para.54, s7.7). Likewise, arguing that one was 'provoked' into action that led to another's death also acquires a reduced sentence. However, in England and Canada acting out of 'compassion' does not exonerate subjects or grant them a status of 'manslaughter' but instead labels subjects as 'murderers'.

Making 'Proper' Subjects

Following Esposito's political project as well as the insights that Campbell (2011) has added, we can explain in more detail the challenge that both scholars extend to the creation of proper subjects (what I am describing as a fiction of an immune

person) that establishes us in reciprocal dissociation from one another (as another fiction, the immune society) and confines us to 'defensive barriers' that enclose the self. This enclosure, which occurs through concepts that feed legal fictions and is arguably most rife in the contemporary neoliberal context, is what creates the appearance of someone who is 'proper'; hence, it creates the fiction of the immune person who appears as an individual sovereign subject and an 'absolute' or 'indivisible' self (Derrida, 2009). As previously noted, the concepts of enmity and vulnerability that operate through the discourse of law as a technology of a neoliberal rationality of governance feed this fiction. In this regard, we can say that law, operating as a discourse and a technology of a neoliberal rationality of governance, articulates the concepts of enmity and vulnerability to legitimate legal decisions through the creation of legal fictions that forge a separation between a 'proper' self and a 'proper' other, of which this proper self and proper other is part of a proper totality of proper selves. The establishment of the proper subject (the legal fiction of the immune person) is necessary in order for law to fix its target (i.e. fix persons into the categories of vulnerable and/or the enemy) and make a decision (Naffine, 2009; Pavlich, 2013). However, in forging proper subjects of law, which is necessary for a legal judgment to be made, the constitution of the 'proper' also closes us off to the possibility of a relational ethics (Campbell, 2011). 'Otherness' itself is central to this proper constitution: the other must be a 'proper' other, which is, ultimately, a 'known' other. Moreover, this other is 'made known' as an 'other' by calling on concepts that frame and fix what is proper to it: its status as an enemy or as a vulnerable

subject. In the same way that Esposito noted that life must be determined as guilty in order to found law itself, we could say the same thing about the way that concepts and fictions operate in order to already define and fix a particular anthropology of humanity that legitimates legal decisions to deny assisted dying. The subject of the right to die—the appellant—must be made known as both a vulnerable subject and as an enemy such that he or she can be brought within law's sphere and judged accordingly. Likewise, the subject who would otherwise help the appellant to die must also be made known before an act of killing even occurs such that he or she can be labeled and judged as guilty. In the cases presented we see how the other or enemy is made known. For instance, the embryonic sovereign could only be granted a proper status by making known an enemy that constituted it as a proper subject; its negative relation to the mother gave it a property and made it a subject. To thwart Nicklinson's appeal to the right to die, a known other, an enemy, had to be created. Despite no obvious enemy, Nicklinson's case required an artificial enemy to rationalize a denial of his appeal: the law invoked the legal status of 'murderer' to directly constitute the other through this 'known' lens, without even demanding a performance of the 'murderous' act. In this regard we can claim that law rationalizes its decisions on denying assisted dying through the construction of concepts that allow law to fix its gaze by creating legal fictions of proper subjects of law (Naffine, 2009; Pavlich, 2012).

Despite the law's perpetuation of these concepts grounded in a neoliberal rationality of governance that feed fictions of the immune person and immune society, these concepts and fictions, like their larger supporting rationality, are not 'truths' per se. Legal decisions on the right to die merely serve to fix and reify human relationships as necessarily immunized and divided from one another by bringing into effect these concepts of enmity and vulnerability that feed divisive and dissociative, individualizing and totalizing legal fictions. As Foucault (1989) notes, governmentality operates through a 'conduct of conduct'; it shapes subjectivities through a fabrication of social conditions. Governmentality may be seen here to operate through law by using concepts of enmity and vulnerability to place limits on the prospects of acceptable human relationships through legal judgments that comport with the defining rationality of governance.

Esposito says something similar about the operation of enmity as part of his account of immunization and the way that immunization mechanisms close off the self from others. Esposito notes, for instance, the 'mythic' idea of enmity. This appeal to myth is akin to Derrida's claim that sovereignty is only ever a 'performance' (Derrida, 2009, p. 28). From Esposito's vantage, concepts and fictions that enunciate political rationalities of governance that operate on the basis of the need to divide subjects from one another do so with the goal of presenting these divisions as natural and necessary: they do so through the establishment of a war-like division between subjects that is grounded in a defense of the individual self, as we have seen articulated in legal cases where the

other is articulated as an enemy of the self. However, from Esposito's vantage, much like Foucault's and Derrida's, such war-like states are governance mechanisms that 'make known' the enemy and, as such, rely on a static division between self and other (Esposito, 2011, p. 159). He or she who is other (the enemy) can be made known, and this known enemy can be defeated. The concept of enmity makes possible the legal rationalization of denying assisted dying by making known the other (as a proper subject), and immunizing the subject from this other absolutely: "With the corpses of the enemies removed or reused for exercises", Esposito writes, "…the battlefield has now been cleared. The body has regained its integrity: once immunized, it can no longer be attacked by an enemy" (2011, p. 159).

However, rather than being something that is "immortal" and final, as Esposito notes, the process of division of subjects and the immunization of subjects from one another is a process embedded with "structural aporias" (2011, p. 159). Immunity is not a mechanism of absolute closure, despite invoking concepts and fictions that make it appear as such; rather, the closing off of the self from the other, which is articulated as a part of human nature within the contemporary context, must be read from Esposito's vantage as something that can always, and will always, open back up to the prospect of more relational ways of being in common. For Esposito this is so given the intimate relation of immunity (or the closure and appropriation of the self) with community that is bound to an originary dependency that we share with one another in the *munus*.

In his reflections on neoliberalism, communitarian scholar Mark Olssen (2010) also notes that a neoliberal governmentality tends to forge closures around subjects through the constitution of proper human relationships by attempting to promote ideals of "self-reliance…responsibilization…and an enterprise culture" (p. 174). However, he notes that this detracts from the ways that we are intimately bound together through a shared dependency that at base shapes our human relationships. He writes, for instance, that, "…dependency is, in effect, a part of interconnectedness, or relationality, by which our lives are defined by our commitments to others" (p. 174).

Having noted this problem of neoliberalism, Olssen also notes that there are always other ways of thinking moving forward. This condition of division, immunization, and the proper can always be reversed to an opening toward other ways of being in common that are grounded in ideas of solidarity, community, and mutual dependency. This is what Esposito (2010) finds in his concept of *munus*, and this is what the present chapter suggests might be considered most simply as an opening up of the defensive borders around the notion of self, and a deconstruction of these borders in order to imagine other ways of being that are more in tune with the interconnectedness of the human condition. Indeed, for Esposito, too, once we have revealed the way that the 'proper' is forged we can in turn critique and deconstruct it. For instance, we can deconstruct as we have done how proper subjects are constituted through a legal mechanism of 'protection' that

unequivocally closes off our relations to the other by defining this other as one's absolute enemy, despite the appeal to this other for help at the end of life. Likewise, one might posit in the same vein that creating an artificial mode of protection around an embryo, which forges its proper status in opposition to a known enemy that is its mother, is another insidious cruelty that disregards the very relationality of life, or the relationality of the 'subject.'

This depiction of the operational features of a neoliberal political rationality and law's generation of legal fictions that are enunciations of this rationality by way of law's creation of the proper subject (immune person and immune society) may be used to highlight how immunity does the 'work' of conservative discourses that frame the mother as an enemy of the fetus, thus rationalizing Christian, Catholic, and right wing beliefs. Likewise, in the context of assisted dying one might consider how conservative discourses could enunciate mechanisms of immunization to err on the side of life that frames any other (besides God) who takes life as interfering with the theological order. However, it is important to note that this proper status of the subject is equally used to do the work of 'liberal democratic' politics, for instance from the vantage of 'liberal' right to die appeals. In this regard, the constitution of the proper subject has implications for both sides of the political debate. The key problem in both cases, as the chapter has argued, is the attempt to close off relations between subjects through the insistence on concepts that feed legal fictions that are grounded in divisive mechanisms of immunity and the proper, particularly when law utilizes a lexicon of war to

construct enmity in order to articulate the individual 'self' in modern politics. Just as conservative discourses that draw on the concept of enmity are dangerous, so, too, can liberal democratic discourses slip when they rely on and inculcate legal fictions of 'proper' subjects who are immune persons within an immune and reciprocally dissociative totality.

Conclusion

Understanding how legal cases articulate concepts of enmity and vulnerability that feed legal fictions to help enunciate a neoliberal ethos can help us rearticulate a politics of assisted dying. This chapter has noted that concepts of enmity and vulnerability work within legal fictions of the immune person and immune society that shore up the limits of human relationships in two ways. The first is through law's articulation of the subject who would help the person die as necessarily an 'other' by fixing the gaze on them as performing an act of murder without considering other motives for taking life. This fixes the appellant as vulnerable and the assister as an enemy: it creates the legal fiction of the proper immune person. The second is through the appellant's 'right to die' appeal itself, which also does not escape this problematic. The appellant's articulation of the right to die through law, by refusing vulnerability and claiming instead to assert self-direction and self sovereignty, also conforms to the shared neoliberal rationality of governance that operates on the basis that subjects are able to take care of themselves, that they can be self sufficient individual subjects, and that they therefore conform to the social conditions in which they find themselves shaped

as subjects (Mihic, 2008). In short, the appeal itself also feeds the legal fiction of the immune person. In this sense, one can ask to what extent rights claims also shore up the limits of human relationships whereby in appealing to the prospect of assisted death subjects are also paradoxically asking the law to immunize them and forge them through a fiction as immune persons.

Moreover, the chapter has shown how law uses concepts of enmity and vulnerability not only to forge fictions of the immune person, but the immune society in which persons are a part: for instance, Fleming's case showed how the concepts of burden and vulnerability also feed a fiction of a society that demands subjects are self responsible and self sufficient and that each subject can operate as a fully immune person within the totality: one must not obligate or impose oneself onto other immune persons; otherwise one becomes articulated as an enemy (i.e. enmity gets invoked to shore up the immune person of others (family members) and reinforce the immune society as that which needs protecting).

Neither of these positions (the law's denial of assisted death, or the right to die appeal itself) necessarily challenges the conditions of a neoliberal governmentality that relies on a legal fiction of immune persons divided from one another to live freely in a totality of reciprocal dissociation: neither challenges the way that law divides or immunizes subjects from one another through the generation of concepts and fictions that are reflective of neoliberal governance rationalities; rather, both positions are fixed within a rationality that continues to

erect borders around the self and shores up human relational limits through compliance with, and indeed generation of, fictions through remaining wedded to the articulation of concepts that feed these fictions. The question then becomes: how can we imagine an affirmative politics of assisted dying without relying on concepts of enmity and vulnerability that feed legal fictions that constitute the 'proper' subject as he or she who is in need of protection from an adversarial other? Or, perhaps better put, how might we envisage a more 'relational' ethics that notes, and works against, the performative features of these utterances of the 'absolute enemy' the vulnerable subject and the 'proper' more broadly conceived?

This chapter has shown how the law creates concepts and fictions that divide us from one another to create a politics that closes us off from one another. As this thesis argues, this closing off of subjectivities is problematic because it closes us off as defensive selves and dismisses a more relational ethic (Olssen, 2010; Campbell, 2011; May, 2013). The chapter has also argued that, despite the use of the concept of enmity to fix subjects through immunity's protective enclaves, the 'other' who is constituted as this enemy is not strictly an 'other' but instead is always reciprocally related to us. A more relational ethic would not close us off from one another through mechanisms of immunization and it would not fix subjects as necessary enemies and vulnerable subjects; it would have to deconstruct these subject positions.

Considering the various ways this chapter has shown how the law uses concepts to fix subject positions that allow it to feed its legal fictions, the next chapter explores another emergent concept within the legal cases that also is used to feed legal fictions of the immune person and the immune society: this concept is 'inviolability' of the subject, particularly as it is used to feed the fiction of the immune person who is an inviolable person.

CHAPTER FOUR

Inviolable Persons

Introduction

When examining legal appeals for the right to an assisted death the 'inviolability' of persons emerges as a central concept. The legal concept of the inviolable person refers specifically to the notion that the person is an impenetrable, private subject who cannot be interfered with from outsiders. Much like the concepts of enmity and vulnerability examined in the previous chapter, this chapter argues that the concept of inviolability of persons is articulated in legal discourse on assisted dying in order to feed the legal fiction of the immune person. Inviolability of persons feeds the legal fiction of the immune person whose body is bordered such that he or she cannot be intruded upon: the immune person is constituted as an absolute self, divided from all other immune persons. In turn this feeds the associated fiction of the immune society: the person who is conceived as inviolable is the person who is protected from outside interference; the society that is immune is the society that is seen to protect each and every immune, inviolable person.

The chapter argues that the concept of inviolability of persons feeding these two legal fictions allows the law to operate as a discourse and technology of neoliberal governance to legitimate ways of differentiating between the life worth living and not worth living in accordance with a neoliberal political ethos. This ethos requires that forms of killing comport with the rationality that demands, at least by way of appearance, that subjects are protected from (and thus divided from) one other as individual, bordered persons under law. The chapter argues that a neoliberal political rationality aims to get rid of subjects it perceives to be burdensome – i.e. those subjects who interfere with a neoliberal ethos of reciprocal non-interference. However, because neoliberalism demands its ethos is sustained through non-interference, it cannot be seen to overtly allow forms of killing that would threaten the reciprocal dissociation held between subjects. The chapter argues that law, as an effect of this rationality, uses the concept of inviolability to be seen to protect each and every person under law as inviolable and immune, finding other ways to differentiate between life worth living and life deemed unworthy. This became evident through my examination of assisted dying cases that compared what the law has dubbed 'active' cases of assisted death with cases that the law has called 'passive' cases of euthanasia. The chapter argues that the former are refused because they would allegedly demand an active killing or taking of life that the law argues would not uphold the notion of inviolability (that feeds the fiction of the immune person); the latter is rationalized as acceptable because it is said to simply be an omission to act, a 'letting die' that is rationalized as being complicit with the legal fictions of immune persons and an immune

society that reflect the neoliberal ethos demanding non-interference. One might note, as this chapter also indicates, that while the law has yet to rationalize active forms of assisted death in such a way that sustains its legal fictions and supports neoliberalism's ethos of non interference, one might be cautious of this possibility in the future.

Inviolability: The Case of *Bland*

Inviolability of persons emerges as a concept in assisted dying cases to support the argument that subjects of law cannot be interfered with by outside intrusion. It arises in both the passive euthanasia case of Anthony Bland as well as in active dying cases. Sometimes the law will refer to 'sanctity of life' and other times it will refer to 'quality of life': in the legal discourse however these two concepts always refer to a life that cannot be penetrated by outside interference; they refer to what legal scholar, Linda McClain (1995), has noted as a body that cannot be violated and must be "impregnable to assault or trespass" (p. 198). One of the clearest indicators of this concept of inviolability of persons in assisted dying cases is how it is drawn on to invoke a differentiation between what the law calls forms of 'killing' or 'acts' versus forms of 'letting die' or 'omissions'. Bland's case had set a precedent for this differentiation, and it continues to be invoked to deny what the law comparatively dubs 'active' forms of killing.

Omissions and Letting Die

We will be reminded that Anthony Bland was the subject of the horrific Hillsborough disaster. At the age of 18 he was trapped in a crush of fans at a football game between Liverpool and Nottingham Forrest, leaving him in a persistent vegetative state. In his case, judges deliberated over whether or not he could be removed from life sustaining treatment. While the court noted that the State upheld the value of human life and its sanctity, it also noted that in this case the quality of life was of equal importance. The following question was raised:

> What is meant now by 'life' in the moral precept which requires respect for the sanctity of human life? If the quality of life of a person such as Anthony Bland is non-existent since he is unaware of anything that happens to him, has he a right to be sustained in that state of living death and are his family and medical attendants under a duty to maintain it? (*Bland*, p. 25).

Later in Bland's case the concept of inviolability emerged, particularly in Lord Hoffman's commentary in which he stated:

> I think, connected with our view that the sanctity of life entails its inviolability by an outsider. Subject to exceptions like self-defence, human life is inviolate even if the person in question has consented to its violation. That is why although suicide is not a crime, assisting someone to commit suicide is. It follows that, even if we think Anthony Bland would have consented, we would not be entitled to end his life by a lethal injection (*Airedale NHS Trust v. Bland* [1993] AC 789 at 831)

The reference to the inviolability of persons provided a pivotal rationale in defence of letting Bland die and also provided a rationale for maintaining restrictions on other forms of killing. Inviolability of persons allowed the law to articulate a legal fiction of immune persons that closed off the self from what exists outside of it. This allowed the law to (indeed it demanded that the law)

articulate a distinction between what it called 'acts' and what it called 'omissions'; the former of which was said to interfere with inviolability, and the latter of which could be said to uphold inviolability. For instance, Lord Justice Toulson cited *Bland* in Nicklinson's case of *Nicklinson V MOJ* [2012] EWHC 2381 (Admin) 60 noting:

> …the judges were acutely aware of the profoundly difficult ethical questions which the case presented. They reached their decision on the legal basis that Anthony Bland's condition was such that the doctors no longer had a legal duty to continue invasive care and treatment, and accordingly the omission to continue such treatment would not be an unlawful omission. They emphasised two things: first, that the law drew a crucial distinction between an omission to maintain treatment and the administration of a lethal drug, however unsatisfactory such a distinction might seem to some people from an ethical viewpoint; and secondly, that it must be a matter for Parliament to decide whether the law should be changed, taking into account the complex humanitarian, ethical and practical considerations.

Specifically citing Lord Goff at page 865 in *Bland*, Toulston continued:

> I must however, stress…that the law draws a crucial distinction between cases in which a doctor decides not to provide, or to continue to provide, for his patient treatment or care which could or might prolong his life, and those in which he decides, for example by administering a lethal drug, actively to bring the patient's life to an end. As I have already indicated, the former may be lawful, either because the doctor is giving effect to his patient's wishes by withholding the treatment or care, or even in certain circumstances in which…the patient is incapacitated from stating whether or not he gives his consent. But it is not lawful for a doctor to administer a drug to his patient to bring about his death, even though that course is prompted by a humanitarian desire to end his suffering, however great that suffering may be… So to act is to cross the Rubicon which runs between on the one hand the care of the living patient and the other hand euthanasia – actively causing his death to avoid or to end his suffering.

Again, the precise reason for the enunciation of the concept of inviolability of persons is revealed above as a necessity in order to articulate the differentiation between what the law calls 'omissions', which is said to be the practice of 'letting' persons die, and what the law calls 'acts' which is a technique of the

active ‘killing’ of persons and the taking of life. As a precedent, Bland’s case has also appeared in the more recent assisted dying appeals that are the focus of this thesis. The decision in *Bland* continues to be invoked to differentiate between acts of killing and acts (or omissions) of letting die.

Acts and Making Die

Appeals to die that are expressed as ‘active’ are deemed so because they are said to require an active taking of life or killing rather than simply pulling a plug, framed as an omission, as with Bland’s case. One of the earliest English legal cases that dealt with an active right to die request was from Dianne Pretty, a sufferer of motor neurone disease. Pretty had initially appealed to the Director of Public Prosecutions in 2000 to the right to have another person help her die should she reach a point in time when she deemed living with her disease intolerable. When her appeal to the Director of Public Prosecutions in the case of *Pretty V DPP* failed, she took her case to the European Court of Human Rights in *Pretty V UK*. Again, however, her appeal was denied. Pretty’s case was one of the first to be denied using *Bland* as stare decisis (binding precedent). Following Pretty’s case that cited *Bland*, England’s Debby Purdy’s case in *R (Purdy) V DPP* EWCA Civ 92 [2008], was also committed to this precedent, revealing at paragraph 38 that:

> … while addressing the right of a terminally ill individual to self-determination, and the importance of protecting his or her dignity and quality of life, underlined the prohibition against taking life, ‘recognising that a terminally ill or dying person’s wish to die never constitutes any legal claim to die at the hand of another person … (and) cannot of itself

> constitute a legal justification to carry out actions intended to bring about death'.

Here we see a direct reference to the impossibility for the law to respond to the prospect of dying 'at the hand of another person' and the 'actions' that would intentionally kill Purdy. Nicklinson's legal case in 2012 also makes this clear. As noted in chapter three, Nicklinson's case references the notion of dueling and the war-like relation between persons; it also references the impossibility for law to respond to compassionate motives for killing because the other, the enemy, cannot be trusted. Nicklinson's case used the reference to *Bland* as a defence; it argued that Lord Goff's Rubicon regarding "the care of the living patient and the other hand euthanasia – actively causing his death to avoid or to end his suffering" was crossed in other cases (*Nicklinson V MOJ*, 2012, paragraph 63). On Nicklinson's behalf, dissenting Mr Bowen argued that in the case of *Re A Conjoined Twins* an act was legalized in order to kill one twin, as the previous chapter three of this thesis outlined. In response to this claim, Toulston noted that these features present in the case of *Re A* were "highly unusual" and were "absent from the present case" (*Nicklinson V MOJ*, 2012, paragraph, 72): Nicklinson's case argued that if a doctor administered Tony a lethal drug "there could be no defence to a charge of murder based on lack of causation, lack of intent or quasi-self-defence" (paragraph 72).

Marie Fleming's case also articulated a similar point. In *Fleming V Ireland*, the High Court noted:

> …in its judgment, the High Court in this case found that there was a 'profound difference' between the law permitting an adult to take their own life on the one had and sanctioning another to assist that person on the other (at para 22). This statement sought to distinguish 'active' from 'passive' euthanasia perhaps for the purpose of reconciling the Court's decision with the apparent ratio of the Ward judgment, where the withdrawal of life sustaining treatment was authorised (para 21).

The concept of inviolability of persons feeds a legal fiction of the immune person that rationalizes the refusal of active killing with reference to the notion of the assister in death—the outsider who, as chapter three noted, cannot be trusted to offer 'help' in dying. Likewise, in *Pretty V DPP* (s.7), Lord Justice Tuckey articulated this distinction in the following way:

> The crucial distinction is between 'killing and letting die'. English law puts helping someone to take her own life on the wrong side of the line, because, as Hoffman LJ said in *Bland at 831,* "the sanctity of life entails its inviolability by an outsider" (L.831). The question is whether this is in breach of that person's human rights under the Convention.

In Pretty's case, as well as in others, the distinction between killing and letting die is made possible through the concept of the inviolable person, who is a subject that cannot be intruded upon "by an outsider". Ultimately, the rationalization for denying (some forms) of assisted death appears to be intimately linked to the constitution of the person as inviolable that is associated with a defense from outside interference.

Outsiders and Immune Persons

One can note some overlap here with the previous chapter three that had already examined how law used concepts of enmity and vulnerability to feed a legal

fiction of the immune person as he or she who was protected from outside interference. Law has long articulated itself as a mechanism of protection of individual life from what exists 'outside'. In the contemporary era it is simply that this mechanism of protection has intensified (Campbell, 2011). McClain (1995), for instance, writes that discussions of inviolability appear in the context of legal discussions regarding privacy, particularly appearing through the articulation of the body as a site of defence from outside interference. McClain for instance notes that inviolability mostly refers to a freedom from governmental interference or from "outside invasion" (p. 201). Esposito's (2008, 2010, 2013) thesis on immunization also makes this point: he even more assertively attaches inviolability to personhood arguing that it is "the inviolability of the person [that] has become the guiding light of all democratically inspired social theories" (2012a, p. 4).

Framing something as an omission rather than an act allows the law to present the idea that in the case of the former no one is 'assisting' with death per se and that the subject who is being merely to be 'let die' is alone and isolated without any relation to the outsider: the subject is an immune person. Through this concept of inviolability of persons that invokes the notion of the private and secure person who is not subject to intrusion or trespass as the law seems to conjecture, the law is able to feed the fiction of the immune person because it makes it appear that there is no 'assistance' in this passive instance of death, but merely an absent presence or a trace of care.

Constructing the Outsider through Medical Techniques

The differentiation between what exists within one's person and what exists outside one's person is a tool to help shape the concept of inviolability of persons that the law requires to feed the fiction of the immune person as he or she who is absolute, whole, and impenetrable. Legal decisions will draw on various ideas to differentiate between acts and omissions in order to support this concept of inviolability and the fiction of the immune person that it feeds.

In England, sedation and passive euthanasia were brought together as viable practices of omissions that could be distinguished from 'acts' of killing in the case of Bland on the basis of 'best interest.' Bland's case followed precedent set in *Re J (Minor)* (Wardship Medical Treatment) [1991] (a case dealing with a prematurely born and brain damaged minor). It argued that a differentiation could be made between omissions (i.e. terminal sedation or a dose of drugs for passive euthanasia patients to help ease pain and passing), and acts (i.e. providing a dose of drugs that would sedate a person in order to actively hasten death to kill the person). The former was defended on the basis of the Doctrine of Double Effect. Lord Donaldson of Lymington MR stated the following at p. 46:

> What doctors and the court have to decide is whether, in the best interests of the child patient, a particular decision as to medical treatment should be taken which *as a side effect* will render death more or less likely. This is not a matter of semantics. It is fundamental. Historically this has been framed as a Doctrine of Double Effect. This doctrine states that it is not acceptable to give someone a lethal dose of morphine to kill them; it is only acceptable to give someone a dose of morphine that will ease their pain, even if this may in turn decrease the longevity of their life. The double effect doctrine suggests that the end goal in giving morphine, or what is now referred to as palliative sedation, is not to kill the person but

> to help them; even though this practice might result in the individual's death, because this was not the principal intention the practice is considered ethical. In this instance the doctrine rationalizes the easing of pain that does not actively set out to kill, or take life. At the other end of the age spectrum, the use of drugs to reduce pain will often be fully justified, notwithstanding that this will hasten the moment of death. What can never be justified is the use of drugs or surgical procedures with the primary purpose of doing so.

Despite law's insistence on the differentiation between omissions and acts, framed and supported by claims of best interest and the Doctrine of Double Effect, scholars and medical ethicists continue to question whether these differentiations can be so clearly made (Billings & Block, 1996; Birnbacher, 2007; Douglas et al, 2008; Shah et al, 2011 Sprung et al, 2008; Miller & Truong, 2011). As Billings and Block (1996), Birnbacher (2007), and more recently Miller and Truong (2011) have suggested, one could just as readily claim that 'withdrawing' life support, currently framed as an omission, is equally as 'active' in providing 'assistance' in death as giving a person lethal medication to inject into themselves (currently termed assisted suicide), or injecting this medication into them (termed active euthanasia).

Likewise, Birnbacher (2007) argues that legal cases will often draw on the example of palliative/terminal sedation to support the distinction between passive and active forms of legal treatment, claiming that sedative techniques are passive forms of treatment despite the question of whether sedation – as an 'act' – notably contradicts this legal difference. Terminal or palliative sedation, which also might overlap in cases of passive euthanasia, involves giving either narcotics (e.g.,

morphine) or sedatives (e.g., valium), or might also involve barbiturates or other tranquilizing drugs. These drugs are used to sedate the patient until he or she dies, also at the same time as withholding nutrition and hydration (e.g., Orentlicher, 1997). Some have argued that this sedation is not an omission but is better classified as an act, and have referred to this as a "slow euthanasia" (e.g., Billings & Block, 1996).

Justice Smith in *Carter V Canada* recognized a similar point to Birnbacher's (2007) claim regarding palliative/terminal sedation. Smith noted that questions of palliative sedation have not effectively been given judicial consideration despite laws often assuming it falls in the category of omissions and passive euthanasia (see *Carter V Canada*, 2012, s. 226). Likewise, in this same case Justice Smith drew on the opinion of ethicist Professor Sumner regarding attempts "to distinguish: acts from omissions; a patient's request for treatment which will hasten death from refusal of a treatment which will prolong life; killing from letting die; and death as an intended outcome from death as an unintended though foreseen outcome". From Sumner's perspective it was impossible "…to show that, of the four treatment options (treatment cessation, pain management, terminal sedation and assisted death), assisted death is uniquely ethically impermissible" (paragraph 235).

Even in *Bland*, where the distinction was upheld so forcefully, the tenuous grounds upon which the distinctions stands were noted. Lord Goff, cited in *Bland,*

noted that law's distinctions between passive and active forms of killing might be deemed hypocritical: "It is true that the drawing of this distinction may lead to a charge of hypocrisy…But the law does not feel able to authorise euthanasia, even in circumstances such as these; for once euthanasia is recognised as lawful in these circumstances, it is difficult to see any logical basis for excluding it in others" (p. 865). An earlier US legal case, *Cruzan v. Director, Missouri Department of Health*, 497 U.S., 261, 269. [1990], (Scalia concurring), also recognized that the line drawn between passive and active euthanasia was as "unreasonable" as a ruling that "one may not kill oneself by walking into the sea, but may sit on the beach until submerged by the incoming tide; or that one may not intentionally lock oneself into a cold storage locker, but may refrain from coming indoors when the temperature drops below freezing". Moreover, scholars have claimed even more broadly outside the context of assisted dying that technology and the body intersect in so many areas of life and death that it is impossible to note any kind of medical technique that does not in some way usurp the sharp differentiation between what exists inside or outside the body, what is organic and natural, and what is technologically aided and unnatural (e.g., Esposito, 2008).

If scholars, medical practitioners, ethicists and even the judges themselves note that the differentiation between acts and omissions is tenuous, why does the law insist on upholding it? Why does the law insist on rationalizing practices it deems acceptable via a concept of inviolability of persons that feeds a fiction of immune persons subject to non-interference, and why does the law in turn rationalize

practices it deems unacceptable on the basis of the active intrusion these practices would have on the inviolable person? The aim, it seems, is to make a clear distinction between the person and those who exist outside the person: concepts of inviolability of persons, shaped through other ideas and narratives feeding this concept, create the fiction of the immune person as an absolute sovereign whole. It is the distinction between the self and outsider that serves to shore up the legal decision to deny acts and allow omissions. Citing ethicist, Wayne Sumner, Justice Lynn Smith of Gloria Taylor in *Carter V Canada* called on Sumner's distinction between the laws on suicide and laws on assisted suicide, that overlaps with the commentary of Lord Goff in Bland's case, and Judge Nicholas Kearns in *Fleming*. Sumner stated: "While suicide remains within personal boundaries (leaving aside spillover effects on others), assistance crosses those boundaries: it is action not by a person on herself but by one person upon another."

This reading of legal appeals to assisted death seems to comply with the commentary of other scholars who have called attention to the 'bounded individual' who appears in law: this is the private, secured, and 'bordered' person (Naffine, 2009; Nedelsky, 2012). This also corresponds to what Goffman called the 'territories of the self'. From Nedelsky's perspective, the boundary metaphor invoked in law:

> …invites us to imagine that the self to be protected is in some critical sense insular, and that what is most important to the preservation of such a self is drawing boundaries around it that will protect it from invasion (or at least that is the most crucial thing the law can do (1990, p. 168-9).

Nedelsky here appears to also note the very way that the concept of inviolability feeds the legal fiction of the immune person: the bounded person is constituted as a fiction that fulfills the function of immunization that divides subjects from one another. As noted previously, Campbell (2011) suggests that this bordered self is not only one that appears through liberalism, as Esposito himself notes, but also becomes increasingly more prevalent in the neoliberal era. For Campbell, neoliberalism with its proliferation and intensification of privacy and self-interestedness has the impact of increasing these defensive borders of the self. A neoliberal political rationality thrives off of, and indeed proliferates, the legal fiction of immune persons in its efforts to complete its goal: an immune society; a totality of immune persons who are reciprocally dissociated from one another.

Norms of Life, Personalization, and the Immune Society

If neoliberalism requires that subjects be immunized from one another as individual units within a larger totality, surely one could argue that taking Bland's life actively could have been legitimated within this larger totalizing logic. Bland's legal case constructed him as absolutely dependent on life support machines and on others to allow him to live. Likewise, I have already noted that appellants who seek assisted death are also framed as burdens on the state and on others. Their deaths might be revered from the vantage of a neoliberal ethos. Why does the law use the concept of inviolability to appear to protect these lives if it might be more helpful for the rationality to allow them to be killed?

In defence of this claim one might point to a number of historical moments in which subjects have been depersonalized and the law has been able to rationalize this without the need of a personalizing safeguard. One could claim that under other historical practices, which have operated with similar immunizing mechanisms that attempt to govern by individualizing and totalizing subjects, law has managed to retain itself and its fiction of immune persons by way of mere depersonalization of other subjects. For example, one could refer to the practices of Nazi Germany. Esposito (2008) argues that German law rationalized 'active killing' through an absolute depersonalization of subjects such that those who were being killed were considered 'already dead'. The German subjects who were killed were not enunciated within the fiction of the immune person: they were not immune; instead they threatened the immune society, the totality of immune subjects. The law simply depersonalized them such that they fell outside the prospect of immunity per se. Killing the 'already dead' was considered of immunitary benefit for those subjects who were considered alive and immune persons under law. Why did the law not in this instance also merely claim that Bland was 'already dead' (i.e. as a ventilated corpse) such that it may have had no need to differentiate between passive and active killing? If Bland was conceived as dead, any action upon him could have been rationalized as passive – as a mere continuation of and finalization of his death. Conversely, one might also question why the law did not, for instance, articulate Bland's death on the basis of a defence of society like the law did with the self-defence of the person in the case of *Re A (Children) (Conjoined Twins Surgical Separation).* Why instead did the

law allow the concept of inviolability of persons to feed the legal fiction of the immune person in the case of Bland?

Protecting Each and All: The Fiction of the Immune Society

That the law did not rationalize Bland's death this way, but rather conferred upon him some notion of legal personhood, is arguably telling; it also helps explain why a consideration of the contemporary political rationality and climate is important. Arguably it is telling of the close association between the two legal fictions emergent in assisted dying laws: the immune society requires the protection of each and of all. It is attached to a larger totalizing rationality that neoliberalism expresses which claims that 'all' life is protected, particularly in the aftermath of other atrocities like Nazi Germany that have compelled contemporary liberal democracies to expand universal human rights in order to protect us from this prospect.

Esposito (2008, 2012a, 2012b, 2013) himself has noted the increased mechanisms of immunization that have arisen post Nazi Germany; since then personhood appears to be granted upon all subjects in the view that it was a lack of personhood that led to Nazi atrocities. The law appears to prohibit the prospect of depersonalization and instead invokes the concept of inviolability to actively claim equality for persons – such as with the Universal Declaration of Human Rights; this allows the law to claim that it is not operating within the same semantics of depersonalization (Esposito, 2012a). The law as a discourse and

technology of a neoliberal governance rationality must at least appear to be protecting persons, even if at the heart of this personalization is a simultaneous depersonalization and a differentiation being accorded on the basis of an ascribed quality of life that is made with the same kind of decisions about whose life has value and whose does not. Law must at least appear to protect persons and confer personhood upon each and every subject; it must at least generate the fiction of the immune person within the immune society. It has done so by bringing all subjects under law as immune persons through a universal declaration of rights that overtly articulates the category of personhood for each and all and claims not to differentiate between subjects and their life's quality, despite it being precisely this category of personhood itself that makes such differentiation possible (Esposito, 2012a; Naffine, 2009). This alleged universalization of immune person is part of the totalization logic of neoliberalism that has also allowed an even deeper division between subjects.

This does not mean that neoliberalism actually protects more subjects than ever before; rather, it means to suggest that neoliberalism has had to find other ways to allow subjects to die in compliance with the neoliberal immune community without seeming, by way of appearance, to be as destructive as Nazism. Indeed Esposito notes this when he clams that even though personhood has apparently been granted to all subjects by way of universal human rights and so on, by virtue of its immunizing particularity (i.e. being immune is a privilege) it would be

impossible to sustain a society of fully immune persons who are absolutely reciprocally dissociated from one another.

Subtle Depersonalizations

Recalling Bland, one might indicate that he was not depersonalized per se, but rather his depersonalization was less overt. The law operating as a norm makes different, less overt instances of depersonalization possible. Arguably this is the precise issue that Singer (1994) misses in his own analysis. Singer and others like him (e.g., Huxtable, 2002) considers liberal politics in a vacuum: he does not try to bring the subject in line with broader governance objectives of the state, but rather takes legal decisions at face value and in the context of liberalism reads the decision in *Bland* as a mere acceptance of the values of liberal individualism without considering how liberal individualism is bound to a larger governmental rationality. One could note for example that law has to operate more as a norm in the present context given the pervasiveness of universal human rights. In the contemporary neoliberal governmental context, which arguably is one that at least in appearance has alleged to have rolled back the intrusion of the state at the same time as having increased security around persons, the constitution of inviolable personhood in legal cases is necessary; it operates in a similar way to the concept of freedom that Rose (1999) has commented on: in much the same way that our freedom is given to us so that we can be free in ways that are shaped by governance mechanisms, so too is our inviolable personhood given to us at least nominally by way of law to appear to protect subjects even if a larger political

rationality is shaping 'who counts' as a subject in different kinds of ways (Esposito, 2012a, 2013).

A number of socio-legal scholars have recently pointed to the operation of legal personhood as a mechanism that law uses to both target its object and rationalize its legal decision (e.g., Pavlich, 2012, 2013; Naffine, 2009; Nedelsky, 1990, 2012; Esposito, 2012a, 2012b, 2013). Various scholars have argued that legal processes play a key role in constituting different kinds of subjects (Naffine, 2003; Lacey, 2001a, 2001b, 2007; Pavlich, 2007, 2009, 2013; Hardes et al 2014). This means to suggest that persons are the targets of law: law relies on categories of persons in order to fix its target. Law's assumptions about persons often performatively configure the subject as a particular kind of person. As Pavlich (2013) convincingly writes "discursive enunciations of persons enable … law to settle its gaze differently on different categories of persons" (p. 3). This is so because law is not a neutral or objective institution but rather law operates as a discourse and technology of a particular rationality of governance. For example, Pavlich argued in the context of his work on criminal law at the Cape Colony that the construction of various categories of personhood permitted law to operate in accordance with a political rationality that governed through the appearance of a sovereign regime of power. This allowed the law to ascribe different punishments on the basis of differentiations between persons.

This treatment of persons and personhood's enunciative function is a key point that Esposito (2012a, 2012b, 2013) has also raised; he has claimed that law operates on the basis of a continual personalization and depersonalization by way of the constitution of legal categories of person: no one is a person by nature, but only by way of law.

> What Roman law achieves with such incomparable categorical imagination is not only the distinction among persons, semipersons, and nonpersons but also elaborations of intermediate situations, zones of indistinction, and exceptions that regulate the movement, or oscillation, from one status to another (Esposito, 2013, p. 115).

Personalization and depersonalization is strategic, notes Esposito. Personhood allows the generation of the legal fiction of the immune person because it allows law to settle its gaze on an object and immunize it.

Foucault was very aware of the very juridico-medical apparatus at play, writing: "it [medicine] infiltrates law, it plugs into it, it makes it work. A sort of juridico-medical complex is presently being constituted which is the major form of power" (1996, p. 197). He made it clear that legal fictions such as the immune person are constituted through the complex interplay of science, medicine, politics and law. Legal judgments that legitimate decisions through the constitution of concepts like inviolability of persons that sustain a differentiation between acts and omissions tend to obscure the very political declension in this determination of what life 'counts' and what life does not: the legal judgment becomes but a moral trace – erasing the decision, and immunizing the decider.

In short, the concept of inviolability of persons feeds the legal fiction of the universal immune person within an immune totality: this detracts from the more subtle ways that subjects are depersonalized. For example, although the legal cases did note that Bland's life was futile, the case was careful not to use this as the overriding rationality for allowing him to die: rather, it emphasised how allowing him to die (or we might argue, killing him) was not a decision on the value of his life per se, but rather confirmed the value of all life that requires legal protection. Simply because the act of killing was legitimated on the basis of non-interference does not mean that a value was not attached to the life being taken; rather, it means that the value accorded to the life was made through less overt means in accordance with a political rationality that claims to protect all life equally, while finding other ways to depersonalize, in this instance through what was claimed to be an omission and a 'letting die'.

The opening pages of the thesis suggested that the law operates more as a norm: in this case, one can note that personhood was necessarily conferred upon Bland overtly for the sake of being able to differentiate between an acceptable legal practice and an unacceptable one; the acceptable practice (passive killing) could be rationalized by suggesting that it did not 'violate' or intrude upon the person per se because the immune person could technically remain intact, whilst the unacceptable act (active killing) could never be rationalized without a violation of the immune person himself or herself.

Protecting (Some) Outsiders: Immunizing Medical Practitioners

The personalization of Bland through the concept of inviolability was also important for another reason. It legitimated the killing of Bland through an act that would comport with a logic of non-interference: the personalization of Bland rationalized the pulling of the plug as simply an omission that did not interfere with his 'inviolable person'.

We will be reminded that in *Bland*, Lord Browne-Wilkinson had discussed the potential for prosecution of physicians in terms of murder on the basis of *mens rea* and *actus reus*. While he claimed that *mens rea* (i.e. guilty mind) would apply in the case of Bland, he noted that the *actus reus* (guilty act) would not be found in withdrawing treatment because it was an act of omission versus a positive act:

> In my judgment, essentially what is being done is to omit to feed or to ventilate: the removal of the nasogastric tube or the switching off of a ventilator are merely incidents of that omission: see Glanville Williams, *Textbook of Criminal Law,* 2nd ed. (1983), p. 282, Skegg p. 169 et seq. (Bland page 29).

Further, at page 29 he writes:

> The removal of the tube by itself does not cause the death since by itself it did not sustain life. Therefore even if, contrary to my view, the removal of the tube is to be classified as a positive act, it would not constitute the actus reus of murder since such positive act would not be the cause of death.

In short, he claimed that the physician did not owe a positive duty of care. One opposing claim, however, was that the doctors had a positive duty to provide care for Bland because they had initiated his care. However, because competent

persons could refuse medical treatment, granting an omission in some cases of refusal was deemed acceptable.

While Bland did not have the capacity to refuse treatment, a lacuna in the law meant that no precedent was set before him. One proposal was to fill this space with the notion of necessity and best interests. The case drew on *Re F* (Mental Patient: Sterilisation) [1990] 2 A.C.1 in support. *Re F* had placed necessity as a rationale for intervening with the person when mentally incompetent. This was only made in terms of best interests of the patient.

> …further continuance of an intrusive life support system is not in the best interests of the patient, he can no longer lawfully continue that life support system: to do so would constitute the crime of battery and the tort of trespass to the person. Therefore he cannot be in breach of any duty to maintain the patient's life. Therefore he is not guilty of murder by omission (*Airedale NHS Trust v Bland*, para 29).

Two things were framed here that are interesting for the present discussion. First, as already noted, Bland's inviolable, and immune, personhood was necessary to frame the difference between acts and omissions and rationalize the taking of his life by the latter, in a sense that preserved him as a private individual from non-interference. Second, and at the same time as preserving Bland as a private individual, it also preserved the immunity of the person taking his life, ensuring this person was also not subject to legal stricture. On this latter note, the case framed the continuation of medical care as that which would constitute battery and trespass. Such trespass would be akin to an interference with the private person, which would be said to actively contradict the legal fiction of the immune

person and therefore also contradict a political rationality of neoliberalism that this legal fiction perpetuates which places increased emphasis on the importance of privacy and non-interference. Constituting Bland as a person was necessary in order to claim that keeping him alive would be deemed battery and assault on his inviolable person, and that letting him die would not constitute such an assault, nor would it interfere with the concept of inviolability feeding the fiction of Bland as an immune person. The case claimed that protecting Bland's body from inhumane medical treatment was in his best interest, which relied on him being a person to have such an interest: it was worse to keep him alive than make him die.

In framing Bland's death this way, and in removing the trace of assistance by way of this differentiation between act and omission, the law enunciates a second level of immunization that claims to protect not only the subject of assisted death (either it is an acceptable death like Bland's or it is protecting subjects- those active appellants—from an unacceptable death and outside interference) but also to protect those who would be complicit in taking life (or letting die as we have been told). Legitimating omissions on the basis that this act does not actively intervene with the inviolable, immune person, also immunizes the practitioner who 'pulls the plug'. By bringing the process of omission into the legal fiction of immune personhood, the act of the withdrawal of care continues to be conceived of as a personalizing act, complicit with neoliberalism's legal fictions of the immune person and immune society and the ethos of non-interference. The immune person, or medical practitioner, who took Bland's life was not constituted

as a murderer because they were not said to have actively killed Bland or interfered with his inviolable, immune person. Rather, by framing the omission as non-interference it could be articulated that the taking of his life occurred by way of respect for his proper person; this would be entirely consistent with a neoliberal political rationality that preserves immunized subjects who are held in relations of reciprocal non-interference through governmental technologies such as law. This neoliberal ethos of non-interference, enunciated through concept of inviolability of persons that feeds the legal fictions of immune persons and immune society, is evident in an increased emphasis on the individual subject of rights who is protected from the state and any other outside interference including that of medical professionals (Lavi, 2008), and might be said to absolutely be reflected within these legal cases and their rationalization through the concept of inviolability.

Where Professor Sumner, cited in Taylor's legal case, had noted that the problem with assisted suicide is that it crosses the boundaries of the inviolable person and threatens the fiction of the immune person, he also noted how this rationale impacts medical professionals. He continued shortly thereafter in Taylor's case that what "the doctor does when he switches off a life support machine 'is in substance not an act but an omission to struggle', and that 'the omission is not a breach of duty by the doctor because he is not obliged to continue in a hopeless case.'"

Miller and Truong (2011) suggest that the distinction between acts and omissions is a necessary fiction constituted through law and medicine to keep the medical profession away from an association with death and killing. Bringing their argument back in line with this thesis that suggests the concept of inviolability is necessary to feeding the fiction of the immune person, that allows the differentiation between acts and omissions, one could argue that the concept of inviolability feeds the fiction of the doctor as an immune person. It is not simply that the fiction immunizes the subject of assisted death (e.g., Bland, and so on) but that it also feeds the fiction of he or she who can assist in this death via an omission. Even if the doctor's assistance constitutes an 'act', it makes this act acceptable by way of the concept of inviolability that feeds an image of a doctor performing an acceptable act (omission) on an immune person, in order to maintain themselves also as good immune persons who do not interfere with others. This is a necessary part of the immune process, and the legal decision to deny assisted dying on the basis of a concept of inviolability is useful because it protects the medical professional from appearing to violate a universal immunity granted to each and every person. As Miller and Truong (2011) argue, the law and medicine have a stake in immunizing the medical profession from acts that would be seen to contradict with their practice based on values of life and care.

Indeed in *Rodriguez* this was highlighted as a possible reason to refuse assisted dying: it would impose an unfair obligation on medical professionals to take life

that would be inconsistent with the tenets of their practice. At paragraph 120, Sopinka stated:

> Since much of the medical profession is opposed to being involved in assisting suicide because it is antithetical to their role as healers of the sick, many doctors will refuse to assist, leaving open the potential for the growth of a macabre specialty in this area reminiscent of Dr. Kervorkian and his suicide machine.

From Miller and Truong's (2011) perspective, the law creates fictions regarding a difference between acts and omissions not only to allow some acts and deny others, but also to protect medical professionals from the possibility of this type of association with death. It might be argued, for instance, that a dissociation between medicine and death is important to preserve the medical profession's alleged responsibility toward maintaining life, and also might be necessary to preserve fiduciary relationships with patients. Bioethicist Brendan Lier (2013) has even claimed that to preserve such a relationship, whilst euthanasia might itself become a legal prospect, the act of killing in euthanasia ought to be passed over to the military, a profession engaged with taking life.

Medicine, Immunity and Death

While some of this claim regarding the separation between medicine and death might appear 'true' in the legal rationalization of preserving life, it seems that one could also note a lineage of medicine that has been associated quite visibly with death; to attempt to obscure this association presents yet another fiction that ignores a wealth of historical instances in which death and medicine have been closely associated (e.g., Agamben, 1998; Frank, 1976; Marshall, 1995).[27]

Indeed, this is one of the strongest critiques one could level at scholars such as Singer (1994) and Huxtable (2002) who claim from a liberal vantage to be in favor of assisted death. Singer, for instance, has forcefully argued that society and law should hand over decisions regarding a person's quality of life and the prospect of assisted death to medical professionals. He claims that hopeless cases such as Bland should be terminated because these subjects are not proper persons: Bland has been sufficiently depersonalized, lacks a quality of life, and physicians should be able to determine when to take such an unqualified life without having to suffer a threat of punishment. Problematically, however, Singer's analysis, like others (e.g., Huxtable, 2002), divorces medical decisions over life from the political rationality underpinning the medical decision. In doing so he ascribes a neutrality to medicine that fails to note its role in what Foucault (1996) calls a juridico-medical complex: Singer fails to pay attention to an entire history that links medicine and politics and fails to note how the decision of what life is good and what life is not is based on a history of legal fictions that are tied to larger schemes and relations of power and knowledge.

One might recall for instance Esposito and others who have cautioned that the atrocities in Nazi Germany did not arise because of an absence of medical ethics, but rather precisely because of its presence: that is, because of a presence "…of a medical ethics perverted into its opposite" (Esposito, 2008, p. 115). Given the controversy that surrounded Nazi Germany and the involvement of medical

professionals in fulfilling the promises of the pure Nazi state (Esposito, 2008), it is no stretch of the imagination to consider the ways that law might try to immunize medical practitioners by bringing some acts within legal stricture in a way that does not allege to comport with eugenicist ideas about the subject/appellant's quality of life (i.e. as unqualified), but that reveals the political rationality of governance operating through law as a norm: legal decisions might be rationalized on the basis that they feed the legal fictions of the immune person in order to legitimate more subtle dividing mechanisms, such as the differentiation between acts and omissions, and the differentiation noted earlier regarding positive obligations to provide care versus the prospect of refusal of treatment. Differentiating between acts and omissions without considering how the distinction is made possible only by reference to a concept of inviolability that feeds a legal fiction of the immune person is dangerous: it tries to sidestep the slippery slope arguments that lead to an analogy drawn between end of life terminations like Bland and active killings like those of Nazi Germany.

On this basis it is important to ask the following: if assisted dying were to be legalized, how would the act of assistance in death be rationalized in this legal discussion? Would or could the act of killing be rationalized via non-interference in a similar way that 'passive' euthanasia cases have been rationalized? Moreover, if this were the case, in what ways might this give some persons the outcome they hope (e.g., the right to die), yet through a legal process that is potentially harmful and complicit with the political rationality of neoliberalism that remains based on

a logic of division and immunization and that feeds the same legal fictions of immune persons and immune society?

As noted in the previous chapter three, for instance, Nicklinson's articulation of "not being vulnerable" had a tendency to share the same logic and rationality that did not undo the legal fiction of the immune person and immune society but instead shored it up. How could an affirmative politics be imagined that does not rationalize legal decisions based on norms of life that ether get articulated as overt depersonalizations (e.g., in Nazi Germany), or get articulated as overt instances of personalization in which the mechanisms of depersonalization are at work in seemingly more subtle yet pervasive ways (e.g., in the contemporary climate where depersonalization is rationalized through the concept of inviolability of persons that gives the appearance of personhood while distinguishing between persons through a distinction between acts and omissions)?

Conclusion

As this chapter has argued, the law in the contemporary moment appears to generate legal fictions in order to shore up of the limits of human relationality: it does so by allowing some subjects (e.g., medical personnel) to take life in ways that are rationalized through a concept of the inviolability of persons that sustains a fiction of the immune person and the immune society framed as non-interference that is fitting with the larger neoliberal rationality. The legal fiction of the immune person and immune society underscored by the concept of the

inviolability of persons allows medical practitioners to 'let' some subjects die while not being seen to kill others: it a) immunizes medical practitioners from being seen as a handmaiden of the state; and b) divorces the question of assisted dying from a larger question about the ways that life is given value much akin to a eugenic, Nazi logic. Indeed, this seems to echo what Esposito (2012a, 2012b) had suggested with regard to the operation of personhood and its articulations of human rights and the protection of persons. Where personhood is often deemed to be an ethic that ought to be expanded to all persons, what we see here is the very way that it is not a lack of personhood that is the problem, but the very expansion of personhood. In this regard the concept of inviolability is necessary in the contemporary moment in shoring up acceptable limits of human relationships.

This chapter has argued that the concept of inviolability of persons emerges as a central element of the legal rationalization of the denial of assisted dying. It feeds legal fictions of the immune person and immune society that in turn rationalizes a legal distinction between acts and omissions, even though these distinctions are themselves made on the basis of a set of norms regarding life that reflect a broader neoliberal political rationality. Thus the division between acts and omissions is necessary to: a) secure a legal fiction of an immune person that is ultimately expressive of a neoliberal idea of a bordered subject who cannot be interfered with; b) legitimate the death of some subjects who would otherwise be a burden by virtue of maintaining their personhood to negate a slippery slope accusation and to also protect and immunize medical personnel from these accusations; and, c) legitimate and bring into legal stricture the appropriateness of some persons

(medical practitioners) performing acts of killing that comport with acceptable practices that are acceptable precisely because they also comport with neoliberal values of non interference (omission). To conclude, distinctions between acts (acts and omissions) that occurs through a fiction of immune persons maintained through the concept of inviolability is an enunciation of a neoliberal political rationality that divides subjects from one another.

Although we are aware that distinctions of acts (i.e. act versus omission) that are made possible through the concept of inviolability and the legal fiction of the immune person is not neutral or innocent but rather is attached to norms of life perpetuated through rationality of governance (in this case neoliberal) (Dayan, 2009), it does not mean to suggest that the law will not find a way to legitimate practices of what it has thus far called 'active' assisted death via other political rationalities. The caution here is to continue to analyze what reasons the law provides for denying assisted dying; what concepts emerge (like inviolability) to feed legal fictions that enunciate the rationality; and to deconstruct these decisions on the basis of what assumptions law makes. In all accounts, a necessary consideration is how law creates fictions that reflect a neoliberal political rationality; how in doing so these fictions shore up limits of human relationships; and what truths law claims to present (i.e. inviolable persons) in order to legitimate this very shoring up and constitution of the fictions of the immune person and immune society.

Finally, noting the centrality of inviolability of persons in this chapter also adds to broader scholarly discussion that has thus far focused on the sanctity of life and quality of life in Bland's case. Scholars such as Singer (1999) and Huxtable (2002) have famously asserted that Bland's case represented a turning point in English law: *Bland* represented a shift from archaic notions of life's sanctity toward more liberal leanings in law. Analyzing legal cases in relation to wider power-knowledge relations instead allowed the chapter to argued that it is the concept of inviolability of persons that connects both passive and active cases; by showing how both sets of cases are connected with the consistent concept of inviolability of persons that feeds a legal fiction of the immune person and immune society operating on the basis of an illusion of a proper, bordered subject, the chapter also challenges these former thesis held by Singer and Huxtable.

Following discussions in this chapter, the next chapter also considers how concepts emerging in right to die legal appeals emphasize the protection of something that appears as a unified whole. This unified whole discussed in the chapter five, analogous in some ways to the concept of inviolability presented here in chapter four, is the notion of the inviolability of society itself: the following chapter focuses more fully on the legal fiction of the immune society as it is fed through the concept of security.

CHAPTER FIVE

Security of Persons and of Society

Introduction

In different ways the previous two chapters have emphasized a common point: both have articulated simultaneous universalizing and particularizing mechanisms of law. Chapter three argued that the legal cases drew on concepts of vulnerability and enmity to create the legal fictions of the immune person (particularizing) and the immune society (universalizing). Enmity and vulnerability were articulated as concepts because they allowed the law to fix subjects according to a negative anthropology of humanity that decided in advance that each subject was an immanent enemy of each other subject. The concepts of enmity and vulnerability enabled law to rationalize its protection of each individual person (immune person) while continuing to protect and divide said persons from one another (immune society). Similarly, chapter four argued that legal cases articulated the concept of the inviolable person to generate a legal fiction of the immune person who could not be interfered with from outsiders, also as part of a larger immune society. The concept of the inviolability of persons fed the legal fiction of the immune person that allowed the law to create distinctions between 'acts' and 'omissions' in assisted dying cases. Where an act was said to interfere with the

inviolable person and therefore did not sustain the legal fiction of the immune person, an omission was said to comply with the legal fiction because it did not penetrate the inviolable body of the subject. Passive euthanasia, for instance, was accepted because law framed it as a withdrawal of care and an omission, as opposed to an act of 'trespassing' or 'intervening' with the person. This allowed the law to refuse the prospect of other forms of assisted death that were not alleged to comport with the legal fiction of the immune person and would otherwise threaten that fiction. In tandem, these chapters showed how legal fictions of the immune person and immune society were complicit with, and enunciated, a neoliberal political rationality that necessarily emphasizes relations of non-interference between subjects who are held in common only by virtue of their reciprocal dissociation from one another.

Along similar lines, the following chapter focuses on universalizing and particularizing aspects of law. It focuses specifically on the concept of security as it appears in legal cases on assisted dying in order to give further content to legal fictions of immune persons and immune society, complicit with a neoliberal political rationality. The chapter argues that the concept of security emerges in the legal cases in two ways that appear contradictory: the first is the concept of the secure society and the second is the concept of the secure person. The latter is said to threaten the former. Security of persons seeks the defense of individual rights within law; security of society claims that these rights can be overturned (or effectively discounted) if these rights are said to threaten or intervene with a

justice in the name of the good of the whole population. The chapter argues that to deny assisted dying cases the former concept of the secure society must feed a legal fiction of the immune society that outweighs and overrides (or that can effectively fold within itself) the concept of the secure person that feeds the fiction of the immune person without threatening this latter fiction. Law does so by appearing to present a balance of interests, whilst at the same time articulating the security of persons as 'positive obligations' and 'liberty interests', both of which are viewed as threatening to the good immune society of immune persons.

Security of Persons and of Society

In the two major Canadian assisted dying cases of Sue Rodriguez and Gloria Taylor the appellants appealed to section 7 of the Charter of Rights and Freedoms; specifically, the 'security of the person.' Section 7 encompassed the following elements:

> Security of the person in s. 7 encompasses notions of personal autonomy (at least with respect to the right to make choices concerning one's own body), control over one's physical and psychological integrity which is free from state interference, and basic human dignity (*Rodriguez v B.C.*, 1993, case introduction).

Those dissenting in Rodriguez's case argued that the prohibition of assisted dying under section 241b of the Canadian Criminal Code, which states that "Every one who…aids or abets a person to commit suicide, whether suicide ensues or not, is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years" was a violation of this right to personal security. The case continued:

> The prohibition in s. 241(b), which is a sufficient interaction with the justice system to engage the provisions of s. 7, deprives the appellant of autonomy over her person and causes her physical pain and psychological stress in a manner which impinges on the security of her person.

Gloria Taylor's case in *Carter V Canada* [2012] also established similar grounds for an argument noting that the provisions on assisted dying "deprived the plaintiffs of their rights to life, liberty and security of the person" (Section 13, paragraph 1).

In response, the law invoked the principle of 'fundamental justice'. Universalizing, fundamental principles of justice, simply referred to as 'fundamental justice', are articulated within the 1982 Canadian Constitution in section 7 of the Canadian Charter of Rights and Freedoms[28]. Though recognized to be a controversial legal principle, as Justice Lynn Smith recently argued in her judgment of the assisted dying appeal of Gloria Taylor (*Carter v Canada*, 2012), fundamental justice is typically invoked in common law as a legal principle that grants the ability for the law to constitutionally deny individual legal rights if the upholding of these individual rights would be seen to breach fundamental justice. In particular, fundamental justice is referred to in relation to the concept of the security of society as opposed to the security of the individual person. As the Canadian Charter reads in Section 7 of 'Life, liberty and security of person:'

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

In general, the legal deferral to fundamental justice legitimates the law's breach of individuals' rights if it considers such a breach (or better, articulates such a

breach) in the interests of ensuring that society is protected (e.g., Plaxton, 2008).[29]

Rodriguez and Taylor's assisted dying appeals called on the principle of fundamental justice to determine whether in the case of assisted dying the principle of fundamental justice could outweigh the legal claim to security of persons. Rodriguez and Taylor's cases both argued that the security of the person was entirely consistent with fundamental justice rather than being a principle that opposed it. The dissenting Justice McLachlin in *Rodriguez* argued that the right to human dignity (or security of persons as it had earlier been framed) was itself a principle of fundamental justice because it must apply to everyone as part of law's role to protect persons. The law had a *positive obligation* to protect the security of the person, and Rodriguez and Taylor both considered the right to an assisted death to be one example of the duty of law to take positive steps to secure this right.

In general the court in Rodriguez's case agreed that personal security was at stake, and Justice Sopinka conceded that the appellant's security interest were engaged. He noted for instance at paragraph 137 that the prohibition in s. 241(b) of the Canadian Criminal Code deprived Rodriguez of "autonomy over her person" and in causing her pain and psychological stress did impinge on the security of her person. However, despite this recognition, Sopinka was undecided on whether the deprivation of security of the person was "in accordance with the principles of

fundamental justice" (para 122). He argued that a consensus of reasonable people underscored fundamental justice: in Rodriguez's case the majority observed that human life must be respected and that the courts should not undermine institutions that insured it (*Rodriguez v. British Columbia* [1993] para 16, 17; *Carter V Canada* [2012], para 928). Essentially, for Sopinka, determining whether interference with personal security was unjustifiable before allowing assisted death was still important.

From Sopinka's perspective the protection of society demanded adherence to principles of fundamental justice. If assisted dying were legalized, society would be left vulnerable. He thus denied Rodriguez's appeal and stated emphatically:

> The principles of fundamental justice are concerned not only with the interest of the person who claims his liberty [page594] has been limited, but with the protection of society. Fundamental justice requires that a fair balance be struck between these interests, both substantively and procedurally (para 146).

According to Sopinka, Rodriguez's interest in securing her person could not be complicit with fundamental justice because the principle of securing the person would render fundamental justice void. The purpose of fundamental justice, he argued, was to balance the legal rights of individuals to legal protection with the law's duty to protect society as a whole and ensure that these individual rights could be maintained. In the case of assisted dying, the demands of the individual would breach law's role as a mechanism of the protection of life and would invariably open up the prospect of killing (which he claimed was "intrinsically morally and legally wrong"). This possibility of killing posed too grave a threat to

those the law intended to protect: the vulnerable (see paragraph 162). In this sense the law rationalized the need to breach the individual right and security of persons on the basis of fundamental justice and security of society because the protection of society outweighed this right: in this case, the law used the principle of fundamental justice in accordance with the concept of security of society to feed the legal fiction of an immune society that was a necessary totality.

Almost 20 years later, Taylor's ruling heard a similar discussion under Justice Lynn Smith regarding this same tension between the individual's security of her person versus the principles of fundamental justice and the security of society. Yet Smith's ruling, unlike Sopinka's, claimed that principles of fundamental justice could never outweigh the individual's security interests; instead, Smith claimed fundamental justice was overbroad and grossly disproportionate. One could not place as with *Rodriguez*, an absolute value on life, or insist that all persons were vulnerable. By the end of her extensive case comprised of 1417 paragraphs and 116 affidavits, and a cross examination of 18 witnesses all of which filled 36 binders, Smith declared Taylor a constitutional exemption: this permitted Taylor a physician assisted suicide within the period of one year whilst the tenets of the law on assisted dying were further considered.

Later, however, in an appeal from the Attorney General (supported by a number of interest groups) in *Carter v. Canada* (Attorney General), 2013 BCCA 435, the Taylor ruling was overturned. Justice Smith in *Carter V Canada* [2012] had

claimed that elements of Taylor's case were 'new': the question of assisted dying had not been sufficiently dealt with in Rodriguez's case. Framing elements of Taylor's case as new meant that Smith could legally reopen the debate on assisted dying laws within her court without being bound by *stare decisis* (binding precedent) to apply *Rodriguez*. However, in the Attorney General's appeal the majority (per Newbury and Saunders JJ.A.) disagreed with Smith and argued that Smith – who was from a lower court— was indeed bound by *stare decisis* to apply *Rodriguez*. While Chief Justice Finch noted in a dissenting opinion that the facts of Taylor's case could be upheld, Justices Newbury and Saunders stated that the decision held in *Rodrgiuez* set a precedent. They also noted that Smith's decision presented itself as exemplary of our contemporary troubled times: they warned, in the words of Sopinka in *Rodriguez*, that the principles of fundamental justice "leave a great deal of scope for personal judgment": the courts must be careful that fundamental justice is not interpreted as that which is "in the eye of the beholder *only*". (At 590.)" This alluded to the claim that Smith's judgment of Taylor's case was swayed with the subjectivism of the modern day "in the context of a society that demands and has enjoyed a greater degree of individual autonomy than ever before" (para 243). In response Newbury and Saunders claimed that despite this social shift,

> …the societal consequences of permitting physician-assisted suicide in Canada – and indeed enshrining it as a constitutional right – are a matter of serious concern to many Canadians, and as is shown by the evidence reviewed by the trial judge in this case, no consensus on the subject is apparent, even among ethicists or medical practitioners (para 243).

Newbury and Saunders' judgment brought the Taylor decision back into the folds of Sopinka's earlier claim that the protection of society's interests outweighed those of the individual.

Legal cases on assisted dying in England have also attended to the same point of tension between the state's interest in securing the wellbeing of society as a whole and the rights of the person to individual liberty. Dianne Pretty's case that was initially taken to the Director of Public Prosecutions in *R (Pretty) V DPP* UKHL 61 [2001] had sought to secure immunity for her husband such that he could help Pretty end her life without fear of being prosecuted. On denial of her case, Pretty took her appeal to the European Court of Human Rights in *Pretty V the United Kingdom* [2002]. Here the court heard her case and claimed that while it recognized and sympathized with Pretty– like Sopinka had done with regard to Rodriguez— the court could not grant immunity to someone who would kill her because it was not considered compatible with the good of society; allowing assisted death did not comply with the laws that exist to preserve the "life and safety of others" (*Pretty V UK*, para 74,). The DPP argued that the right of the individual could be overruled when there arises a need to "balance" this right with "considerations of public health and safety against the countervailing principle of personal autonomy" (*Pretty V UK*, para 74). The UK's 1961 Suicide Act Section 2 that prohibited assisted suicide was said to be grounded in this need to balance autonomy with the protection of the "weak and vulnerable and especially those who are not in a condition to take informed decisions against acts intended to end

life or to assist in ending life". Likewise, as the House of Lords Select Committee noted in 1994, cited in *Pretty v UK*:

> Ultimately…we do not believe that these arguments are sufficient reason to weaken society's prohibition of intentional killing. That prohibition is the cornerstone of law and of social relationships. It protects each one of us impartially, embodying the belief that all are equal. We do not wish that protection to be diminished and we therefore recommend that there should be no change in the law to permit euthanasia. We acknowledge that there are individual cases in which euthanasia may be seen by some to be appropriate. But individual cases cannot reasonably establish the foundation of a policy which would have such serious and widespread repercussions. Moreover, dying is not only a personal or individual affair. The death of a person affects the lives of others, often in ways and to an extent which cannot be foreseen. We believe that the issue of euthanasia is one in which the interest of the individual cannot be separated from the interest of society as a whole (para. 237).

From a similar vantage that Justice Lynn Smith had argued in the Taylor ruling, Pretty argued that this 'balance' was entirely disproportionate (*Pretty V UK*, para 45): Pretty's right was "an absolute one"; there could be no room for "balance." Societal interest could not outweigh her right given that this societal interest was only possible on the basis of a universal protection of individual rights.

Securing a Balance between the Interests of the Individual and Society

The chapter has thus far noted that legal cases on assisted dying invoke the concept of security in two ways: on the one hand the concept of security is invoked in the name of the person; on the other hand the concept of security is invoked in the name of society that protects the 'whole' from the interests of the particular. In broad terms, legal discussions of assisted dying are framed as a 'balance' of these interests. Scholars such as Pavlich (2000), Rose (1999), Donzelot and Gordon (2008), and Lemke (2011) have argued that the concept of

security is frequently used, not only in discussions of assisted dying but also elsewhere, to enunciate a logic of governance that attempts to settle disputes between individuals as part of the collective body, or in this instance of legal cases on assisted dying between individuals and the idea of what constitutes the collective. Pavlich (2000) for instance notes the overlap here with what Foucault (2003) had called a 'pastoral' model of governance; the pastoral model is one that attends to the one and the many, and is vital for legal processes to rationalize the reconciliation of an individual with the good of the whole. Indeed this reconciliation between the one and the many has occupied a place in much of Foucault's later work on political rationalities of governance, particularly with regard to liberalism and neoliberalism, which share remnants of pastoral logics of power. As Foucault himself noted with reference to political liberalism and later neoliberalism, "I think the main characteristic of our political rationality is that this integration of the individuals in a community or in a totality results from a constant correlation between an increasing individualization and the reinforcement of this totality" (Foucault, 1988b, p. 161-162).

As this thesis has already argued, following the insights of Foucault and Esposito, a pastoral logic of power in neoliberalism that endeavors to integrate the one and many has not dissipated but rather has intensified in the contemporary context. This intensification has been conceptualized via the legal fictions of the immune person and immune society, both of which aim to further dissociate subjects from one another to bring to fruition a neoliberal dream of a reciprocally dissociated

society in which individuals share in common only their non-obligation and non-interference with one another. What comes to be regarded as a social good and what 'secures' society in the current neoliberal era is that individuals operate as isolated subjects who are private, proper, persons and who do not interfere with other private, proper persons. As such, to secure the society one must also secure the subjects comprising this society: "Against the boundlessness of the community, which is *absoluta* and *exlege*, the individual and the state are born under the sign of separation and autonomy with regard to what is internal to their own proper borders," Esposito writes (Esposito, 2013, p. 128). Like the previous chapters had noted of the way the law constructed concepts of enmity, vulnerability and inviolability to feed legal fictions of private, bordered persons, so too does the law use the concept of security to push us to withdraw, appropriate, and remove us from what is common. "Only this division of what is common is able to give security to modern men and women", notes Esposito (2013, p. 128).[30]

In what follows I give two specific examples that emerge in assisted dying legal cases on how the concepts of security of persons and security of society appears to present a 'balance of interests' while at the same time feeding, constructing, and maintaining its two key legal fictions of the immune person and immune society, sometimes seen as aporetic (that is, in contradiction with one another). The first example is the differentiation that law makes between positive and negative obligations, whereby it rationalizes the latter as that which feeds the

fiction of the immune society. The second example is the differentiation the law makes between what it calls 'security interests' and 'liberty interests' of the person. The law calls on the concept of security to argue that only the former, security interests, is compatible with a neoliberal rationality of governance that requires that law feeds the fiction of the immune society which the latter, liberty interests, would otherwise threaten. Where liberty is seen to tip in favor of the individual at the expense of society, security is said to favor both.

Positive Obligations and Non-Interference

Within the legal cases examined, the legal terminology regarding 'positive obligations' as they stand opposed to negative obligations was a key argument used to bring the fiction of the immune person into the folds of the immune society. In much the same way that the previous chapter four had noted that the law drew on a difference between positive acts and negative omissions (framed through non-interference), so too did the law make a similar distinction regarding a logic of non-interference in the case of these obligations. Specifically, when plaintiffs appealed to the legal concept of the 'security of the person' in order to articulate their right to be assisted in death, the law denied these requests with reference to a difference between a positive obligation and a negative obligation. The law claimed that it did not owe a positive obligation to help persons die, but rather simply owed a negative obligation to ensure that persons were protected from one another. Much like inviolability feeding the fiction of the immune person who is protected from outside interference, the concept of security of

persons was fashioned as a negative right that secured persons from outside interference but did not give such persons a right to demand anything further.

Consider the conditions outlined in *Pretty V DPP* [2001] by way of example. The judge, Lord Hope, drew on precedent set in *Rees v United Kingdom* [1986] 9 EHRR 56,[31] an earlier case that had dealt with the question as to whether a positive obligation existed for the state. Rees dealt with the case of a female-to-male transsexual who after having undergone surgery and name change argued that the law was breaching his right to respect for private life and the right to marry. The case noted at paragraph 37 of its judgment that in order to determine "…whether a negative or positive obligation exists, regard must be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual, the search for which balance is inherent in the whole of the Convention" (pp. 63-64). The case then determined that the law owed no positive obligation to protect the private life of Rees; rather, the law simply had the negative obligation to protect Rees from outside interference: such protection did not mean that the state owed any intervention in terms of providing him provisions to marry.

Returning to *Pretty*, Lord Hope argued that the United Kingdom was not "under a positive obligation to ensure that a competent, terminally ill, person who wishes but is unable to take his or her own life should be entitled to seek the assistance of another without that other being exposed to the risk of prosecution." Ultimately,

Hope argued, following a precedent set in *Rees*, that a respect to a 'private life' did not impose a positive obligation on the state to give the right to assisted suicide. *Pretty V UK* at paragraph 15 stated:

> ... Respect for a person's 'private life', which is the only part of Article 8 which is in play here, relates to the way a person lives. The way she chooses to pass the closing moments of her life is part of the act of living, and she has a right to ask that this too must be respected. In that respect Mrs Pretty has the right of self-determination. In that sense, her private life is engaged even where in the face of terminal illness she seeks to choose death rather than life. But it is an entirely different thing to imply into these words a positive obligation to give effect to her wish to end her own life by means of an assisted suicide. I think that to do so would be to stretch the meaning of the words too far.

Not only did Justice Sopinka of *Rodriguez* make a similar differentiation between positive obligations and negative obligations but Sopinka also noted that a positive obligation conferred upon respect for an individual's security of person would conflict with the state's positive obligation to protect the life of all inviolable subjects under law. At paragraph 129 he stated **"**I find more merit in the argument that security of the person, by its nature, cannot encompass a right to take action that will end one's life as security of the person is intrinsically concerned with the well-being of the living person". This point was also made with regards to suicide; the judgment noted that while suicide was legalized in Canada in 1972 it was not actively encouraged; the state had no obligation to actively help subjects commit suicide. Suicide was a negative right to the non-interference from a paternal state, rather than a positive right conferred upon subjects. The state argued that it did not 'advocate' suicide.

The concept of security is formed through this differentiation between positive and negative obligations; it feeds a legal fiction of an immune society that reflects a neoliberal political rationality grounded in a lack of obligations toward the other. Indeed, Hirschl (2000) notes that in a neoliberal era negative rights are far more likely to be guaranteed in law than positive obligations. This differentiation maps neatly onto the negative pole of what Esposito calls *immunitas* that refers only to the negative: "non-dominion, non-constriction, and non-community (2011, p. 53). The legal judgments in the cases of Pretty and Rodriguez legitimate law's denial of assisted dying on the basis that the law has no need to *positively interfere* with subject's rights unless these rights are harming another subject under the law. Even though this protection from harm is articulated positively (i.e. the law articulates itself on the basis of taking 'active' steps to prevent harm to other persons), such protection from harm is articulated very much by way of a negative modality of immunization that operates on the basis of non-interference and the very protection of this non-interference (i.e. law takes 'positive' steps to secure freedom for persons *from* other persons: law takes positive steps to feed a legal fiction of a totality of immune persons; an immune society).

Put simply, the law articulates a positive obligation to protect persons from harm by articulating this positive obligation within the semantic framework of non-obligation: it does not aim to help people live in a state of solidarity, but rather it aims to help people live securely from the threat of other people. Therefore, the political rationality of governance that the concept of security reflects defines a

double closure from communal obligations toward others. The concept of security does so first by appearing to provide a 'positive obligation' to protect other lives of the whole community (the society) by securing this community via a 'negative obligation' whereby the relations between subjects of the whole society are normalized according to a simultaneous non-interference with one another. Second, the concept of security closes off assisted dying appeals by way of denying the state's and law's positive obligation to actively bring about or help someone die by stating that there is no positive obligation to end life; there is only a positive obligation to protect it from outsiders. This legal decision therefore denies assisted dying appeals as it enunciates a neoliberal political rationality that is grounded in and reinforced through the non-interference of subjects. Via the concept of security operating in assisted dying cases the legal decision to deny assisted dying reflects a political rationality that ensures that subjects are divided from one another.

Here one can again draw a parallel between the differentiation between positive and negative obligations made through legal judgment with reference to security, and the differentiation between passive and active forms of killing formulated through the legal judgment explored in the previous chapter four with reference to inviolability. Arguably both reveal how different concepts – inviolability and security – are used to feed legal fictions of bordered subjects that close persons off from the outside, highlighting law's lack of interference not as an infraction of justice or a thwarting of liberty but as its very protector (Nedelsky, 2013). In

chapter four this mechanism of drawing boundaries around individual subjects allowed law to personalize Bland and other subjects of law who remained under law's protection even though these subjects (and or those acting on their behalf) claimed such protection was also destructive. By invoking the concept of security as a freedom from others, or the right not to be interfered with (the appellant) and the right not to interfere (hence no positive obligation of the law) we see the reflections of a political rationality that seems to close off responsibility toward other subjects (both closing off the responsibility from the state toward appellants, and also closing off the interference of the state in dictating the course of one's life from the vantage of the appellant).

Security Versus Liberty

The law also made another differentiation that helped feed the legal fictions of the immune society and immune person that together mirror a political rationality grounded in reciprocal non-interference. This second differentiation was between what the law called 'security interests' versus 'liberty interests'. In *Rodriguez*, for instance, Sopinka used the concept of security to feed a legal fiction of the immune society as that which had at its core the best interests of all; in comparison, he used a parallel concept of liberty to feed a legal fiction of a non-immune person and a non-immune society whereby persons were free to pursue their own individual interests that would threaten the legal fiction of the immune society and would also in turn threaten the very possibility of the immune person: he said that Rodriguez's claim to be "free from governmental interference in

making fundamental personal decisions concerning the terminal state of her life" was not considered a 'security' interest but rather "only the liberty interest" (*Rodriguez*, para 124).[32]

Arguably Sopinka made this distinction between security and liberty interests for the strict purpose of supporting his earlier denial of a positive obligation to protect the individual subject interests in favor of simply protecting the subject from non-interference. Liberty was invoked as a concept that threatened to undo security. Liberty was attached to the depiction (or fiction) of a self-directing individual who would demand that the law provide him or her positive rights, which would mean the state and law would have to intervene with individuals to protect these rights. By linking liberty with positive rights in this way, the law then freed up security as simply a negative obligation. This allowed the law to deny the security of persons as a positive right and maintain security of persons as a negative right that could be folded within the security of society, as a negative obligation. The differentiation between negative and positive obligations allowed the law to separate liberty from security, framing the former as a positive obligation that would conflict with the greater good of society, and framing the latter as a negative obligation, allowing security of persons to be folded within the security of society, upholding the legal fictions of the immune person and immune society. Were liberty, as it is articulated as a distinct concept in legal cases with reference to a positive obligation to protect individual rights, be deemed an acceptable and necessary concept in law, it would feed a legal fiction not of an immune society,

but of a society that imposed positive obligations onto subjects. The concept of liberty would feed a fiction of a society of reciprocally bound individuals within a reciprocally bound society that aims to protect the liberties of each in positive obligatory ways. In Esposito's terms it might be more akin to an originary *munus*. This is contrasted to the negative concept of security that instead fixes law's goal as that which secures non-interference through negative obligations, and in turn feeds the legal fiction of the secure and immune society. Liberty is articulated as a dangerous concept in legal cases: it is a concept that is privative but not bordered; it is articulated as though it were in favor of the one, but not also of the totality.

Security, though articulated as a negative obligation, certainly imposes a positive obligation onto us as much as liberty and the protection of individual interest does. In alleging to govern less, a neoliberal rationality of governance does not refrain from interference (i.e. it does not stop taking positive steps to interfere); rather, it changes how it interferes by conducting conduct in different ways. In this regard, the concept of security of society is drawn on and constructed in legal cases as the good society, and law is used as a discourse and technology of governance to bring this good society to realization (Gordon, 1991; Barry *et al.*, 1996; Foucault, 1991, 2003, 2009; Rose, 1993, 1999, 2001). Indeed, as noted throughout this thesis, law became a technique of governance that also operated more and more as a norm and as a conduit of the political rationality of governance.

Expanding on François Ewald's (1986, 1990) thesis on the social function of law one might note that the law operated through reference to the social custom as a 'norm'. The very goal of social law is to make each individual feel 'secure' (Zamboni, 2010). Cases on assisted dying construct concepts of security of society in opposition to concepts of personal securities (that are not liberties) in order to present an alleged seamless balance between the individual and the collective good. In doing so we can posit as Ewald did that "Judging in terms of balance means judging the value of an action or a practice in terms of its relationship to social normality, in terms of those customs or habits which at a certain moment are those of a given group" (Ewald, 1986, p. 68). In this event, judging in terms of balance means finding a way to ensure that legal judgments on assisted dying bring into effect the legal fiction of the secure society that can outweigh by folding within itself the legal fiction of the secure person, the latter of whom is not an individual who is 'alone' and self interested merely by way of his or her liberty but is only self interested by virtue of his or her larger connection to the secure society: one cannot be an immune person without also being a member of the immune society. Returning to Rodriguez's case, Sopinka made this clear. He referred to the concept of security as that which encompassed both the security of persons and the security of society, while he referred to the concept of liberty (that which cannot be entertained in law) as that which only encompassed an individualized element, and that which would threaten the prospect of a unified whole.

This neoliberal governance corresponds with what Esposito (2009) terms both the 'defensive' and 'offensive' barriers of immunity. We might think of these as parallel to the negative and positive liberties that neoliberalism invokes, such that the former, negative liberty, is a defensive barrier drawn between the self and other that asserts an imperative for non-interference, and the latter, positive liberty, is an offensive strategy employing law and rights, framed through the concept of self-mastery. These, as Esposito posits, are two sides of the same immunized mechanism of defense and protection whereby "both emerge within a negative horizon of meaning" (2008, pp. 70-71). Here Esposito means that both negative and positive liberties are ways of withdrawing from the affirmative obligation of the community. Both 'types' of liberty – positive and negative— expressly have the same function, which is to close off the parameters around the self through security and privatization. The neoliberal immune community simply articulates itself as one that is comprised of negative rights, obligations and omissions to create a fiction of an immune society, despite it also shaping this society positively in the way it sees fit according to its own set of norms. In constituting liberty as a contradiction of the good immune society, the prospect of assisted dying remains framed within a political rationality of governance that does the work of shoring up the limits of human relationships: law frames assisted dying as a positive act of killing, much like the previous chapter noted. To assist with someone's death is to take positive steps of intervention that would burden and threaten the security of other persons who exist outside one's self. The legal decision to deny assisted dying through the generation of the concept of security

of society feeds the legal fiction of the neoliberal immune society; our relations to one another are continually bound to a condition of reciprocal independence in which we owe no positive obligation toward one another but rather owe a negative obligation: we must not interfere.

Our modern horizon of freedom (i.e., what we can do/how we can live) is 'immunized' through the concept of security. [33] As such, the legal fiction of the immune person inscribed within the immune society privatizes us in two ways: "It is privatized *and* deprives us of that relation which exposes it to its communal mark" (Esposito 2008, p. 61, Italics Added). For Esposito, this means "…the individual appears protected from the negative border that makes him himself and not the other" (2008, p. 61). As with the previous two chapters, the concept of security highlights how the law divides the individuals from one another through concepts that establish fictional limits between subjects. We can see a conceptual analogy to Esposito's philosophical notion of immunity and community: where freedom in *communitas* was a reciprocal freedom through a common debt, freedom in *immunitas* remains reciprocal through the non-obligation or dispensation from this debt. While the dispensation from the *munus* is typically granted on the basis of privilege, the liberal – and increasingly neoliberal— operation of freedom demands that this freedom be considered universal, such that *all* members of the community—now properly defined— receive a dispensation, and are no longer obligated to one another. Everyone, no matter whether privileged or not, is alleged to be 'free', or have the capacity to be so, on

the basis of this universal immunity that (neo)liberal democracy proclaims to grant. Esposito writes:

> When, beginning with Hobbes as the model of natural law, modern political philosophy attempts to restore universality to the concept of freedom, it can only do so within an individualistic framework that has now been extended and multiplied by the number of individuals who are made equal by their reciprocal separation. Freedom is what separates the self from the other by restoring it to the self; it's what heals and rescues the self from every common alteration (Esposito 2012c, pp. 53-54).

This is precisely the aporia revealed in legal appeals to assisted death: cases of Rodriguez, Taylor, Pretty and others point to an immunitary mechanism whereby their liberty, framed as a necessary privatization and preservation of the individual subject is seen to contradict the preservation of the whole of which this subject is said to be a part. Liberty does not feed a fiction of an immune person within an immune society: it feeds a fiction of an immune subject that must be deconstructed in law because its immunity would threaten the tenets of the immune society.

Dangers of an Immune Society

Two problems are revealed through the legal fiction of the immune society that folds within itself the immune person as a necessary and conforming part of this whole. First, it legitimates closures around subjects such that secure individual subjects are no longer obligated toward one another but rather have become increasingly secure from one another and more and more dissociated. This is consistent with Esposito's thesis that immunity mechanisms have a "…continual recourse to create ever more extensive and intensive security-producing

dispositifs" (2006, p. 55). Second, it legitimates the immunization of each and all such that the immunization of each often resultantly occurs as part of a governmental immunization of all. The individual comes to desire a closure off of their own self that operates in potentially destructive ways for the good of this whole such that mechanisms of protection often end up causing the individual to sacrifice themselves, rationalizing and legitimating a kind of violence.

In an excellent genealogy and philology of 'security' John Hamilton (2013) notes this very problem:

> …Security grants identity but seals this achievement with a gravestone. Proponents of a human care that does not seek resolution in care's removal recognise that the subject is sacrificed to the very institutions that make the subject a subject (p. 81).

Ultimately Hamilton touches upon an aporia of security. He notes that the problem with the appeal to the security of the individual (as *singulatum*) that is part of a governance agenda that aims to also secure the whole (*omnes*) is that the self will always necessarily sacrifice itself to this greater whole. One cannot be a 'self' without this whole (Esposito, 2010; Lopez, 2013). Esposito notes for example that individuals are "paradoxically sacrificed to their own survival" (2010, p. 14). Likewise Lopez adds: "Extirpating every living bond, every traces of a shared and henceforth exposed existence, Law demands the sacrifice of life itself in exchange for its protection" (2013, p. 21). While neoliberal political rationalities might use discourses such as law as a conduit to bring into being legal fictions that operate as security mechanisms, and these might provide us with the prospect of a subjective identity (the fiction of the immune person who is

self-directing, bordered and absolutely sovereign), in their very process of conferring upon us this security or immunity, that is in removing us from what Hamilton calls a reciprocal 'care' or what Esposito calls '*munus*', or what one might simply call an openness and exposure to otherness– in removing us from the positive obligation to others or what necessarily takes us outside of ourselves precluding the possibility of self in communitas —the very *possibility* of the individual that is granted necessarily in establishing it qua individual becomes sacrificed to the to the law that secures immunity, the new 'immune community'—the *omnes*, the 'whole'.

For example we ought to be cautious of how an appellant seeking assisted death frames his/her appeal through a desire for personal security that is consistent with the logic of the security of state. Even when the law claims that these two things are contradictory, what we see emerge is an individual who seeks to secure themselves not simply *from* the larger community but *for the sake of* this community; not in the name of a reciprocal obligation to the other but in the name of a reciprocal independence from these others. We must therefore be cautious when the right to die appeal is symptomatic of a desire to secure oneself from the kind of dependent relations found in a community of reciprocal obligations that simply reifies the larger neoliberal political rationality grounded in divisions between subjects. A deconstruction of the legal fictions that feed off of these concepts of security allows us to re-think assisted dying away from security and immunization toward a different prospect of community.

Conclusion

This chapter has examined the concept of security as it emerged in right to die cases in two ways: first with reference to the security of society, and second with reference to the security of the person. The chapter suggested that the concept of security is articulated in legal judgments in such a way as to fix two objects of law that are both legal fictions. The first object of law is that of 'society' itself or the very possibility that one can imagine society to share in common the goal of its own security on the basis of security as a social good: the fiction of the 'immune society'. The second object of law is that of the 'secure person'. By differentiating between different positive and negative obligations, as well as security versus liberty interests, the law fixes the secure person as a part of the immune society: the fiction of the immune person who is folded within the immune society is maintained on the basis that these two fictions are inseparable. Security of persons is folded within the security of society through a legal fiction of an immune society comprised of absolutely immune persons, that presents these two concepts of security as necessarily inscribed within one another; to further support this fiction, the law also draws on other concepts such as liberty and positive obligations that it articulates as dangerous to the legal fictions given that these concepts would undo the fictive relation between the one and the whole. The chapter argued that the fiction of their simultaneous operation allows the governmental rationality to bring the individual within the logic of the larger whole while presenting the legal decision as a balancing act that aims to secure

the rights and freedoms of individuals only if they conform to the rights and freedoms of the good society.

In theorizing this balancing act of security the chapter drew more fully on Foucault's account of governmentality in conversation with Esposito's account of immunization or what Oliva (2006) called the 'immune community'. In drawing these ideas together the chapter argued that we can read the current paradox of security in right to die appeals as symptomatic of – and enunciating of—the neoliberal political rationality that simultaneously brings us together and divides us, to the extent that what we hold 'in common' is our freedom and security from one another: a common immunization. In view of this the chapter argued that the concept of security articulated in legal decisions on assisted dying and in legal appeals to assisted dying is highly problematic. In short, the problem of liberalism, which is an increasing problem of neoliberalism (Campbell, 2011), is that,

> To the degree that it isn't limited to the simple enunciation of imperative of liberty but implicates the organization of conditions that make this effectively possible, liberalism contradicts its own premises. Needing to construct and channel liberty in a nondestructive direction for all of society, liberalism continually risks destroying what is wants to create (Esposito, 2008, p. 74).

Law, as a discourse and technology of governance and that uses concepts of security to feed a legal fiction that serves to divide us from what is common, comes at a price. It comes at the expense of always sacrificing the individual to the whole: the promise of an absolutely immune society of reciprocal independence will always find ways to rationalize the death or denial of rights to

subjects who threaten the whole. In the previous chapter this was made possible by depersonalizing and allowing the law to operate as a norm through fictions that generated distinctions between acts and omissions; in this chapter this was apparent through differentiations between positive and negative obligations—both are fictive, and both attempt to divide us from obligations toward one another, rationalizing the possibility to ignore requests to die, or allowing some deaths on the basis of necessary fictions of division.

The next chapter turns to the concept of 'dependency' which is bound within this same problematic of an individualizing, immunizing society that has shifted away from ideals of community expressed as an opening up of the borders of the self. It considers how the concept of dependency becomes attached to degeneracy and an abject social status. A key argument here is that the law does not challenge the association between dependency and degeneracy; instead it fixes the correlation through a concept of degeneracy that forms part of a legal fiction through which assisted death is denied. The chapter additionally considers how the assisted dying appellant appears to emerge as he or she who increasingly desires a freedom from dependent relations in ways that feed the same legal fictions and also fulfills the promise of a neoliberal immune community.

CHAPTER SIX

Freedom from Dependent Relations

Introduction

Like the previous chapter that examined how both the appellants and the law denied assisted dying through a concept of security, this chapter considers both appellants' and the law's use of another concept, namely dependency. With reference to the former, the chapter focuses on how appeals to a 'death with dignity', one of the most common phrases used by plaintiffs in assisted dying appeals, is best interpreted as a desire to be free from dependent relations with others. On this point, the chapter addresses the relation between indignity and dependency: the appellant's subjectivity is shaped through the neoliberal political rationality where the latter emphasizes that to be dignified is to be an independent subject who does not interfere with the independence of other subjects. In short, the appellant's articulation of the concept of dependency feeds the two legal fictions noted throughout of the bounded subject divorced from reciprocal relations of dependency within a larger immune society of independent persons.

Where subjects appeal to assisted death as a 'right to die' based on a desire to be free from dependent relations, the law claims to protect subjects from the internalization of these neoliberal norms, stating that appellants might feel a 'duty to die'. While the law appears benevolent when it denies assisted dying based on a concern that subjects have internalized a problematic ethos of being dependents, the chapter argues the law does not try to remedy this internalization of an abject status so much as confirm and fix it by noting that appellants of assisted dying are particular kinds of subjects. Hence, the law does not undo the problematic relation between indignity and dependency that fixes particular subjects as the proper kind of appellant for death; rather, law continues to fix the appellants as particular kinds of people (elderly, disabled, or terminally ill) who are all dependents and thereby undignified (i.e. persons who burden or obligate others). This means to suggest that the law does not challenge the social norms, such as the 'fact' that certain kinds of people are legitimate in their appeals to death, which is shaped by the larger negative connotation of being a dependent in a society defined by an independent ethos; instead, the law simply, at present, shows a concern regarding the act of killing itself (i.e. how one 'gets rid' of these dependents). It is this latter aspect of assisted dying appeals that do not comport with the overall legal fictions of the immune person and immune society and would thereby contradict the neoliberal ethos. In short, the law's denial of assisted dying seems to be paradoxical because it would seem that to let abject subjects be killed would be beneficial to the neoliberal immune community; however, when one looks beyond the *ratio decidendi* and examines law as a discourse enunciative of broader

rationalities of governance one can note an underpinning immunizing logic whereby the law simply has not yet found a way to rationalize some kinds of assisted deaths within this immunizing logic. In turn, the chapter argues that if assisted death were to be rationalized, we ought to be concerned with precisely how this rationalization would occur, particularly if it were in accordance with the reciprocally divisive ethos of neoliberalism (as chapter four for instance, highlighted with reference to the legitimation of Bland's death).

Death with Dignity: Freedom from Dependency

> She will be totally dependent upon machines to perform her bodily functions and completely dependent upon others. Throughout this time, she will remain mentally competent and able to appreciate all that is happening to her. Although palliative care may be available to ease the pain and other physical discomfort which she will experience, the appellant fears the sedating effects of such drugs and argues, in any event, that they will not prevent the psychological and emotional distress which will result from being in a situation of utter dependence and loss of dignity.

This above excerpt is taken from *Rodriguez* at paragraph 137 explaining her plight. Indeed, each of the assisted dying cases analyzed revealed similar assertions: most appellants, like Rodriguez, framed their appeals to assisted death based on the perceived failure and degeneracy of their body and how this failure would leave them in a state in which they were absolutely dependent on other persons. Appellants tended to argue that they wanted an assisted death for two, somewhat overlapping, reasons on the basis of this degeneracy. The first reason was that subjects did not want their person intruded upon such that they would be subject to outside interference (i.e. they did not want to be dependent on others

because this would impose on their own freedom as an individual). The second reason was that subjects did not want to burden their loved ones; while most appellants recognize their loved ones would be happy to look after and care for them, the appellants typically felt that this would impose too great an obligation onto them. In both of these instances, appellants sought what they called a 'death with dignity'.

While scholars have discussed the various meanings of dignity in death and have debated the ethics of dignity as a concept (e.g., Dworkin et al, 1997; Waldron, 2009),[34] when one examines the wording of cases one notes that dignity is used in a very specific way:[35] in legal cases on assisted dying a death with dignity is best described as life that is freed from dependent relations through death. This uptake of the term 'death with dignity' in legal appeals creates a clear link between an undignified life and a dependent life, and thereby a dignified death and an independent death: one is not dignified in either life or death if one is dependent on others. This is entirely consistent with critical disability theorist, Susan Behuniak's, commentary; she claims that while the concept of dignity is polyvalent, it appears most readily in assisted dying legal appeals as a way to legitimate a "liberation from indignity" (2011, p. 18). In assisted dying appeals, this appeal to a death with dignity conceptualizes death as a liberation from the indignities of illness, and/or disability (where often disability is considered synonymous with illness) (Oliver, 1996). While appellants used the concept of dignity to express their desire to die, within the legal cases this concept of dignity

referred most specifically to a desire not to be dependent. The prospect of liberation from indignities that Behuniak noted is more precisely articulated in assisted dying cases as a liberation from dependent relations.

Problematic dependent relations were articulated in two further ways in the assisted dying cases examined: the first was with reference to the failing body that could no longer do the things it used to do; the second was with reference to the way this failing body relied on technology and other forms of care from others that would intervene with the body and that would intervene with the freedom of others who would be burdened by this care. As noted in the excerpt from Rodriguez's case, she had feared that her body would be reliant on machines and on others who would care for her: she would be absolutely dependent. Nicklinson's case expressed a similar fear. Recalling his plea noted earlier in chapter three, he claimed emphatically:

> My life can be summed up as dull, miserable, demeaning, undignified and intolerable…it is misery created by the accumulation of lots of things which are minor in themselves but, taken together, ruin what's left of my life. Things like…constant dribbling; having to be hoisted everywhere; loss of independence, … particularly toileting and washing, in fact all bodily functions (by far the hardest thing to get used to); having to forgo favourite foods;…having to wait until 10:30 to go to the toilet…in extreme circumstances I have gone in the chair, and have sat there until the carers arrived at the normal time (*Nicklinson V MOJ,* 2012, para.13).

In his mind, what Nicklinson described was an unbearable existence and one that he would rather not live through. Life was considered undignified on the basis of what he perceived to be an absolute relation of dependency to his physical existence and to others that he was confined to: dependent relations infantilized

and dehumanized him; these relations constrained him to a body that he could not care for or control himself, whereby he would dribble or defecate in his chair; he was subjected to the necessary care (and interference) of others, being absolutely reliant on others for 'private' tasks such as toileting. From Nicklinson's vantage the law's refusal to allow him to die confined him to a life of dependency and indignity. Nicklinson sought a freedom from a corporeality that he conceived as exposing of his self to outsiders and dependent relations (e.g., Hepworth, 1996; Fennell, 2004).

Norms and Dependency

Appeals to assisted death are shaped by social norms (Mihic, 2008; Tierney, 2006). Social norms tell us that to be dependent on others is a problem (Amundson & Taira, 2005). In a neoliberal context this is especially so as indicated by a considerable rise in appeals to assisted death since the 1970s (Lavi, 2008). What and who is said to constitute a dependent subject is socially constructed and is shaping of and shaped by the political rationality of the time (Biggs & Powell, 2001). For instance, the welfare state is more likely to accept ageing dependents (e.g., Townsend, 1981; Walker, 1982) whereas a neoliberal entrepreneurial state is more likely to consider such persons' worth (as a discursively constituted category of 'elderly') on the basis of a perceived lack of human capital (Powell, 2001). This is particularly the case as the neoliberal capitalist state has conferred more responsibility onto families and individuals

themselves for dealing with the processes of ageing (Powell, 2001; Powell & Biggs, 2003).

Here we can also draw a link to points raised throughout to suggest that political rationalities of governance play a large role in shaping perceptions of what constitutes a 'dependent' person – that is, who is said to be a dependent subject. Ageing has come to be viewed and assessed within a bio-medical model that gets attached to decline, degeneracy, abnormality and dependency and is therefore regarded as a 'problem' (Biggs & Powell, 2001; Phillipson, 1998). The same can be said for disability whereby the use of the concept of dependency linked to degeneration details a truth about living with a disability.

Scholars like Shelly Tremain (2005) have argued that abelist discourses in society contribute to a normalization of the body such that disability is 'medicalized' and considered an 'illness' of individuals. In an era where one's worth is measured by one's productive output, the association between disability, degeneracy and dependency in the same way as ageing also serves to contribute to the narrative of disability as an individual problem that affects the larger social fabric (Saltes, 2013). We see here that the individualized 'problem' of disability where it is deemed undesirable to live with a disability or an illness or aging issues is also intimately associated with social values of disability. That is, disability is not only an individual problem whereby subjects ought to desire to become normal on the basis of ablest norms (McCruer, 2007; Tremain, 2005) that allow said subjects to

live more independently as divided and immunized selves, but also that subjects with disabilities are articulated as dependent, and therefore a burden, on society (McWhorter, 2005; Tremain, 2005). Disabled persons are seen to interfere with other subject's personal rights and immunity because their disability causes them to 'take' from the liberal state (Waldschmidt, 2006; Saltes, 2013; Pothier & Devlin, 2011; Taylor, 2011; Lero, 2012).

Immune Persons

One might argue that appeals to death with dignity invoked on the grounds of a desire to be free from dependent relations simply feed the same legal fiction of the immune person that appellants claim to want protection from. They reify the existing neoliberal political rationality that constructs them as particular kinds of subjects (degenerates). Rodriguez and Nicklinson's appeals to assisted death used the concept of dependency to feed a legal fiction of the immune person as he or she who ought to be protected from these dependent relations that were articulated as relations that consisted of too much outside interference. Nicklinson, for instance, had appealed to a personal immunity from outside intrusion that he regarded as infantilizing, dehumanizing, and paternalistic because it forced him to remain in an absolutely dependent relationship with others (i.e. caregivers).

Such an express desire to be free from dependent relations is arguably complicit with the neoliberal political ethos of 'reciprocal independence' discussed throughout this thesis. The desire to free oneself from dependent relations

reinforces the legal fictions of immune persons and an immune society that reflect a neoliberal rationality that demands increasing independence of subjects from one another. A death with dignity, which at once constitutes one as a proper subject (self directing), and also releases one as a proper subject from a relation of dependence with others, is not possible without the legal fiction of an immune person who is sovereign over him or herself, free from relations with and to others. One might say, as Feinberg (1986) does, that a death with dignity is "…not possible without the acknowledgement of personal sovereignty" (p. 354). Sovereignty in this sense is the articulation of a type of personalization; it is the constitution of the proper person as a subject of law who can appeal to the right to a 'proper' death, which is dignified because it treats the subject as a proper person who is not interfered with by others. It also does not treat the subject simply as a 'thing' that can be controlled by others; one is a thing not a person if one is dependent on others. To be a person is to dictate one's will; to be a thing is to have no will but rather be subject to the will of others. Assisted dying appeals are attempts to turn the self from a thing that cannot be mastered efficiently through bodily processes and that is subsequently dependent on relations with others to sustain one's self, into a 'person' who can be mastered rationally through the exercise of free will: subjects appeal to their own sovereignty and personalization in order to refute their alleged corporeal degeneracy; in doing so they claim to assert sovereign control over their body and an independence from the paternalistic decisions of others. A dignified, proper death is not dehumanizing and infantilizing as Nicklinson's case had earlier depicted; rather, it is a death that

is free from dependent relations. An assisted death that would allow someone to help Nicklinson die in a way that would allow him to be free from relations of dependency would be a good death.

The notion of a proper death or a 'good death' being one in which the subject retains his or her proper status through personalization (i.e. maintaining a personal sovereignty or control over one's body and one's actions) arguably mimics the desire for sovereignty as a 'whole' and independent being. Nicklinson's case articulated depersonalization as that which is associated with dependency, calling it infantilizing and animalizing. His case reinforced that the good death had to conform to social norms of personhood that also required independence: to die well is to die as an independent person. Here one can draw a parallel to the concept of inviolability of persons discussed in chapter four of this thesis: a dignified death is a death that seeks to shore up and feed a legal fiction of an immune person who is a proper person such that his or her body cannot be interfered with by outsiders. The appellant, through his or her appeal to a freedom from dependent relations with others via assisted death, produces himself or herself as a bounded subject (Nedelsky, 1990), feeding the legal fiction of the immune person.

Where appellants have endeavored to become, through law, a person and have fed a legal fiction of an immune person who is protected from outsiders by claiming their right to die with dignity as a rational, adult, sovereign human rather than as a

subject who is dehumanized and infantilized through dependent relations, two key problems emerge. The first problem emerges when one equates dependency with indignity. As noted previously, this has the effect of relating particular subject positions that are deemed to be dependent with an undignified life (Oliver, 1996).

This also has the effect of fixing 'who' can appeal to assisted death: only those who are sufficiently degenerate (understood as those who are absolutely dependent on others and perceived as undignified) can be the proper subject of assisted death. When one fixes the subjectivity for assisted death this also means that subjects who want to appeal to death have to sufficiently fulfill this subject position; it means that Nicklinson, for instance, cannot simply claim that he wants someone to help him die, but also that he must declare absolutely his dependent status in order to be considered the correct type of person for assisted death. To appeal for assisted death requires in the first instance a depersonalization before a subject can then claim a personalization via an appeal to self-direction and a freedom from this dependent status. Only by effectively fixing one's corporeality can one then distance one's self from this corporeality through acts of personalization by creating legal fictions of an immune person who is independent, sovereign, and able to exercise one's self as free from dependent relations when exercising this decision.

This fixing of subject positions is a key part of the problem with assisted dying appeals. It is only on the basis that the appellant for assisted dying disqualifies his

or her life in accordance with social norms (i.e. that one accepts that one is not normal and that one's life is not worth living because it is dependent, which goes against the norm) that one can legitimately appeal for assisted death. Appealing to die with dignity uses the indignity of dependent relations to try to erase the trace of this indignity through a personalized, independent death.[36] In doing so, one's 'dignified death' arguably does not sever the more apparent link that binds degeneracy to dependency and thus to indignity in the first instance. I will return to this point later with more specific reference to the operation of law and will explain how the law appears to act benevolently in protecting subjects yet does not challenge and deconstruct the social norms that link degeneracy to dependency as much as it reinforces these norms. For now I will continue to focus on the appellants and their requests for assisted death that invoke the concept of dependency which feeds a legal fiction of an immune society.

Immune Society

Thus far the chapter has argued that the appeal to a death with dignity as that death which is free from dependent relations feeds a legal fiction of an immune person. It has been argued that this is consistent with other chapters in the thesis where concepts have emerged in legal cases on assisted dying to feed the legal fiction of the immune person as the bordered sovereign independent subject; this in turn precludes the prospect of assisted death that is said to otherwise contradict this fiction. The beginning of this section also noted another way that appellants also invoked the concept of dependency, this time with more specific reference to

the impact one's dependent self would have on others who would be burdened by one's care. Here one can take Gloria Taylor's case as an example.

In 2012, Gloria Taylor's plea for the right to die was met with what many pro-right to die activists would regard as a 'success': she was granted a constitutional exemption from Canadian law and was allowed the right to have a physician assist with her death should she indicate a point in time in which her life was beyond tolerable. The Judge, Madam Justice Lynn Smith, framed Taylor's appeal in the following way:

> Ms. Taylor's illness is steadily impacting her ability to do…things. She is fearful about the progression of her disease and about which of her body's functions will be affected next. She says that one of her greatest fears is to be reduced to a condition where she must rely on others for all of her needs. She does not wish 'to live in bedridden state, stripped of dignity and independence' *(Carter V. Canada* 2012, para. 52).

As Taylor stated in her own words:

> I want to be very clear: I do not believe that my family considers me a burden. Nor am I concerned that as I get more and more ill they will begin to do so. When I told my family and friends that I wanted a physician-assisted death, my concern was that they might be disappointed in me for not trying to hold on and stay with them until the last possible moment. But I do want to express the fact that I, myself, will be greatly distressed by living in a state where I have no function or functionality that requires others to attend to all of my needs and thereby effectively oblige my family to bear witness to the final steps of the process of my dying with the indignity a slow death from ALS will entail. I do not, in particular, want to be the cause of my 11 year old granddaughter's sitting vigil as I die an ugly death, and I believe that is what she will do, because she loves me. I do not want to be a burden, not because I fear my family does or would resent me – I do not think that – rather, I do not want to be a burden because I know they love me (*Carter V. Canada* 2012, para. 52).

Justice Smith drew on a plethora of ethical, legal, medical, and psychological

expertise to present the case set forth. One particular source was Ganzini et al's (2008) research on depression and assisted suicide, which supported the quote from Taylor. Following interviews with over 50 patients, Ganzini et al noted: "Although many worry about being a burden, in fact, their families would appreciate the opportunity to give greater care. These are very independent people who do not want more care" (*Carter v. Canada,* 2012, para. 438). Given Taylor's assertions, and those put forth by Ganzini et al, the principal issue at stake in Taylor's appeal to the right to die did not seem to be whether she would be conceived as a dependent and therefore a burden. Rather, what seemed to be more centrally at stake was the notion that Taylor, herself, refused a position of becoming a dependent: she did not want to become dependent on her family who she noted would have happily cared for her but who would have inevitably been burdened by this care.

In Taylor's case she articulated her appeal to die not only on the basis that she desired a freedom for the right to her own self-direction or positive freedom as an individual, but also because she was heavily aware of not implicating her loved ones. She denied being fearful that another person would take her life (or so she said); she also denied being fearful that her family members would resent her or see her as an obligation. She was not, at least outwardly, concerned with a reduction of herself to the status of a thing, or an abject other as Esposito and others like Mihic (2008) and Tierney (2006) have pronounced as a possibility. Ganzini et al's remarks also seemed to support this rationale. However, she still

refused to obligate her family, framing her desire for an assisted death as a release of her loved one's from this obligation. In this sense one can see a more overt fiction of the immune society being fed via an appeal to die for the sake of preserving (indeed immunizing) the other's freedom from dependent relations toward oneself. In short, it is not simply that the legal appeals to a death that is free from dependency feeds a legal fiction of an immune person who is free from interference from others, but also that appeals to death attempt to help secure the freedom of others from whom one endeavors to be free. It thus brings to bear how the two legal fictions overlap with the individualizing and totalizing poles of pastoral power in neoliberal rationalities of governance, discussed most extensively in the previous chapter five: appellants want to free themselves from dependent relations, but they also want to free the other from these relations to which they would obligate them. Through an immunizing logic of closure the individual invariably sacrifices himself or herself to the whole.

Law's Denial of Appeals to Freedom from Dependent Relations

I have argued that the law continues to deny assisted dying, despite appeals to the right to die as a 'freedom from dependency' appearing to feed the same legal fictions that the law purports. If the appeals are complicit with the legal fictions, why does the law refuse them? This section of the chapter focuses on two things. First, it notes how the law appears to act benevolently based on a concern that subjects have internalized a problematic ethos of being dependents. That is, the chapter focuses on the law's construction of the subjects of assisted death as

dependent subjects who would necessarily feel compelled to die. Second, it focuses on the problem of law's benevolence: it argues that its claim to benevolence via a paternalism is problematic because the law presents itself as a mechanism of protection that does not try to remedy this internalization of an abject status so much as confirm and fix it by noting that appellants of assisted dying are particular kinds of subjects.

Law's Benevolence

The law presents itself in assisted dying cases as a benevolent and paternal force; it claims to protect subjects from the internalization of social norms that frame subjects who are dependent on others as abject and vulnerable. Because of this dependent status, like chapter three noted, the law claims it must protect subjects from other persons would likely kill the abject subjects because the latter would interfere with the freedom of the former. Likewise, the law propels the vision that appellants, being particular kinds of persons, would inevitably (indeed universally so) feel pressured to seek out actively or succumb to the social pressure to die in a way that the society sees fit. In paragraph 89 of *Rodriguez*, this was the point communicated by Lamer (dissenting):

> Sadly, increasingly less value appears to be placed in our society on the lives of those who, for reason of illness, age or disability, can no longer control the use of their bodies. Such sentiments are often, unfortunately, shared by persons with physical disabilities themselves, who often feel they are merely a burden and expense to their families or on society as a whole.

Indeed, in the current neoliberal era whereby privacy has extended beyond the family unit to the individual self, being dependent on one's family and friends is considered increasingly burdensome (Biggs and Powell, 2000).). Biggs and Powell (2000) for instance point to the rise of 'elder abuse' in the contemporary society to argue that we are increasingly finding ourselves wanting to be free from dependent relations that obligate us to others, including from relations that obligate us to our own families. Others also point to the decline in social responsibility toward elderly persons within western societies, romanticizing eastern cultures for their respect for elders, and criticizing individualizing western cultures for their treatment and disregard of elders whose value has come to be associated with a mere drain on public and private resources (Kenner, 2008; Pfaff et al, 2010).

Mihic (2008) for instance notes that in the era of neoliberalism persons might be coerced toward choosing death rather than burdening their families given the prospect of exponential medical bills. The neoliberal subject is never free or autonomous but is moulded and shaped "…to fit the socio-economic order in the form of human capital" (p. 167). Mihic continues: "…advocates of physician assisted suicide conceive of the self as human capital" (p. 170). The neoliberal subject's value is measured on the basis of its investment and productivity (Campbell, 2011, p. 73). From Mihic's vantage, interpreting the right to die via human capital means that we must consider how:

> …the supposedly autonomous dying patient is supposed to take into consideration the welfare of her or his loved ones. On the neoliberal

> human capital model, parents who love their children will try to close the self like a firm; they will try to die as efficiently as possible (p. 180).

Those who age will not want to burden their loved ones; they would sooner die than become a dependent and interfere with the good, free, secured, immune person of their relatives.[37] Speaking from the vantage of the United States where health care is private and can leave families in serious debt, this concept of dependency as it relates to being a social burden has also become a central figure in assisted dying legal cases particularly with response to economic considerations (Heasell & Paton, 2004).[38] One of the most recent comments from Daniel Callahan, a well known speaker on aging and economics, even noted that we need to 'let death have its day' given the burden that elderly persons cost to society in end of life care in our current socio-economic climate. Surely, then, the law is acting benevolently in denying assisted dying; it is simply protecting appellants from becoming an economic 'solution' for a neoliberal society that would potentially benefit from fewer dependents (e.g., Callahan, 2008, p. 79-82; Humphrey, 1991)[39].

As the intervener COPOH (Coalition of Provincial Organizations of the Handicapped) also observed,

> …[t]he negative stereotypes and attitudes which exist about the lack of value and quality inherent in the life of a person with a disability are particularly dangerous in this context because they tend to support the conclusion that a suicide was carried out in response to those factors rather than because of pressure, coercion or duress [page 566].

We find the same discussion emerge in *Pretty V UK*, whereby the case drew on the work of The House of Lords Select Committee that had forced the point

regarding "the undesirability of anything which could appear to encourage suicide" (report, p. 49, para. 239). It stated as follows:

> We are also concerned that vulnerable people – the elderly, lonely, sick or distressed – would feel pressure, whether real or imagined, to request early death. We accept that, for the most part, requests resulting from such pressure or from remediable depressive illness would be identified as such by doctors and managed appropriately. Nevertheless we believe that the message which society sends to vulnerable and disadvantaged people should not, however obliquely, encourage them to seek death, but should assure them of our care and support in life.

This particular argument was also made in Fleming's legal case. The law argued that it was impossible to tell whether Fleming freely chose assisted death or whether she was coerced into it. The judge, Kearns, argued that because Fleming was a degenerate, and as such – because she was dependent on others—it would be impossible to detach her person from this dependent status: there would always be a possibility that she felt a 'duty' to die. In short, a 'death with dignity' would be a duty and responsibility for particular kinds of persons: those 'dependents' who would burden others (Sprung et al, 1997; Corlett, 2001); the law is simply acting benevolently to protect us from this prospect: the law is protecting particular kinds of persons.

With these previous arguments in mind, this particular logic that law asserts suggests that: a) anyone appealing for the right to die has possibly been coerced into this appeal on the basis that they have internalized social norms of what life counts and what life does not (thus they have appealed for their own subjection on the basis of social pressure); and/or b) if assisted dying were to be legalized those

subjects deemed to be lacking a life worth living would inevitably be terminated or at least would face this possibility.

Law is not Benevolent: How Law Reinforces Social Norms

While the law might claim to act as a benevolent paternal force, arguably its discussions of assisted dying do not attend to the root of the problem, which is the relation that has been constructed in society between indignity and dependency. As noted already in this chapter, one of the central problems appears to be that subjects are fixed in particular kinds of ways on the basis of being a proper appellant for death. The person who ought to seek death is the person who is a dependent. The problem, therefore, is that certain persons are labeled as abject because they are dependents. One finds support for this claim in the wording of legal cases on assisted dying. Law is only able to act 'benevolently' with its problematic paternalism precisely because it plays a role in fixing subjects as dependents and as abject.

Categories of Persons in Assisted Dying Cases

As noted earlier, the constitution of types of person is invariably linked to the political rationality of governance (Rose, 1999). Different political rationalities will legitimate different distinctions between persons based on the values the rationality advances (Pavlich, 2013). For instance, in Pavlich's (2013) research on distinctions of persons at the Cape of Good Hope, governance under sovereignty politics rationalized a different distinction of persons to that of contemporary

political rationalities. In our case, as noted earlier, in the contemporary society the abject person is the one who cannot ascribe to the neoliberal ethos of reciprocal independence: the abject person is the dependent person (Biggs & Powell, 2001; Townsend, 1981; Walker, 1982; Powell, 2001; Phillipson, 1998).

The law requires that it is possible to fix particular kinds of persons into categories because it renders these persons as the objects of law "visible and calculable" (Foucault, 1976; see also Pavlich, 2013; Naffine, 2009). Law can then act on subjects in a universalizing way given that their identities are constituted as fixed (Campbell, 2005). The constitution of the dependent subject— particularly *how one is framed as a dependent*— is a way of fixing subjects into a particular category. Dependency, as noted, is labeled negatively from a social perspective because it is not fitting with a neoliberal society that values relations of reciprocal independence whereby persons live privately and refrain from interfering with or obligating one another (Fine, 2005). Constituting subjects we deem as (or who claim to be) dependent fixes these people as abject.

Indeed, most scholars writing on assisted dying note that appellants and those who would be directly affected by legal reform regarding assisted dying fall into three 'categories' or 'types of person' as Esposito (2012a, 2012b) would note: those who experience a terminal illness; those who experience a disability; and those who are considered elderly, as noted above. Sometimes these categories are even used synonymously, which for some scholars such as those involved in critical

disability studies poses its own set of challenges (Tremain, 2005). In each of these three identity categories, subjects are framed as 'vulnerable' and degenerate on the basis that their 'person' is articulated as being at a stage in life in which their life might be perceived by themselves and others as unqualified or not worth living precisely because it is dependent on others (Hiranandani, 2005).

In its response to assisted death, the law then claims to act as a benevolent sovereign force: it refuses assisted death claiming that one could not know whether an appellant seeking a death with dignity was instead coerced into this death. Because of the appellant's dependent, vulnerable personhood (universalized and fixed by law), the law cannot allow the prospect of assisted death and generates the legal fiction of the immune person, as the subject requiring law's protection, and the immune society as the secure society (as noted in the previous chapter five) that is also protected from havoc should the law not protect its vulnerable persons.

The association between an appeal to die and a duty to die does two things. First it relies on the abject status of the appellant to depersonalize their claim – their life is unqualified and dependent, so they cannot make a free decision (it would be impossible because their life is already bound with/to others). This legitimates the law's paternalism and the law's constitution of appellants as vulnerable, and it also legitimates the law's constitution of the other who would help assist death or support the appeal to death as an enemy, thus feeding the legal fiction of the

immune person in an immune society who must be protected from outside interference. By fixing its object as a particular kind of person (a degenerate who is dependent), the law is able to reject the appellant's own assertion of sovereignty and its own immune person and immune society fiction whereby the appellant claims to protect loved ones from their own burden, in favor of a fiction of an immune society that protects appellants from themselves, and also protects appellants from those they would otherwise trust. The law overrides the appeals with an assertion of its own legal fictions that claims to protect particular kinds of subjects.

This logic of law becomes even more apparent when we examine the wording of legal cases where appeals to death are denied on the basis that persons are not deemed degenerate 'enough'. Fixing subject positions and conforming to social norms about what life is worthy of death and what life is not based on this connection between the concept of dependency to indignity also allows the law to limit those who might seek death who do not conform to the proper subjectivity. Take for example the case of *Re E (Medical Treatment: Anorexia)* [2012] EWHC 1639 (COP). In the case of *Re E* the appellant, E, a 32-year-old woman, attempted to exercise her right to refuse treatment for anorexia nervosa. E was not appealing to an assisted death; she was simply committing what some might call a slow suicide through self-starvation. Yet arguably she was not the right kind of subject to die: though she was being supported in a hospice and was dependent on others and on machines, she was also a potentially healthy subject who could be restored

to health: her case was not 'hopeless.' Because she was not a proper subject in the sense that the court deemed she was not terminally ill, disabled, or elderly, the law came up with a different rationale for making her live. Her case even cited a precedent in which the law had allowed a subject, Ms B, the right to refuse life sustaining treatment (a right that has been set as a precedent since *Bland*) on the basis that Ms B in *Ms B v An NHS Hospital Trust* [2002] EWHC 429 (Fam) had been paralyzed by a sudden illness and was left "dependent on mechanical ventilation and total nursing care." The case noted Ms B "…chose to refuse continued life support despite retaining full mental abilities and having a substantial expectation of life. Her decision was upheld by the court, and she died)". Despite discussing this case it did not set a precedent for E. That it did not set a precedent is telling: Ms B was a proper subject of death; E was not.

While the case of E might stir complaints because it is not a case on assisted death, arguably it is precisely because of this that it is telling for the narrative unfolding in this chapter regarding the concept of dependency. The law does not interfere in death when the subject, like Ms B, is dependent on others and onto society such that he or she will never have a hope of regaining any independence and becoming 'normal'; in contrast, E's case shows how law claims to protect some subjects by virtue of the prospect of being restored to this normal status. Retuning to our assisted dying cases, the law does not claim that the appellants are not 'proper' subjects: it does not refuse them an assisted death simply because dependency is, or ought to be, an acceptable social virtue and that we ought to, as

a society, try to change the way we relate to one another. Rather, the law simply avoids the discussion of the norm of life that it takes for granted that labels some life worthy and other life unworthy as a matter of who is dependent and who can live independently; instead, as explained in chapter four with reference to Bland, law focuses on the act of killing as that which would cause the alleged problem. In doing so it avoids the larger social problem and a discussion of social norms that place limits on what life counts and therefore also places limits on how we can relate to one another. We are simply to take for granted the 'fact' that a dependent life that can never be restored to an independent life is an undignified one. Focusing on a difference between acts of killing conceals these underlying norms that allow such differentiations between acts to be made.

One could also call upon the instance in Belgium in 2013-2014 in which the Senate passed the controversial prospect that children might be able to seek assisted death: the prospect that children might desire their own death has caused much controversy, even if said children possibly fall into the 'acceptable' categories of being terminally ill and/or disabled. Likewise, the case of the Belgium twins, Marc and Eddy Verbessen, elicited much media coverage on the basis that they were born deaf and sought euthanasia together as they were becoming progressively blind. A number of media sources speculated whether they were 'disabled enough';[40] their case appeared to invoke less sympathy and popular support than appeals from subjects who seemingly fit the 'appropriate' criteria to die such as appeals from frail, elderly persons, or from those who are

confined to a wheelchair. Caution with regard to this particular narrative that seeks to regulate assisted dying on the basis of being a 'proper' subject of the right to die is therefore important.

The case of *Re E* also shows us not only how the appellants articulate their subject positions, but also how the law tends to fix these positions and reaffirm the prospect that certain subjects are suitable for death, while others are not. In the English and Canadian cases of assisted dying that were analyzed it became clear that the problem was not that the law deemed the subjects unsuitable for death (they were the right kind of subject – i.e. disabled, terminally ill); rather, the problem was that the law simply could not rationalize the act that would complete these subject's death because it would contradict its own legal fictions that were reflections of a neoliberal ethos.

One might object that the above claim is a bold one. How could one know that the law views the appellants as the 'right kind of subjects' for assisted death? Likewise how could one know that the law denies the prospect of assisted death not on the basis of some appellants being the wrong kind of subject but instead because the act itself is not complicit with the legal fictions law projects? If one recalls the arguments put forth in chapter three of this thesis one can note a defense to this claim. Chapter three showed how the law used the abject subjectivities of appellants in order to 'fix' them as vulnerable subjects. The law claimed that they were vulnerable, even when they demanded that they were not

(i.e. in the case of Nicklinson): the appellants in the cases examined were the right kind of subjects for assisted death, so much so that they need protecting from its very prospect. Indeed, this brings us full circle to the paradox that the appellants themselves are presented with: by fixing themselves as the right kind of subjects (i.e. claiming the right to die on the basis of their dependent status, which allowed the law to fix them as vulnerable— even if they then try and deny this subject position by working against it and claiming a personalization for themselves as discussed above), they have already fed the legal fiction of the immune person that allows law to deny them the prospect of assisted death.

While the law claims to be benevolent by protecting these dependents, instead, arguably, law helps create and reify the very problem: legal discussions and decisions on assisted dying continue to fix the appellants as particular kinds of people (elderly, disabled, or terminally ill) who are all dependents and thereby undignified (i.e. persons who burden or obligate others). While the law might deny assisted death it does not challenge the social norms that allow indignity to get attached to dependency that construct particular kinds of subjects who are seeking assisted death as the proper subjects of such death. This means to suggest that the law does not challenge the social norms, such as the 'fact' that certain kinds of people are legitimate in their appeals to death, which is shaped by the larger negative connotation of being a dependent in a society defined by an independent ethos; instead, the law simply, at present, shows a concern regarding the act of killing itself (i.e. how one gets rid of these dependents). It is this latter

aspect of assisted dying appeals that does not comport with the overall legal fictions of the immune person and immune society and would thereby contradict the neoliberal ethos.

Neoliberal Law's Paradox of Assisted Dying

In short, and to bring this chapter to a close, the law's denial of assisted dying seems to be paradoxical: given that the law reflects the values of a neoliberal ethos, albeit by effect rather than design, much like chapter four had argued, it would seem logical to let abject subjects be killed via assisted death; it might feed a legal fiction of the neoliberal immune community that seeks to rid itself of dependents who interfere with the immune persons of those comprising the immune society. This is so given that what life counts or is 'qualified' in the good neoliberal society is the life that can live independently and can contribute to the larger immune society by sustaining itself in a reciprocally independent relation with others.

However, this chapter like others has argued that one must look beyond the *ratio decidendi* and examine law as a discourse tied to the neoliberal rationality of governance. When one does this one finds that concepts emerge that feed legal fictions sustaining this rationality of governance. These legal fictions are both particularizing and universalizing and are based around a logic of protection of the bounded individual immune person who is part of a larger community of immune persons. The neoliberal ethos is one grounded in a simultaneous desire to

rid the immune society of burdens, yet cannot rid these burdens in overt ways that would contradict its protective, particularizing logic. At base, while allowing the deaths of those deemed dependent might be beneficial to the neoliberal ethos, one could argue that the law simply has not yet found a way to rationalize some kinds of assisted deaths within this immunizing logic. Chapter four of this thesis also drew this conclusion through an analysis of the concept of inviolability of persons. Chapter four argued that the law made a differentiation between acts and omissions, or killing and letting die; it did so to rationalize some deaths through a logic of non-interference that could feed and sustain the legal fictions of immune persons and immune society complicit with a neoliberal ethos. One might claim similarly that the law has not yet found a way to rationalize other forms of assisted deaths in the same way. This chapter on dependency has argued that those who are deemed more dependent are suitable subjects for assisted death, and those who can live independently do not conform to the same kind of acceptable stance. The law operates more and more as a norm, legitimating certain requests on the basis of their being at least the right kind of subject; however, refusing them because at present there is no 'decent' moral way to get rid of them that would not otherwise contradict the rationality itself. This ought to trouble us: if assisted death were to be rationalized, we ought to be concerned precisely how this rationalization would occur, particularly if it were in accordance with the reciprocally divisive ethos of neoliberalism (as chapter four on *Bland*, for instance, highlighted).

Conclusion

This chapter has considered how the concept of dependency emerges in both appeals to assisted death and in legal decisions to deny assisted death. It has argued that the concept of dependency feeds the legal fictions of the immune person as a subject who desires a freedom from dependent relations, complicit with a larger neoliberal ethos that is grounded in an idea that the good society is the society in which all subjects are immune from one another, bound simply by their reciprocal non-interference with one another. The law operates as a discourse and as a technology of neoliberal political rationality that makes decisions in line with its political ethos that is progressively forging a society that relishes in individualism, non-interference, and privatization. A neoliberal ethos supports and encourages relations between subjects that are increasingly immune from one another. The chapter has also argued that the law claims to act as a benevolent sovereign in its protection of subjects from this neoliberal ethos: it claims to protect subjects from the internalization of social norms that render some lives less valuable than others on the basis of their being more dependent. Law denies assisted death on the basis that it claims to protect vulnerable subjects, much like chapter three argued, from the 'slippery slope' that would lead to vulnerable subjects being killed by those who deem them a burden. The law thus feeds a legal fiction of an immune person whom it protects from outside interference.

The chapter also argued that, while law appears to act benevolently, it actually instead serves to fix subject positions and uses these fixed subject positions to deny assisted death. Law does not challenge social norms that construct certain persons (e.g., elderly, disabled, terminally ill) as dependents and therefore as the proper appellants for assisted death; instead law fixes these subjects as the right kind of subjects for assisted death and therefore as inevitably vulnerable to outside interference. This is a problem because the law does not then challenge the idea that some lives are more worthy than others, but rather confirms this idea and then claims to protect unworthy life from the interference of outsiders based on its legal fictions. Recalling chapter four that considered the concept of inviolability, this lack of deconstruction of social norms that fix subjects as particular kinds of persons ought to concern us; chapter four showed us how the law is able to differentiate between kinds of lives that it deems worthy and unworthy by creating distinctions of 'acts', some of which are not deemed complicit with its fiction of the immune person (active killing), and some of which are said to be complicit (such as withdrawal of care). The law seems to operate as a norm; it does not overtly make distinctions between qualified and unqualified life so much as it instead makes these distinctions more subtly with reference to a concept of inviolability shared by all, but that can be used to rationalize the death of some it deems unqualified and not others. The law reflects the ethos of neoliberalism because it maintains the legal fictions of immune persons and immune society that such an ethos requires. Because the law operates as a norm that reflects a neoliberal ethos, this means to suggest that the law might

not have yet found ways to get rid of some of its dependent subjects like those appealing for assisted death in ways that conform to the neoliberal ethos, but this does not mean such a prospect might not be possible in the future.

My intent here is neither to claim that assisted dying as a practice is necessarily good nor bad *per se*; rather, the intent is to show the ways that the law's decisions on this practice reflect wider power knowledge relations that are deeply bound to a particularizing and universalizing logic based on the reciprocal protection of individual life. At present, laws decisions that deny assisted dying do nothing to challenge what appears to be the core problem which, as this chapter has argued, is that society does not value relations of dependence. Devaluing relations of dependence means that particular subjects who might be regarded as interfering with the freedom of others by way of being a dependent on these others can be constructed as a vulnerable subjects and the right kind of subject for assisted death. It also means conversely that if one does not conform to being this particular kind of person one is alternatively not the right kind of subject for assisted death, which, as the chapter has argued, is constraining for others who might seek death.

The argument advanced is that if a neoliberal ethos is one that attempts to completely immunize us from relations of dependence, a more 'affirmative' political ethos would open itself up to the prospect that dependent relations are not only necessary but are also inevitable: while we require the protection of

individual life to some degree, it seems that in the current era this protection of life has gone too far and risks falling into the very opposite: a destructive power that in its alleged protection actually risks this life (Esposito, 2008, 2011). The wording of assisted dying legal appeals and the concepts law draws on to feed legal fictions that reflect a neoliberal, immunizing ethos reveals this problematic paternalism; it also reveals how this paternalism closes us off to other kinds of relations that the ethos of neoliberalism does not permit.

What follows in the concluding chapter is not only a summary of the key arguments presented throughout this thesis but also a deeper exploration of what a different politics of assisted death might look like: how might one challenge the social norms that regard dependency in a negative light, and how might one ensure that appeals themselves and the laws that deny them consider assisted death in ways that perhaps undo the legal fictions of immune person and immune society that the previous chapters of the thesis have argued are fed through various concepts that close subjects off from one another?

CONCLUSION

Three Theses for an Affirmative Politics of Assisted Dying

Introduction

The opening pages of this thesis described the problem of assisted dying as a problem of community: our current political rationality of neoliberalism emphasizes relations between subjects that are privative, independent, and divisive; neoliberal subjects are encouraged to seek a life that is free from obligation toward others and from others; neoliberal subjects are immunized subjects (Esposito, 2008, 2011). I have argued that law operates as a discourse and technology of this neoliberal governance. An analysis of assisted dying legal cases from England and Canada, two western neoliberal counties, revealed this point. I undertook an extensive exegesis of these cases but also drew on cases from the United States and Ireland as supporting evidence. I also examined various political texts, Parliamentary Bills, and Task Force documents that have contributed to the building of the larger picture regarding how the law currently

treats assisted dying – ranging from practices of palliative sedation, passive euthanasia, physician assisted death, as well as voluntary active euthanasia. When the thesis examined the wording of legal cases on assisted dying in the context of its wider power-knowledge relations it argued that assisted dying laws, by effect rather than by design, reflected this larger neoliberal ethos: the discussions and decisions made in case law reflected a divisive, privatizing rationality. While focusing on law's decisions, I also considered how appellants express their appeals to assisted death. In particular, I have argued that these appeals themselves reflect a larger neoliberal ethos: appellants, for instance, articulated desires for personal security; some like Nicklinson denied vulnerability; others like Rodriguez claimed to be rational and autonomous, able to make decisions free from the coercion of others; and subjects articulated a desire to be free from relations that they argued rendered them dependent on others. Both the law that denied assisted death and the appellants who sought it framed their positions within this divisive, closed and privative logic.

My interest in the question and prospect of community and my concern regarding how law operates as a mechanism that seems to reinforce neoliberal dissociations from community led me to focus on the pastoral logic underpinning legal cases. I was interested in how legal cases developed concepts, as noted above, that seemed to feed legal fictions that overlapped with the pastoral mode of governance directed at the one and the many, or the particular and the universal. I noted, drawing on Foucault (2003), that a neoliberal ethos emphasized

increasingly closed off and privative subjectivities shaped in accordance with the governance of the whole community. The preceding chapters have shown, in various ways, how legal decisions drew on various concepts that fed legal fictions, reflecting the individualizing and totalizing tendencies of the neoliberal rationality. Chapter three emphasized the concepts of enmity and vulnerability; chapter four examined the concept of inviolability; chapter five considered the concept of security; and chapter six discussed the concept of dependency. Each chapter argued that the concepts expressed in legal cases fed the two interrelated legal fictions of the 'immune person' and the 'immune society'. My analysis revealed how the fiction of the immune person reflected the particularizing tendency of neoliberalism that sought to maintain borders around particular subjects who were to be divided from one another; it also revealed how the fiction of the immune society reflected the universalizing feature of neoliberalism, which emphasized a totality of reciprocally dissociated persons. I argued that the 'ideal' neoliberal society, if brought to fruition, would be a society in which subjects are as closed off as they can possibly be from one another such that subjects can live with as much freedom from interference and from obligation as possible. I called this, following Oliva (2006), the reciprocally dissociative society. The legal fiction of the former immune person was constructed in assisted dying legal cases through various concepts (e.g., enmity, vulnerability, inviolability, security, and dependency) in order to present the idea that individuals are private, sovereign, independent selves who are dissociated from others. The legal fiction of the latter immune society was constructed simultaneously as a totality of immune persons

that sometimes required protecting from the immune persons themselves who might otherwise threaten the totality (e.g. in the case of security, enmity, and dependency).

Together the chapters indicate how legal fictions emerge from a neo-liberal politics. However, I noted from the onset of the thesis that law is not simply a conduit of this politics; rather, law is socially shaped and has the potential to create a new kind of politics. "Law is dependent on the powers that exist outside it and…these powers are themselves dependent upon the law," write Golder & Fitzpatrick (2009, p. 71). Law is mutable and responsive. Where this thesis shows how the law through appeals to the 'right to die' operates as a mutable conduit for a neoliberal ethos, this concluding chapter turns to the potential responsiveness of law. Drawing from and summarizing the main points raised of the thesis, it alludes to the possibility of articulating an 'affirmative' politics of assisted dying. Three key theses can be drawn from the previous analysis to help devise such an affirmative politics of assisted death.

What is an Affirmative Politics?

My image of an affirmative politics is indebted to Esposito's (2008) thesis on an affirmative biopolitics noted in the first chapter. As should now be evident, my thesis has examined law as a discourse and technology of governance that enunciates legal fictions driven by a political rationality demanding increasing immunization. As noted before, in exploring the pastoral logic underpinning

assisted dying case law, I have examined how law closes subjects off from one another in ways that were both particularizing and totalizing. I argued that law as a discourse and technology of neoliberalism presents a problematic paternalism over subjects that claims to protect individual legal subjects whilst at the same time dividing all subjects from one another in line with a pastoral logic of unity grounded in division.

In contrast, my affirmative politics highlights three key points that I will state plainly before elaborating upon them. I have argued throughout the thesis that legal practices around assisted dying, at present, comply with social norms. Thus, the first point of call for an affirmative politics is to act as a practice of critique of these norms. I will argue that case law would shift from being a conduit of social norms toward a practice of critique through the construction of case law as a space of dialogue and critical thought, that will manifest in a more innovative use of precedent to reshape the existing limiting social norms. Second, I conclude that, at present, the law and appeals themselves serve to fix subjects in a personal, privatized logic; in contrast, an affirmative politics will find and create ways to treat subjects within cases, and also treat the cases themselves, as relationally constituted and thereby never fixed or knowable. Case law will become a space that does not replace norms with new ones but will seek to revalue and proliferate norms. Learning from the conclusions drawn in this thesis, this affirmative space of law will not only arise through new precedent, but also will arise through the refusal to fix subjects (appellants, as well as those would assist with death) as

certain kinds of subjects. Finally, where the pages of this thesis have shown how case law on assisted dying currently closes law off to change, an affirmative politics would treat law as continually open and responsive: the creation of new precedent on assisted death, and the multiplication of possible subjectivities within this space, would ask and require that that law remain open to new prospects. Like processes of immunization and communization, law is never complete but is always creating new ways of being in the world. What follows is a closer look at these 'three theses' on an affirmative politics of assisted death.

Thesis One: The Responsiveness of Law or Law as Critique

One might argue that the thesis has thus far presented a rather passive view of law. Arguably, my analysis supported this passive reading: the wording of legal cases and the ways that these cases drew on concepts to feed legal fictions that were enunciations of a neoliberal ethos demonstrated that the law has done little to challenge the social norms that undergird the legal cases and feed the legal decisions.

The various chapters of the thesis also made it clear how the law operates as a social norm rather than as a practice of critique. Chapter three argued that the law invoked concepts of vulnerability and enmity in ways that also did not challenge the norms that underpinned assisted dying requests. The law instead served to fix particular kinds of persons—those who are dependents and therefore hopeless by societies' standards— as 'vulnerable persons'. Like chapters three and six noted, fixing subjects as vulnerable and fixing other subjects as enemies who would

naturally want to kill these vulnerable subjects would they have the opportunity did not deconstruct the social norms that, in the first instance, label these persons as vulnerable. The law did not critique the norm; instead the law claimed to act as a benevolent sovereign power that would protect fixed abject persons, bringing the norm into being in law.

Chapter four, likewise, noted the same effect: the law ignored how norms of life underscored what life was seen to count as qualified and what life was simply abject; instead it found a way to let the latter abject subjects die through its differentiation between acts and omissions. The law did not challenge the idea that Bland's life, for instance, was of no value; nor did it challenge the idea that other appellants like Rodriguez's were of less value. It did not critique the social norm. Rather, it encompassed the norm within its decision when it allowed Bland's abject life to die in accordance with the larger neoliberal ethos of non-interference. The decision in *Bland* did not challenge the logic of non-interference, nor did it critique the prospect that the law was only deciding on Bland's life precisely because society's norms had declared it abject. Instead law concealed this norm in a decision to universalize all subjects under the alleged protection of law; law protected a social norm of non-interference even though this social norm was divisive.

Finally, the chapter on security showed how the law differentiated between positive obligations and liberty interests which allowed it to reinforce the 'fact'

that the good, normal society operates best when persons do not interfere with one another; when appellants claimed the right to security of their person, case law claimed that it operated for the good of society and was under no obligation to protect positive rights and freedoms that might interfere with the freedoms and rights of others. The cases suggest a distinction between a negative obligation to protect persons from interference, complicit with the neoliberal ethos of reciprocal dissociation, and a positive obligation that would require that law took steps to intervene in persons' lives that it argued did not comport with its logic.

Drawing attention to the concepts that emerge in legal cases on assisted dying and how these concepts feed legal fictions to enunciate a neoliberal ethos allows one to note how the law might operate differently. This thesis had indicated how legal fictions, *as fictions*, are not immutable truths; they are instead reflective of wider power-knowledge relations. Law operates as a particular discourse and technology in which these power-knowledge relations are realized. I also noted that one of the earlier scholars on legal fictions, Bentham, had said that we ought to 'demystify' law's fictions. I have claimed that as a discourse and political technology, law does not simply create fictions independent of social norms: these are not simply law's fictions, but rather they are socio-legal fictions because they feed an ethos that exists outside of law and that in turn permeates law. I have also argued that law is not simply a conduit of these socio-legal fictions but has the potential to reshape the fictions through changes in the operation of law. Given this, I will argue that an affirmative politics of assisted dying ought to demystify,

through law, socio-legal fictions. As a practice of critique the law would consider, as Pavlich (2001) – drawing on Foucault (1997) – how it might perpetually seek ways of "how not to be governed thus".

Expectations of Law

One might suggest that one ought not 'blame' law for its passivity. Why should one expect law to deconstruct social norms? At least at present one might argue that law is a product of neoliberalism and creates legal fictions on the basis of this rationality: it unwittingly (i.e. by effect) creates a neoliberal ethos through its concepts and legal fictions. In short, law is not divorced from the social norms it brings into effect (Golder & Fitzpatrick, 2009).

Despite the current passivity of law, this does not mean that law cannot take on a more critical role: law might indeed be a conduit of a political rationality, but law can also become a space for critique (Golder & Fitzpatrick, 2009). Law, and especially case law that is judge-made and spends time covering various positions on subject matter from witness statements, so-called 'experts', and even scholarly work on the topic, can provide a productive space to hold discussions about social norms (Valverde, 2003). Were law to be understood as a practice of social critique it could potentially deconstruct social norms (Golder & Fizpatrick, 2009). This then forms the first part of my affirmative politics: case law must become a practice of critique that plays an active role in deconstructing the social norms that bring appeals to bear and currently frame legal discussions and decisions. Cases

would not make decisions on the basis of a *ratio decidendi* but rather would consider appeals within the context of power-knowledge relations. For instance, the various chapters have shown how the law currently misses the opportunity to critique social norms. Instead, the chapters have shown how the law reinforces these norms through concepts and fictions that sustain a neoliberal ethos. This ethos is one that posits the good society as the reciprocally dissociative society.

Challenging Social Norms

By virtue of its method, my thesis has already demonstrated the type of critique that law might take on board. The last chapter of this thesis most readily emphasized law's ignorance to social norms that underpin assisted dying cases. I argued that the principle problem underpinning the question of assisted dying was the neoliberal ethos that perpetuated a social norm of independent, reciprocally dissociative relations between persons. Because of this social norm, subjects come to associate any form of dependency as a mode of degeneracy: being elderly, ill, or disabled is to be degenerate because one is a dependent and places obligations onto others who, by virtue of the neoliberal ethos, are encouraged to value a freedom from dependent relations. My analysis of assisted dying cases revealed that the law did not challenge these social norms that attached dependency to degeneracy but instead reinforced them through the creation of legal fictions of the immune person and immune society. These fictions allowed the law to reinforce social norms and emphasize how practices of assisted death would not comport with the norm of reciprocal dissociation. It also reinforced these norms

when it did not challenge their basic assumptions about what life was worth living and what life was not worth living but simply confirmed the 'fact' that some lives are dependent and hopeless, while others have the prospect of being independent and therefore not hopeless.

Innovations in Precedent

Second, in examining cases as playing into wider power-knowledge regimes, case law would not simply apply existing precedent as it currently does. Currently, precedent will be drawn on in an 'act of judgment' to apply a universal principle to a particular case (Baxter, 2012, p. 162), which then in turn legitimates law's use of concepts and fictions to rationalize and reinforce the tenets of this existing law. Conversely, critical case law would instead use the prospect of precedent to become a practice of critique (Lefebvre, 2005, 2008). Rather than allowing precedent to fix case law, one could argue that precedent poses a potential space for case law to be stretched. If *stare decisis* means to 'stand by things decided', as Lefebvre (2008) writes one could argue that "…the same points never occur exactly in litigation" (p. 171). For example, the assisted dying case of Gloria Taylor highlighted that Justice Lynn Smith was open to the prospect that the alleged precedent set in *Rodriguez* was not binding because it did not apply to Taylor's case. Justice Smith arguably, in Taylor's case, performed more as a Justice and less as a Judge: her extensive case opened space for political dialogue and she did not simply close the case with Rodriguez as *stare decisis* but rather challenged this case. She showed how law might respond more openly. While

Smith's decision to allow Taylor a constitutional exemption certainly presented a closure of sorts through the act of making a legal decision, her new treatment of Taylor's case arguably worked to proliferate the norms of assisted dying laws: she made possible a new affirmative space for the prospect of assisted death that had not previously existed.

Treating cases on an individual basis and allowing law to make decisions that are not bound by existing precedent but rather to make decisions based on the particularities of the case means that law can create more and more precedents: it means that law can multiply precedents. Arguably this is an example of an affirmative politics that could be used in instances of assisted dying. Thinking about law as a practice of critique that treats legal cases as particularities would allow law to innovate around questions of assisted dying rather than being bound to previous decisions (Lefebvre, 2005, 2008). This would multiply the prospects for the directions the law might take.

While Esposito (2008, 2013) does not speak directly to law in his affirmative biopolitics, he does speak to the multiplication of norms as part of this politics, which he calls more broadly a third person politics. Arguably the proliferation of legal norms through case law setting more and more precedents from the particularities of each case is one example of such a third person politics.

Second Thesis: Law as a Third Person Politics

The first person politics refers to the pronunciation of 'I' that divides one from another; likewise, the second person, 'you,' like the first person, is reversibly also an 'I' in relation to oneself (Esposito, 2012a, p. 105). A politics that is critical of the first and second person notes how appeals to death and the law that denies them in accordance with social norms of life currently relies on divisions between subjects. An affirmative politics, practiced through law as critique, cannot rely on this division between I and you, self and other.

A Critique of 'Rights'

Law as a third person politics breaks down these binaries between self and other that is shored up through 'rights' appeals which assert and feed a legal fiction of an immune person divided from other immune persons. To break down these binaries between self and other that are embedded in a neoliberal ethos and therefore currently embedded in legal rights appeals as well as legal discussions and judgments, Esposito argues that a third person politics must recognize how the same shared being-in-relation constitutes 'I' and 'you': the third person is the absence of the subjective quality or the idea of personal identity. As he writes, "the only person that has a plural, even when it is in the singular—or rather, precisely because it is in the singular—is the third" – because it is a non-person and it is neither singular nor plural but both (2012a, p. 108).

Breaking down Binaries

To be in the third person or to act in the third person is to multiply the norm of life in such a way that it breaks down binaries between what is normal/abnormal, who is personalized/ depersonalized. Where legal decisions as well as rights appeals themselves currently reinforce divisions within subjects between the animal part and human part, and between subjects on the basis of being abnormal/degenerate and normal, those who are immune and those who are not, the multiplication of norms of life would break down such that all life would be respected in its singularity as life itself.

Law would no longer be an adversarial space that reconstructs positions of authority based on divisions between subjects; instead it would become a collective space of justice led by critical discussion rather than by formative persons. As with the judge who makes decisions and remains in the first and or second person (as a so-called interlocutor), appellants also remain in the first person through assisted dying appeals that are currently practices of rights. An appeal to a 'right to die' in the language of rights has a "private and privative character" (Esposito, 2013, p. 119); it closes us off from one another before we have even entered into a realm of discussion (Weil, 1986). Law as critique and as a third person politics would not speak in or respond to the language of rights. Instead, law would serve as a critical space where justices would listen carefully to appellants as well as those who object to various practices. In doing so law

would instead become a space for ‘critical requests’ rather than ‘appeals’ and ‘rights’.

Replacing Judges with Justices

If case law is also a third person it can no longer be regarded as judge-made law but rather is law as critique and the ‘judge’ is simply justice. Judges are first persons; one cannot be an interlocutor and be a third person. Persons of justice are third persons (Esposito, 2012a, p. 115). The justice would act as a critic and would hold account of all arguments and deconstruct these arguments. The justice would not present a judgment through the application of precedent but instead would create new precedents in a space of justice that responds to the particularities of cases that would embrace critical openings for law.

Multiplying Social Norms and Subject Positions

With case law as critique, the judges as figures of justice, and appellants as critical requestors, case law would deal with appeals to assisted death very differently. I have already noted how, when case law is opened up to deal with the particularities of cases, it means that the role of precedent can shift. A third person politics that tries to avoid the language of the personal would proliferate norms that make this attention to particularities a central issue. This could be done in several ways in assisted dying cases that responds to the main problems that the various chapters of this thesis have identified. For example, where chapters have noted that case law as it currently exists will endeavor to fix subject positions

such that it can apply universal principles to these subjects, as a practice of critique and a third person politics, case law would find ways not to fix subjects. Indeed, in opening up precedent and being critical of social norms that are entrenched in this precedent and in broader social issues brought to attention in the practice of law as critique, justices would aim to deal with the particularities of the case at hand.

Take, for example, the English case of Dianne Pretty. The judge was bound by *stare decisis* to apply *Bland*. Precedent argued that subjects could be 'let die' but that 'making die' was not a legal practice. Chapter four showed how the law then used the concept of inviolability of persons as a universalizing and particularizing tool to frame Pretty as a bordered subject whose body could not be violated by outside intrusion. The law fed the two legal fictions of the immune person and immune society that constituted Pretty in a relation of reciprocal dissociation, closed off from all other subjects through law's alleged benevolent paternalism. Her request for her husband to help her die was denied. Law as a third person politics would not blindly apply *Bland*. Not only would it recognise that the legal fictions created in Pretty's case that denied her the prospect of assistance in death did not treat her case on its own terms but also it would recognise that it did not deconstruct the ways that inviolability constrained and fed this pastoral logic of closure. One technique would be to ensure that subjects of assisted death are not fixed in particular ways. Deconstructing the link between Bland and Pretty, the law would show as chapter four did how these differences between acts and

omissions are sustained through fictions that are required for the universalizing possibility of law. If justice deals in particulars and not persons, justice cannot continue to fabricate fictions to sustain a truth that upholds divisive social norms.

In relation to Nicklinson's case discussed in chapter three on enmity and vulnerability, law would have to consider how it has already fixed others as necessary enemies of appellants before they have had a chance to act. The law as a third person politics has a responsibility to deconstruct the ways that concepts of enmity and vulnerability are invoked in law to feed a fiction of persons who require protecting and immunizing from one another. A critical law would consider other possibilities that in paying attention to the individual case would deconstruct this logic. One could argue that many of the loved ones who would help subjects die are not inevitably trying to 'get rid' of their family member who the law articulates as a burden and therefore as a necessary enemy (as with Fleming's case, discussed in chapters three and six); instead they could consider helping their loved ones die to be an act of love. In many instances, helping a loved one die is not a 'relief' of burden on the subject who is left behind; it is not an act that restores one to oneself as a whole appropriated being, but is a painful process. It might be better regarded as an expropriative act that takes one outside of one's self. Through the death of the other one does not become complete, returned to a whole that is immunized through the death of this other who was a burden; rather, one loses a part of oneself when one's loved one dies. Through the other's death one's self is expropriated (Bataille, 2000; Noys, 2000). One could

argue that 'compassionate killing' is possible not as a measure of restoring one's self, but as a measure of opening this self up to the other.[41]

The case of Rodriguez discussed in chapter six on dependency provides another example. Rodriguez vehemently claimed that she did not want to be a dependent subject and felt that the law that denied her assisted death depersonalized her. Requests to death on the basis of a relation between a subject position of dependency and the social norm that links dependency to degeneracy would be brought into discussion in a critical third person practice of law. The discussion, with the judge as justice, would consider how a request for an independent death is potentially a privatizing, personalizing appeal that feeds legal fictions of subjects who are reciprocally dissociated from one another. The justice would then engage in dialogue around whether the request for death might be framed differently such that it could detach degeneracy from an inevitable link with dependency. Justices might also consider how appeals to death might reinforce closures between requestors and others who would assist them based on social norms; however, it would also consider how assisted death may not reinforce these closures but could instead become the very promise of an openness to otherness. For instance, one might instead read the practice of assisted death as a more originary kind of dependency relation: the requestor who appeals to assisted death is the requestor who is placing himself or herself in an absolutely dependent relation in seeking death with the help of another. In this regard, a critical third person law would not simply close off assisted death as a practice; instead it

would ask how assisted death is also currently confined to a norm of division between persons as chapter three on enmity and vulnerability, and as chapter four on inviolability, chapter five on security, and as chapter six on dependency showed.

Law as a practice of critique and a third person realm of justice is to deconstruct the legal fictions that sustain these divisions, and to open law out to the prospect of other ways of considering assisted death. These other prospects cannot be limited by concepts that feed fictions invoking closures. Rather, we could consider how these concepts also invoke an openness to community. For instance, chapter three argued that law invoked the concept of vulnerability to frame particular kinds of subjects (requestors) as vulnerable to all others and to feed a legal fiction that rationalized the protection of these so called vulnerable persons. Chapter three also argued that a denial of this vulnerability is also not a solution; an affirmative politics would not simply deny vulnerability within a critical legal realm. Nicklinson's denial of vulnerability, for instance, was problematic because it invoked the same legal fiction of an immune person, albeit from a different vantage: it continued to be a privatizing, personalizing politics. Instead one might consider how, rather than limiting vulnerability, one could proliferate it as a concept.

Vulnerability cannot be attached to particular kinds of subjects; for example, as chapter six demonstrated, we should avoid associating dependency with

vulnerability. It reflects a wider neoliberal ethos that requires we be divided from one another as private subjects and therefore allows law to fix dependency and vulnerability as degenerate and abject because it apparently does not comport with this wider ethos. Working against the personalizing politics of a neoliberal ethos one might come to a more interconnected view of human lives that allows us to reframe vulnerability not as that which ought to distance us from one another (i.e., inevitably feed a legal fiction that closes us from one another) but rather considering how it might bring us together. The critical third person law would deconstruct the way concepts like vulnerability and dependency are used to shore up the limits of human relationships through the feeding of legal fictions that produce immune persons who are divided from one another. For instance, vulnerability might also be used to feed a fiction of a more open and relational politics. We might consider how each of us is vulnerable to one another and dependent on one another in a necessary way as part of our connectedness to one another (Butler, 2006; Olssen, 2010). Being vulnerable and dependent is not something we should remove ourselves from, but instead it is something that we all share in common as part of a web of connectedness (Butler, 2006; Olssen, 2010). The role of law as a third person politics is to open up these possibilities; it is not simply to close off decisions by way of concepts that feed legal fictions reflecting social norms but instead must consider how concepts could deconstruct these legal fictions and multiply social norms.

In multiplying social norms a critical third person space of law would refrain from fixing any possibility for assisted death within a particular subject position. It would not rationalize assisted death based on a personalizing politics at all but would find ways to open up politics to new rationales that were based on openings. One example might be that the law would treat requests to death from those who do not seem to be 'degenerate enough' in a different way. For example chapter six showed how the English law fixed E as the wrong kind of subject for death. The law cannot simply deny assisted death, nor can it legitimate it, on the basis of one's person: rather, the law would have to come up with a different kind of politics to consider this prospect. Allowing the assisted death of subjects who do not appear to properly conform to the closed subjectivities of appellants the law currently regards as the right kind of subjects (e.g., dependents with no hope for a normal neoliberal life as chapter six discussed) might deconstruct the intimate link between being an abject subject and desiring death.

Opening Up Who Can Assist with Death

In the same vein, the law must be open to the prospect that those who would assist in death cannot be fixed subjects either, and the law must respond to the prospect that not all persons who would take life are fixed. Taking cases as particularities, a critical third person space of law would try to expand and multiply the norm of who can be trusted. In being more open to these requests to death the law would also be required to be more open to the idea that people will help subjects die for benevolent reasons. Law ought not close off who can assist with death based on

being certain kinds of subjects (e.g., medical practitioners versus a family member). Rather, the law might be more particular and moderate requests on a case-by-case basis, considering not 'who' the assister is in terms of their credentials but 'what' the assister reveals in terms of their motivations to help (Arendt, 1958). This also requires that norms of assistance are not enforced such that particular persons are left with the duty to take life but that all persons can potentially assist with death if considered singularly within the critical realm of law.

This does not mean that law should never deny a request to death. A critical law will make a decision based on the particulars of each case. However, this decision, always as a closure, would also always be re-opened through a third person law as a practice of critique. My point is rather broader: law as a third person would open up legal cases as spaces of dialogue that not only proliferate norms via more diverse precedents based on the singularity of each legal case, but also would proliferate the subjectivities of those seeking assisted death and would offer to provide assisted death within its critical discussions; this would ensure that a critical law did not allow subjects to be fixed in categories such as vulnerable, enemies, degenerate, inviolable, or secure persons.

Third Thesis: An Affirmative Law is an Open, Risky Law

One might argue that this is a risky kind of affirmative politics of assisted death but this is precisely the point. Life is at base risky. The role of law as critique

would be to challenge the idea that law must invoke a problematic paternalism that serves as an inevitable closure; we do not need a law that grounds itself in such a negative view of humanity that allows it to rationalize its fictions of immune persons and an immune society that is required to protect us from one another. This closes off the potentials for how we can understand or interpret different ways that we act toward one another. For instance, chapter three showed how the law rationalized certain acts of killing because they comported with the logic of protection and closure (e.g., self defence and provocation) but did not recognise other acts that might be defined as compassionate.

A critical law of the third person cannot make subjects 'known' in advance: we are not inherently defensive, yet law's paternal stance and the neoliberal ethos it brings into effect, currently tell us otherwise. How are we ever going to learn to trust each other and live reciprocally and relationally if we are already always divided from one another through laws that fix us in particular ways, claiming to know our intentions before we even act? While risky, a critical politics that deconstructs this link between knowable subjects and law is one way that the law might be able to open up new prospects.

Arguably, law that risks life is a more compassionate law. It is a law that is open to other prospects and open to community in a way that immunizing tenets of law through legal fictions that claim to allow the law to act in problematically paternal ways do not. Jean-Luc Nancy, for instance, suggests that compassion is "…the

contagion, the contact of being-with one-another in…turmoil. Compassion is not altruism, nor is it identification; it is the disturbance of violent relatedness" (Nancy, 2000, p. xiii). In the case of laws dealing with critical requests for assisted death one could imagine compassion as the exposure to the violent relatedness in the *munus*—not that with which we identify and therefore selectively choose—but as *compearance* or being-with that asks us to open ourselves up to the other (Nancy, 1992). Perhaps, then, a politics of assisted dying is precisely that which takes us outside of ourselves, providing the very openings for a new ethics and politics of relationality.

In short, critical case law is to become less normative in this process and instead become the proliferator of, and proliferation of, norms. In turn, this allows case law to become a new realm of justice that is immanent. It slowly brings the norms of the outside (i.e. neoliberal political rationality) in and challenges this outside, changing it over time by proliferating norms, breaking down the fictions of immune persons and immune society that sustain a reciprocally dissociative society. A society that instead proliferates norms of life disrupts mechanisms of immunization and opens out to new prospects of community. It grants more possibility for people to detach themselves from norms on the basis that they can live in particular ways. As Esposito recognizes, the "maximum deconstruction" of the immunitary paradigm rests precisely on the prospect of creating "continually new norms" (p. 190). In turn, the hope would be that a critical law of the third person, as a space of dialogue that is always open, would start to have an

influence on the social conditions that exist outside of it. If law can act as a space that can deconstruct norms of society, and if this can slowly work to reorient how we think about our relations to one another and the centrality of our dependency, rather than trying to remove ourselves from it, requests to assisted death might very well decline over time.

Contributions to the Scholarly Field

This thesis contributes to several broad 'fields' of inquiry. First, its theoretical lens adds to the field of socio-legal studies. Few studies in this area have offered a sustained engagement with the philosophical thought of Esposito in relation to law that has underscored much of this thesis. Second, it adds to the socio-legal area in terms of its topic of study. Relatively few scholars from a critical legal or post-structural legal studies vantage have analyzed how legal decisions on assisted dying are shaped within broader power-knowledge relations. Vice versa, while other scholars had analyzed the topic of assisted dying from a governmental perspective they had ignored law as a central point of analysis (e.g., Tierney, 2006; Mihic, 2008). Others like Hanafin (1999, 2009) had analyzed assisted dying from a post-structural legal perspective, paying attention to legal cases in the context of power-knowledge relations, but had not considered the pastoral underpinnings to the logic of decision-making and therefore did not note the particularizing and universalizing aspects of legal decisions; this meant that the problem of community at the heart of cases had not yet been considered.

Main Findings

The thesis has identified several important issues regarding how the law deals with assisted dying appeals, and how assisted dying appeals themselves might be considered within the contemporary context. While it has not advocated for a renewed communitarianism per se (i.e. on the basis of a fixed idea of community), it has asked us to consider the various ways that assisted dying appeals at present seem to appear as an expression of—and indeed a problematic of – an increasingly individualizing society. In the current political moment we face a crisis of community. Appeals to assisted death seem to have emerged as a modern symptom of this crisis. In noting how appeals and legal decisions that deny assisted dying seem to contribute to this broader crisis through the concepts they draw on and the legal fictions that they feed, the thesis has also generated some prospects for other, more relational ways, of considering assisted death.

Pavlich (2005) identified a particular problem regarding the relation between law and community: the law operates on the basis of defining—indeed fixing—an absolute idea of 'community' and what community interests are; law assumes that the community as a totality has a shared set of interests and that law must protect these interests. Pavlich, Campbell and Esposito influenced my interest in providing a new associative lens on assisted death. They pointed not to community as a norm operating over life, but rather to practices such as law that might enable new openings up to human relationality. At base, Esposito's rich theoretical insight underscored this thesis. His work helps us consider how

governance mechanisms that centre on closing subjects – what he calls immunization of individual life, or what Campbell calls the defensive borders of the self—are intimately associated with the symbiotic affirmative prospect of opening up life back out to community. In considering this, the thesis has suggested that social values of reciprocity and dependency be emphasised through the proliferation of norms of life. I have argued that this can emerge in case law as a space for social change. Case law can become a space of dialogue that challenges social norms, multiply subjectivities, and creates new precedents based on the particularities of assisted dying cases.

Future Research

It would be difficult to define this thesis as 'complete'. In my own modest appraisal of the right to die appeals in case law it is likely that I have failed to attend to all the concepts (and possibly legal fictions) that others analyzing the same cases might invoke in their own analyses of the subject matter. Likewise, several areas of study warrant further attention for future research. While this thesis has exclusively focused on case law as its site of inquiry and has paid peripheral attention to voices emerging in other types of law, as well as policy and task force documents, and commentary perpetuated through the media, further study could consider these components in far more depth.

Likewise, the dissertation has considered neoliberalism as a backdrop and has drawn on it more so from the vantage of its philosophical underpinnings to focus

on how, as a political rationality, it operates on the basis of creating and sustaining divisions between proper subjects (i.e., the thesis has combined neoliberalism with Esposito's' notion of immunization). Further analysis might consider studying the neoliberal context in relation to law less from a philosophical vantage and more from an economic one to consider other potential associations between human capital and economic cost-benefit discussions concerning assisted dying.

Future studies might also consider a comparative analysis of case law in England and Canada with case law in other countries where assisted dying has been legalized. This might provide a way to consider what concepts and legal fictions are articulated in legal judgments that have allowed assisted death and whether or not these legal discourses also reflect a logic of neoliberalism that shores up human relational limits in other ways.

Still other work might consider deconstructing the historical legal exceptions to murder in other contexts that have allowed partial defences; this research might consider what concepts were drawn on and what legal fictions were fed that allowed the possibility of death. This might allow one to consider how assisted death might be opened up as a future partial defence. Finally, one might consider examining criminal law cases in which judgments on subjects who have assisted with the death of others have been judged accordingly in order to ask what

concepts and fictions emerge as part of this judgment. The prospects for studying this topic are extensive.

Closing Remarks

On the strength of the arguments developed throughout this thesis, and in consideration of the three theses on an affirmative politics of assisted dying outlined in this concluding chapter, one might conclude as Georges Bataille has emphasised: "Communication cannot proceed from one full and intact individual to another. It requires individuals whose separate existence in themselves is risked, placed at the limit of death and nothingness" (Bataille, cited in Esposito, 2010, p. 145-6). To bring this thesis to a close –without immunizing, that is, closing off, the conclusion itself— one might ask the following open question: based on the conclusions that have emerged throughout this thesis, to what extent could the prospect of assisted dying be regarded not as a necessary closure, framed through immunizing concepts and legal fictions as the appeals and the legal denial of these appeals seem to be currently wedded, but rather as an openness to otherness that being-with and dying-with invokes as *possibility*?

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Notes

[1] http://www.theguardian.com/uk/2012/sep/16/tony-nicklinson-lauren-daughter-euthanasia

[2] This differs to active involuntary euthanasia whereby the subject does not consent to death yet the appeal is made on the basis of a 'mercy' killing. A key Canadian case of Latimer represents this type of euthanasia, whereby a father killed his disabled daughter and appealed his case on the basis of compassion. See R V Latimer (2001), 193 D.L.R. (4th) 577 (Sup Ct Can).

[3] The thesis was complete prior to the passing of Bill 52 on June 5th 2014. One could debate the various aspects of this Bill in some detail. The wording of the Bill regarding 'end of life care' versus active forms of killing is interesting in the context of the larger thesis presented here. Unfortunately the Bill was passed after completion of the thesis and therefore such discussions cannot be included.

[4] While there appears to be more supplementary material than primary source material (i.e. seventeen versus twelve cases) this is not strictly so: the secondary material is largely comprised of series of appeals from cases such as Terry Schiavo which, alone, comprises five of these legal cases. Likewise, these cases are drawn on as supplementary material. They were mainly analyzed when other English and Canadian cases drew on them as points of reference. They therefore rounded off the scholarly range rather than providing a key point of analysis.

[5] While England and Canada's right to die legal cases did not emerge until later in the early 1990s, the also-neoliberal United States witnessed the emergence of the first 'modern' right to die legal battle of *Re Quinlan* in 1975 (Lavi, 2008).

[6] One might consider the varying context between the United States where families have been known to suffer tremendous debt from medical costs, versus countries such as England and Canada where perhaps the financial burden is less important (though the alleged 'social' or 'emotional' burden might be argued to be equivalent (e.g., Mihic, 2008).

[7] BBC News, 2004: http://news.bbc.co.uk/2/hi/uk_news/4090463.stm

[8] The living will/advance directive was an active declaration designed to ensure that fully competent persons could choose how they wanted to be treated should a time have arisen that they became ill and unable to articulate their own choices (Samuels, 1996).

[9] For instance, arguably Foucault (1999) emphasizes the material dimension more so in the *History of Sexuality*. In his later work he seems to almost replace the importance of biopolitics with an emphasis on its rootedness in pastoral power and the notion of governmentality (e.g., Foucault 2003, 2009).

[10] See Rose (1993). He argues, for example, that neoliberalism's importance is not associated with its "status as a political philosophy" (1993, p. 294). Rather, neoliberalism is important because of its "capacity to associate itself with certain key elements of an alternative formula of rule, a set of strategies for governing in an 'advanced liberal' way" (1993, p. 294).

[11] See Brown, W. (2003). "Neo-liberalism and the End of Liberal Democracy," *Theory & Event*, paragraph 38. There are no page numbers for this piece.

[12] One might draw a parallel here to Jacques Derrida's notion of the gift, which he understands as an impossible kind of giving (e.g., Weir, 2013). The gift cannot be returned because as soon as the other gives back or owes me, or even is grateful for or recognises a gift, what I have given him or her "there will not have been a gift"; rather, the gift becomes a matter of economic exchange. "It is perhaps in this sense that the gift is the impossible. Not impossible but *the* impossible" (Derrida, 1994, p. 7).

[13] In his discussion of immunity and community, Esposito (2008, 2010, 2011, 2013) regards the former as the creation of the 'proper', while the latter is defined as 'improper'. Esposito therefore explains that community understood through the concept of *munus* is not based on or forged through something proper that is shared – for example community is not defined by a shared origin of where one comes from, or a shared identity, or the instance that we all 'have' a body. All of these things or shared attributes would be something 'proper' that defines community.

[14] A scholarly book on Esposito and law is due to be released later in 2014. One cannot yet access this text. See Langford, P. (forthcoming). *Law, Community and the Political*. Routledge Press.

[15] I have also published two pieces of work that analyses Esposito's work in relation to assisted death, drawn from elements of this thesis: see Hardes (2013), Hardes (2014).

[16] Hunt and Wickham (1994), for instance, cite Foucault's work on governmentality, which notes that, "The instruments of government, instead of being laws, now come to be a range of multiform tactics. Within the perspective of government, *law is not what is important"* (p. 53, emphasis made by authors).

[17] Smith (2000), for instance, writes that "Expert knowledge occupies a privileged position in government and its essentially discretionary and norm–governed judgments infiltrate and colonise previous sites of power" (p. 283).

[18] Hardt, H.L.A. (1973). *Bentham and the demystification of the law*. Article accessed online at: http://onlinelibrary.wiley.com/store/10.1111/j.1468-2230.1973.tb01350.x/asset/j.1468-2230.1973.tb01350.x.pdf;jsessionid=95EC0472A5192BF10479842FD48A399F.f04t03?v=1&t=hvp3nf6y&s=4d0b7fc0fcb9883bc76606960dcfbddf148a5d09

[19] Arguably this search for truth is what differentiates an ideological reading of law from a Foucaultian one.

[20] I have published part of this argument in: Hardes, J. (2014). Biopolitics and the Enemy: On Law, Rights and Proper Subjects, *Law, Culture and Humanities*, Published online before print. doi: 10.1177/1743872114524879

[21] This quote was accessed online: see Roberto Esposito, Community and Nihilism, *Cosmos and History: The Journal of Natural and Social Philosophy*, 5(1), accessed online April 2nd, 2013, at: http://cosmosandhistory.org/index.php/journal/article/view/124/234. See also Roberto Esposito, "Appendix Nihilism and Community" in *Communitas,* 2010. Here he offers a different variation on the quote: "Community is the "'with', the

'between', and the threshold where they meet in a point of contact that brings them into relation with others to the degree to which it separates them from themselves…the being of community is the interval of difference, the spacing that brings us into relation with others in a common non-belonging, in this loss of what is proper that never adds up to a common 'good'" (p. 139).

[22] An affirmative biopolitics would not 'get rid' of immunization per se; rather that conceiving of immunization as forged through a fixed war-like figure of enmity, it would conceive of immunity constructs as those forged through any and each relation with others that constitutes our own being and another on the basis of this fluid relationality that is the very ontological condition of our existence (that makes being immune and being common possible).

[23] In the United States, the difference between passive and active means of ending life is allegedly rooted in seminal cases such as *Glucksberg* and *Quill*.

[24] The thesis focuses on appeals in case law only. It does not examine criminal cases whereby subjects have already performed or attempted to perform practices of euthanasia, PAS, or mercy killing and are subject to prosecution for these acts.

[25] See also Patrick Hanafin, 'The Embryonic Sovereign Meets the Biological Citizen: The Biopolitics of Reproductive Rights'. Accessed online, February 4th at: http://backdoorbroadcasting.net/2011/11/patrick-hanafin-the-embryonic-sovereign-meets-the-biological-citizen-the-biopolitics-of-reproductive-rights/, (Birkbeck: University of London, November 2011).

[26] Some aspects of this chapter including the details of Nicklinson's case and the analogy made between dueling, *Re A,* and relations of enmity have been published

in *Societies* journal. See Jennifer Hardes (2013), Fear, Sovereignty and the Right to Die.

[27] For Agamben (1998) this juridico-medical complex was especially prevalent—indeed, it culminated— in Nazi Germany whereby medical practitioners themselves suggested Nazism's euthanizing techniques and played a key role in administering them through policies such as T4, which euthanized persons with disabilities and others deemed 'degenerate'. Esposito also writes of this direct involvement of physicians in the atrocities of Nazi Germany, whereby they participated in "all of the phases of mass homicide…No step in the production of death escaped medical verification" (2008, p. 113). Recalling the legal disposition of Victor Brack who was head of the Reich's Euthanasia Department's, Esposito further posits that only physicians "had the right to inject phenol into the heart of victims or to open the gas valve" (2008, p. 113).

Despite Agamben's contention that this integration of medicine and law is a relatively modern issue that reached its apex when physicians administered death on behalf of the Nazi state, one might note that such medical involvement with law and state affairs regarding death has occurred for centuries. The role of medicine in disseminating death on the part of the state, and making use of state-killed subjects for medical advancement, has a long and callous history. By way of example, we can note the integration of medicine, death, and state law in England, prior to the 1800s. For instance, commencing during the reign of Henry VIII, the British Barbers and Surgeons were granted the use of four dead criminal

bodies per year for anatomical dissection. Into the late 1700s and early 1800s, a growing medical demand for cadavers could not be sustained through the use of criminal corpses alone. Medicine became deeply embedded with crime, which culminated in the 1828 Burke and Hare scandal. Doctor Robert Knox of Edinburgh Medical Academy had purchased 16 corpses of persons who had been murdered. Until this point, it had chiefly been the robbing of bodies from graveyards that had provided physicians with such additional cadavers (e.g., Frank, 1976; Marshall, 1995).

The use of cadavers for medical purposes was also a key instance of the juridico-medical apparatus that Foucault notes in *The Birth of the Clinic*, which cultivated a normalizing society through medicine. For example, particular to the role of anatomy in the 18th-19th Centuries was the link that anatomical dissection practices came to have with both pathology (hence its link to normalization), and the political economy—both of which were inscribed in the new emerging political rationalities of liberalism. For example, as a solution to the need for more cadavers, as well as a solution to the need for decreased government allocation of resources for the poor population in Britain, the use of the deceased bodies of poor persons for cadavers was put forth, which in turn legitimated the passing of the Anatomy Act (1832) and Poor Law Amendment Act (1934). Ruth Richardson (1987) suggests that these legal acts entangled medicine and law, generating the possibility for more bodies to become part of medical advancement by opening up the use of the dead bodies of the poor for dissection. One could argue that the law

sought not only to profane the dead body for medical advancement but also operated as an enunciation of a political rationality that demanded a way to govern the poor through techniques of discipline, by endeavoring to make persons take responsibility for their own welfare and therefore their own death.

Medicine was not only linked to law through anatomical dissection post-punishment but was actively involved and implicated in the history of a legal exception to homicide: the death penalty. It was indeed physicians who invented some of the more 'humane' systems of capital punishment. For instance, the Irish doctor Reverend Dr. Samuel Haughton aided with the refinement of hanging via the long drop in the 1860s (see Haughton, 1866); Joseph-Ignace Guillotin, a French physician and anti-capital punishment protester, invented the guillotine in 1789 out of the desire for quicker and less painful deaths (Miles, 2006); and the Medico-Legal Society of New York was consulted on the design of the electric chair in 1888 America (Brandon, 1999). Further, we can draw attention to the contemporary role of doctors consulted and implicated globally in various forms of torture including the infamous war on terror (Miles, 2006; Jesper, 2008). Despite this varied history of the interrelation between medicine and state politics, for Singer and others who do not consider such social histories, it seems that medicine remains nonpartisan. Politics has no bearing – nor should it— on the determination of the quality of one's life and the medical decisions made on this basis; this perspective is upheld regardless of the historical trajectory within

which one can speculate that medical decisions and actions might not prove completely neutral or innocent.

[28] Before this security of persons appeared in Canadian law in the Canadian Bill of Rights in 1960 that acknowledged "the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law."[28] However this was this Bill of Rights was statutory and not part of the Canadian constitution.

[29] As Denike (2000) writes, typically the principles of fundamental justice are enacted in line with the social norms that favor the 'masculine', 'liberal, abstract, universalist rule' (p. 153).

[30] According to Esposito (2008), one can consider the concept of liberty in its originary etymological meaning in association with the concept of the *munus.* From Esposito's etymological vantage, he noted that the concept of liberty [*libertates*] that we find in the munus or the space of reciprocal obligation referred to an "increase, a non-closing" (2008, p. 70). Its "original affirmative connotation," was thus one that could be articulated as being expansive; liberty united members of community in a sharedness of being (2008, p. 70).

[31] *Rees v United Kingdom* (1986) 9 EHRR 56, paragraph 37 of its judgment at pp. 63-64 stated the following:

> In determining whether or not a positive obligation exists, regard must be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual, the search for which balance is inherent in the whole of the Convention. In striking this balance the aims mentioned in the second paragraph of Article 8 may be of a certain relevance, although this provision refers in terms only to

> 'interferences' with the right protected by the first paragraph - in other words is concerned with the negative obligations flowing therefrom.

[32] The full quote is here:

> The appellant argues that, by prohibiting anyone from assisting her to end her life when her illness has rendered her incapable of terminating her life without such assistance, by threat of criminal sanction, s. 241(b) deprives her of both her liberty and her security of the person. The appellant asserts that her application is based upon (a) the right to live her remaining life with the inherent dignity of a human person, (b) the right to control what happens to her body while she is living, and (c) the right to be free from governmental interference in making fundamental personal decisions concerning the terminal stages of her life. The first two of these asserted rights can be seen to invoke both liberty and security of the person; the latter is more closely associated with only the liberty interest (para. 124).

[33] While we do see that communities of care are often forged despite this imperative not to interfere with the other, these care communities tend to replicate an instance of a 'proper community' in that they allow us to determine who to respond to, rather than being reciprocally bound to respond to all others. One might consider here Derrida's (1995) caution whereby when one chooses to respond to an ethical demand there are a number of others one is equally *not* responding to. Thus, the ethical demand is immunized such that it forms the self *and* other through immunity (or sets up the host/hostis relation) (Derrida, 2000). In this sense, immunization makes it possible to justify attempts to care for family (should we choose to do so), or forge social care communities, which are also oftentimes exclusionary. We might open this discussion up further to consider who receives care, for instance.

[34] The colloquial phrase has become part of the widespread liberal battle against current law that precludes this legal right to die. One of the earliest uses of this phrase amidst the right to die debates was found in Oregon's Death With Dignity

Act passed in 1997. The phrase has since made its way into Canada's Bill C-384, which encompassed the concept, entitled: *An Act to Amend the Criminal Code (right to die with dignity)*, 2nd Sess., 40th Parl., introduced in the House of Commons in May 2009. Quebec's *Dying with Dignity Report* in 2012 has been followed by its most recent Bill 52, tabled in June 2013, *An Act Respecting End of Life Care*, which also notes in its first line that the purpose of the bill is to ensure end of life care that is "respectful of….dignity and … autonomy and to recognize the primacy of wishes expressed freely and clearly with respect to end-of-life care". Moreover, it might be no surprise that Switzerland's national euthanasia clinic is termed 'Dignitas', the term from which dignity is a derivative.

[35] From a definitional and etymological standpoint, the term dignity is most broadly akin to honour and respect. In Latin it translates as *amplitudo*, denoting greatness and grandeur, and as noted above it is a derivative of the Roman word *dignitas*, meaning 'authority' or 'charisma.' Indeed this seems to be how we arrive at the word dignitary, meaning someone of rank. Thomas Hobbes had a similar conception of dignity, which he equated with power. For him, dignity was something personal and it indicated that one had value. Someone with charisma, who could persuade persons of his or her worth, had dignity. This reference to charisma is particularly interesting when considering Esposito's genealogy of the dispositif of the person, whereby he describes the charisma of the person as "a gift" (2012b, p. 22). In his essay *Enough of Self*, Campbell also speaks to this concept whereby he notes that this term charisma derives from the Greek Kharisma, meaning a divine "gift of grace" (2012, p. 38). For Max Weber, too,

charisma is considered that which separates particular individuals from ordinary persons. Campbell suggests that this uptake of Kharisma is biopolitically important, particularly when considered as a secularized concept in a neoliberal era. He posits: "The first layer of thanatopolitics in contemporary biopower will be found in the separation that the dispositif enacts over man and in particular in separating what properly and improperly belongs to him as a person thanks to neoliberalism's appropriation of grace" (2012, p. 39).

What is particularly interesting about Campbell's note regarding charisma is its link to grace and to the constitution of the proper subject. Indeed, dignity is a concept that we often find used in religious rhetoric that links dignity to the grace of god, and also to the proper subject par excellence: the sovereign. In *The Kings Two Bodies*, Kantorowicz notes this relation between dignity, grace and sovereignty. The dignity of the King is embedded in the declaration *dignitas non moritur*, meaning "the dignity does not die" (Kantorowicz, 1997, p. 386). Bestowed with the grace of god, or being god incarnate, the King's body represented a gift from grace—he was a dignitary; his body was sacred. At the same time, his body was also a terrestrial body—it was material, which made him human like all others. The King was god and man, species and individual. As Kantorowicz says, "The concept of a Dignitas in which species and individual coincided, naturally brought into focus two different aspects of dignitary himself —his 'dual personality'" (Kantorowicz 1957, p. 395). Theology links the dignity of God to the dignity of the sovereign, and therefore also to the dignity of

humankind found in Christian humanism. This theological conception of dignity, as that bestowed upon sovereignty by grace, is therefore also bestowed upon the sovereignty of individual persons who comprise the body of the king and are thought, as *imagio dei,* to be made in the image of god.

This conception of dignity has particularly informed far right Christian attitudes toward the person, such as those found in the most contemporary Personhood Movements across US states such as Oklahoma and North Dakota. These movements claim that they are operating on the basis of all persons based on the notion that humanity is made in the image of god. They use strategies based on historical differentiations between persons in order to legitimate their Christian position. For example, one of their rhetorical strategies is to draw an analogy between the historic depersonalization of slaves and the contemporary depersonalization of the fetus. On this basis, one of the principal arguments found lacing their website as well as news articles is the contention that historically slaves were not considered persons, and as such there is a need to continue with moral human progress by respecting that humans, from conception, are lives in need of protection. For instance, the site calls on the 1858 Virginia Supreme Court quote that stated: "In the eyes of the law…the slave is not a person". This is used as part of a civilizing discourse to rationalize an extension of personhood in our contemporary time to other marginalized non-persons, which according to Personhood USA includes the fetus. This appeal to personalization is grounded in theological conceptions of the person. One article appearing on the Personhood

USA homepage includes a quote from Abraham Lincoln in his 1858 speech against slavery in Lewistown, Illinois, stating "Nothing stamped in the divine image was sent into this world to be trod on".

According to Jeremy Waldron (2009) writing in his Tanner Lectures, scholarly thought has typically given dignity two different meanings. On the one hand dignity refers to this universal conception of the extension of rights to life to all human beings, as found in the theological conceptions above, as well as the secularized conceptions of dignity found in human rights discourse. On the other hand Waldron notes that dignity has been pursued purely with reference to aristocratic notions of honor or worth, whereby dignity is only accorded to elite or higher up members of society. This seems to be the kind of account we see in reference to the Greek notion of Kharisma as well as that account that Weber speaks of. We might argue that both of these positions seem to be somewhat fitting, given that 'who' counts as a member of this inclusive human society seems to shift. James Whitman (2003), for instance, suggests that, as a legal concept, universal conceptions of dignity are typically regarded to have emerged since post-World War II Germany in response to hierarchical conceptions of dignity found to be inherent in fascism. On this account he notes that dignity was utilized as a type of universalizing strategy to protect persons from the kinds of hierarchized divisions accorded on account of personhood and the types of qualifications of life. However, Whitman also notes that contrary to this popular belief, the concept of dignity had not only been long been in play legally—as well

as during the Nazi occupation itself—but even more insidiously we saw within the occupation the same kinds of universalizing attempts regarding dignity that we see in the post war response to Nazism. On this reading, he notes that Nazism utilized these two conceptual accounts of dignity (aristocratic and universal) synonymously in efforts to extend the aristocratic account of dignity to all humans. As we also know well, and as was discussed in the previous chapter, given the Nazi differentiation between persons, we can conjecture that the account of 'dignity' for 'all' was, like quality, based on a subjective belief about whose life counted as part of the 'universal'. Nazism did not consider itself to be hierarchically differentiating persons on the basis of dignity because those who were exempt from dignity were also exempt from personhood on all counts. One could not be hierarchized on the basis of something that one was not considered a part.

[36] It is also ironic that subjects appeal to 'assisted death' to assert their sovereignty when the notion of assistance in death reinforces the relationality of the act of assistance itself that also serves to deconstruct this sovereignty.

[37] One might also, however, consider on the basis of human capital, that individuals as Campbell suggests "harvest their own biopower" – the governance of the self under neoliberalism somewhat maps onto the ethics of self-care that Foucault imagined (2011, p. 73). While Campbell is cautious that an ethics or affirmative biopolitics does not "do the bidding of neoliberalism" we might imagine that Foucault's later work was an attempt to think about how an ethics of self-care might evolve out of the contemporary rationality of governance that

treats said subjects as human capital whereby their value is based on their productivity as individuals. Or, at the very least, an affirmative politics must bear this in mind and consider a relational way of constituting an ethics of the self from within the very social conditions one finds oneself. It would be paralyzing to think that we could not do 'anything' because any movement would result in a claim of mere subjection.

[38] See, for example, Nancy Cruzan case. Economic cost is not discussed in English, Canadian or Irish legal appeals.

[39] See text Final Exit. Some have argued for instance that end of life termination could lead to lower insurance premiums (Dickinson, 1996, p. 107).

[40] See, for example, CBC News article: http://www.cbc.ca/news/world/death-of-twin-brothers-fuels-debate-over-belgian-euthanasia-law-1.1334860

[41] In terms of the prospect of what right to die advocates often call "compassionate killing", this would involve a re-thinking of compassion not as that which reifies divisions between subjects based on a 'pity' for the other that depersonalizes this other and asserts our own proper status over this other, as Hannah Arendt's (1990) reading of compassion would entail. From Arendt's vantage, for example, compassion is that which is "stricken with the suffering of someone else as though it were contagious" (p. 75). Compassion keeps that other at a distance and is a vice of politics because it undermines solidarity and the prospect of political action. It does so because it is private and guided by our sentiments (Arendt, 1990; Kateb, 1984; Berlant, 2004). Indeed this is akin to Judith Butler's (2004) point noted in chapter two, which is to suggest that

compassion like the western liberal notion of vulnerability (that she wants to expand) is 'selective' whereby we only help those who are in 'proximity' to us. An affirmative politics of assisted dying grounded in compassion could not only respond to those of our choosing, in private, which would in turn allow us to remain closed off: this notion of compassion encourages us to remain in the first and second personal politics. Indeed one could note the very way that 'conservative compassion' under the guise of liberal discourse often uses discourses of compassion to exert its own domination over other subjects (Butler & Athanasiou, 2013; Newcombe, 2007). One could interpret compassion as a dominant discourse that merely coincides with the neoliberal belief that persons are acting from a good moral vantage in killing their 'loved' ones, when perhaps this disguises the way that we noted in previous chapters how individuals are part of a broader operation of power and internalization of this power: people believe they are being compassionate and acting benevolently, but at the same time are also articulating an inherent violence by reinforcing proper relational statuses (killing out of compassion in such a way that acts as a closure between subjects rather than as an opening). For instance, a subject might kill their loved one on the basis that the loved one wants to die independently and without burden; this might be interpreted then as a compassionate killing that reifies the immune community proper by reasserting divisions between subjects where neither subject is exposing themselves to an outside but is instead hypostatizing the already forged immune divisions. An affirmative politics of assisted dying would, like Nancy asserts, see

compassion as something that exposes us to risk rather than that which feeds legal fictions of immune persons and an immune society.