Carter v. Canada: Nonreligion in the Context of Physician-Assisted Dying

Cory Steele

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Department of Classics and Religious Studies
Faculty of Arts
University of Ottawa

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Abstract

In 2015, the Supreme Court of Canada ruled in the *Carter* decision that the prohibitions against physician-assisted dying, as outlined in section 241(b) of the *Criminal Code of Canada*, were unconstitutional as they violated an individual's s.7 rights as outlined in the *Canadian Charter of Rights and Freedoms*. Though the jurisprudence of this landmark decision and subsequent amendments to Canadian law are interesting in and of themselves, what is particularly interesting about *Carter* is the framework within which physician-assisted dying is conceptualized. The Court shifts from a religiously informed framework for conceptualizing assisted suicide to a non-religious conceptualization of physician-assisted dying. Given that there remains much to be explored about nonreligion, this thesis asks: how is 'nonreligion' constructed by law in relation to physician-assisted dying in Canada? Since the *Carter* decision is not explicitly about religion or nonreligion the analysis in this thesis maps how the concepts life, death, and morality are reconceptualized. The analysis reveals that nonreligion is a phenomenon that is absent of the transcendent and is instead given positive content through a focus on autonomy. The conceptualization of nonreligion as presented in this thesis contributes to the literature that emphasizes that nonreligion is both positive and meaningful and not simply deficit terminology.

Keywords: Carter, nonreligion, nonreligious, religious nones, religion, religion and law, nonreligion and law, physician-assisted dying, medical assistance in dying.

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Introduction

It was a hot, humid summer's day in late May 2016 in the nation's capital, Ottawa. My mum and I were patiently waiting for our taxi to take us to the airport to catch our flight to Frankfurt, Germany for a weekend getaway. The rest of our family were out of the country, so we decided we deserved some adventure too—one such perk of having a dad who is a pilot. Little did I know, however, that although this hot summer's day was the beginning of a mini-European adventure, it also marked the beginning of my graduate studies. This was the day that I entered into the abyss of nonreligion.

It all started as I was sitting in the departure lounge in the Ottawa Macdonald-Cartier International Airport. I was waiting to board Air Canada flight 838, a seasonal route with direct service from Ottawa, Canada to Frankfurt am Main International Airport in Frankfurt, Germany. Despite the overwhelming background noise of excited travellers; the chirping of birds who had found refuge inside the terminal in the rafters overhead gate 14; and the endless public announcements advising Smith, party of two, that this was their final boarding call, I was still able to hear the distinct chime my phone made, notifying me of the arrival of a new email (not as distinct, or obnoxious I might add, as America Online's classic "you've got mail" notification that plagued the online community in the mid-to-late nineties). I pulled my phone out of my pocket, swiped the screen, and entered the code to unlock the device. I had one new email from Dr. Lori G. Beaman—my future supervisor. I opened the email and, to my surprise, Dr. Beaman had offered me summer employment researching nonreligion. Without hesitating, I quickly responded to Dr. Beaman's email advising her that I would be thrilled to research nonreligion, whatever that was, and that I would contact her as soon as I returned to Ottawa. As I slipped my phone back into my pocket I couldn't help but think what Dr. Beaman meant by the term 'nonreligion'. What was it that I was going to be researching? Surely it must just be a fancy way to refer to phenomena that are without religion. The 'secular' I thought, I'll be researching the secular.

My response to Dr. Beaman's email would have a profound influence on the direction of my research interests as a graduate student. Initially interested in religion and politics, I had planned to delve deeper into if and/or how religion could legitimize political power. Dr. Beaman, however, had asked me to help assist her with her 'interveners' project—a project aimed at analyzing nonreligion in the context of landmark Canadian legal decisions. I was asked to analyze the 2015 Supreme Court of Canada decision related to physician-assisted dying: *Carter*

v. Canada (Attorney General).[1] I was to sift through the Court decision, as well as all of the associated legal submissions by interested parties known as interveners, for instances of nonreligion and religion and report back to Dr. Beaman with my findings. The interveners project fostered my growing interest in nonreligion and has ultimately laid the foundation for this thesis.

This thesis borrows from and builds on, portions of the framework I developed while working on the *Carter* decision for Dr. Beaman. This thesis contributes original research to the study of nonreligion by examining how this concept is rendered, in the context of physician-assisted dying, by Canadian law.[2] Although this thesis engages with Canadian case law it is by no means a *legal* analysis of the *Carter* decision. I am not a lawyer and have no formal legal training, so I do not possess the appropriate tools required to provide a legal analysis of this, or any other court decision.

What this thesis *is* about is nonreligion and, by extension, religion. Although the jurisprudence of the *Carter* decision may be interesting, as a religious studies scholar I am far more concerned with how nonreligion and religion are constructed by law. Inherent in this approach is the notion that society and social institutions construct elements of social life. By this I mean that nonreligion and religion are themselves the result of discourse and social interactions. Discourse is not merely neutral and transparent, but rather constructs the reality in which we live (Wetherell et al. 2001; Carabine 2001; Beckford 2003; Fairclough 2010).[3] Consequently, this analysis seeks to examine how nonreligion is constructed in *Carter* and is

[1] *Carter v. Canada (Attorney General),* 2015 SCC 5, [2015] 1 S.C.R. 331. Hereafter referred to as "*Carter*".
[2] This thesis emphasizes primarily how *Canadian law* conceptualizes *nonreligion*.
[3] I am not suggesting that religion only exists as a social construct thereby denying the existence of the possibility that religion is *sui generis*—in fact, I very much want to leave this possibility open to consideration. In this thesis I am not focused on answering truth claims, so I will not be touching on religion as a pre-constructed entity outside the realm of, as James Beckford (2003) describes, human culture. I simply want to acknowledge that religion is a very real category to some people and to deny the existence of religion as something other than a social construct, detracts from the value of the beliefs of these people.

therefore a *socio-legal* analysis. Nonreligion for the purposes of this thesis refers to phenomena that are not religious but instead are understood in relation to religion. In short, a shift from religion to nonreligion, as I argue throughout this thesis, stipulates that the transcendent is removed and replaced by the immanent self.

Carter v. Canada (Attorney General)

> *On a day like any other in the summer of 2009, Gloria Taylor, a sixty-one-year-old postal worker; residential care worker; and health advocate, who resided in the quiet, picturesque town of Westbank, British Columbia, just south of Kelowna, awoke and began her day like any other. Gloria's day was to be filled with what she enjoyed most in life: motorcycles; her family; and her friends. She looked forward to a motorcycle ride along the shores of the Okanagan Lake followed by a dinner with friends and family. This day, however, was different than most—Gloria noticed a tingling sensation in her fingertips Not thinking much of it at first, Gloria became distracted by the continued presence and persistence of the tingling throughout the week and decided it was best to perhaps contact her physician. Thought to be a pinched nerve at first, Gloria was sent for further testing to rule out anything more serious. Following her tests, Gloria was surprised when the doctor entered the examination room with a grim look on her face. The doctor sat down, paused, and looked into the concerned eyes behind the purple framed glasses Gloria was wearing. The doctor informed Gloria that she had Amyotrophic Lateral Sclerosis (ALS, often commonly referred to as Lou Gehrig's disease). Gloria was in shock as she left the physician's office, asking herself 'why me'? As the days progressed and she learned more about the disease, she knew that she did not want to endure the torture that the disease was almost certain to bring to her body. Gloria explained to those around her: "What I fear is a death that negates, as opposed to concludes, my life. I do not want to die slowly, piece by piece. I do not want to waste away unconscious in a hospital bed. I do not want to die wracked with pain" (Carter, at para. 12). Exploring the possibility that she could choose the time of her death, rather than allow the disease to slowly take away the activities that made her life meaningful, she discovered that it would be illegal for a medical care provider to assist her in dying peacefully at a time of her choosing. Gloria decided to spend the last year of her life fighting to change the law so that no one else would have to face such a cruel fate.*[4]

[4] This narrative was co-authored by both Lori Beaman and I for a paper presented at the annual conference of the Association for the Sociology of Religion in 2017. See Beaman and Steele (2017).

Gloria did not want to succumb to a painful and slow death but given the prohibitions on physician-assisted dying imposed by the *Canadian Criminal Code,*[5] the option to choose the time and place of how her life was to be concluded remained out of the question. Gloria knew "she would be unable to request a physician-assisted death when the time came [… and] this left her with what she described as the 'cruel choice' between killing herself while she was still physically capable of doing so, or giving up the ability to exercise any control over the manner and timing of her death" (*Carter,* at para. 13). Unable to mediate this suffering by choosing the time of her own death Gloria challenged the constitutionality of the *Criminal Code* before the British Columbia Supreme Court.[6] The trial judge of the British Columbia Supreme Court declared that "the prohibition [was] unconstitutional, granted a one-year suspension of invalidity, and provided Ms. Taylor with a constitutional exemption for use during the one-year period of the suspension" (*Carter,* at para. 32). Gloria died without accessing this exemption prior to the Crown's appeal of the British Columbia Supreme Court's decision.

The Crown appealed the decision, which was then heard by the British Columbia Court of Appeal.[7] The majority of the Court of Appeal concluded that "neither the change in legislative

[5] Section 241(b) of the *Criminal Code*, which relates to counselling or aiding suicide. Section 241 (R.S., 1985, c. C-46, s. 241; R.S., 1985, c. 27 (1st Supp.), s. 7) read as follows:

> Every one who
> - (a) counsels a person to commit suicide, or
> - (b) 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.

[6] *Carter v. Canada (Attorney General)*, 2012 BCSC 886. Gloria was joined by Lee Carter (the daughter of Kathleen Carter who used the services of DIGNITAS, an assisted-dying clinic), Hollis Johnson (who helped Lee and Kathleen Carter), Dr. William Shoichet (a physician from British Columbia), and the British Columbia Civil Liberties Association in challenging the constitutionality of these prohibitions.

[7] *Carter v. Canada (Attorney General),* British Columbia Court of Appeal, 2013 BCCA 435, 51 B.C.L.R. (5th) 213.

and social facts nor the new legal issues relied on by the trial judge, permitted a departure from *Rodriguez*[8]" (*Carter,* at para. 34). The Court of Appeal overturned the trial decision.

The case was then appealed to the Supreme Court of Canada by Carter et al. The case was heard by the Supreme Court on October 15th, 2014 and the judgment rendered on February 6th, 2015. The appellants argued that the prohibitions against physician-assisted dying infringed their rights as protected by section 7 (the right to life, liberty, and security of the person)[9] and section 15 (equal treatment by and under the law)[10] of the *Canadian Charter of Rights and Freedoms* (*Charter*). After careful analysis, the Court concluded that:

> the prohibition on physician-assisted dying infringes the right to life, liberty and security of Ms. Taylor and of persons in her position, and that it does so in a manner that is overbroad and thus is not in accordance with the principles of fundamental justice. (*Carter*, at para. 56)

The Court ruled, unanimously,[11] that:

> Section 241 (b) and s. 14 of the *Criminal Code* unjustifiably infringe[d] s. 7 of the *Charter* and are of no force or effect to the extent that they prohibit physician-assisted death for a competent adult person who (1) clearly consents to the termination of life and (2) has a grievous and irremediable medical condition (including an illness, disease or disability) that causes enduring suffering that is intolerable to the individual in the circumstances of his or her condition. (*Carter*, at para. 147)

The Court, however, suspended this declaration of invalidity for a period of 12 months to allow Parliament, provincial legislatures, and various medical associations to devise an appropriate regulatory response.[12]

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[8] *Rodriguez v. British Columbia (Attorney General),* [1993] 3 S.C.R. 519. Hereinafter "*Rodriguez*". It was in this case the Supreme Court of Canada had previously ruled on this same issue, that the *Criminal Code* did not infringed an individual's *Charter* rights.

[9] Section 7 of the constitution reads: "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" (*Constitution Act 1982,* section 7).

[10] Section 15(1) of the Constitution claims: "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability" (*Constitution Act 1982,* section 15, subsection 1).

[11] This stands in stark contrast to the split decision (5-4) in the *Rodriguez* decision.

The efforts of Gloria Taylor, as well as the other appellants, resulted in the decriminalization of physician-assisted dying in Canada. This provided a way for individuals, who did not wish to suffer as a result of a grievous medical condition, to choose the circumstances in which they would die. Canada became one of very few jurisdictions in the world that permit individual access to an intentionally hastened death.[13]

What is particularly interesting about the *Carter* case and one of the main reasons why I have chosen to make it the focus of this thesis, is that the decision is not primarily about religion.[14] *Carter* does not directly discuss, or address the regulation of religion in Canada, nor does it involve claims related to the infringement of freedom of religion as protected by section 2(*a*) of the *Charter*.[15] *Carter* is instead a case about equality rights. At first glance, the use of such a case to study nonreligion and religion, things that seem to be absent from this decision, may seem counter-intuitive. On closer scrutiny, *Carter* offers insight into how nonreligion and religion are navigated and intertwined in conversations about social issues of critical importance to Canadian society (such as physician-assisted dying) when conflicting social norms are at odds with one another. There are two social norms pertaining to physician-assisted dying that are highlighted in the *Carter* decision: one is grounded in religious ideology and the other in

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[12] Individual exemptions for access to physician-assisted dying were denied during this period of suspended validity: "We would not accede to the appellants' request to create a mechanism for exemptions during the period of suspended validity. In view of the fact that Ms. Taylor has now passed away and that none of the remaining litigants seeks a personal exemption, this is not a proper case for creating such an exemption mechanism" (*Carter,* at para. 129).

[13] These include Belgium, Germany, The Netherlands, Luxembourg, Switzerland, and Colombia to name a few (See Kennedy Institute of Ethics n.d.). In the United States, six states have legalized physician-assisted dying (California, Colorado, Hawaii, Oregon, Vermont, and Washington), and in Montana access to physician-assisted dying can be granted to an individual via court order. Physician-assisted dying is also legal in the District of Columbia (CNN 2018).

[14] The words 'religion' and 'religious' are only mentioned a total of 5 times throughout the entirety of the *Carter* decision and even in these instances religion is only referred to in the broad sense—e.g., as part of equality right as protected by section 15 of the *Charter.*

[15] For cases where the primary focus *is* religion, see: *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551, 2004 SCC 47 (Hereafter "*Amselem*"); *R. v. Big M Drug Mart Ltd.,* [1985] 1 S.C.R. 295 (Hereafter "*Big M Drug Mart*"); *Multani v. Commission scolaire Marguerite-Bourgeoys,* [2006] 1 S.C.R. 256, 2006 SCC 6 (Hereafter "*Multani*"); and *Mouvement laïque québécois v. Saguenay (City),* 2015 SCC 16, [2015] 2 S.C.R. 3 (Hereafter "*Saguenay*").

something that I am referring to as *nonreligion.*[16] When these two normative frameworks are in opposition to one another, as is the case in *Carter*, we see how their values are entangled with religious and nonreligious sentiments when one examines, not only the Court's decision, but also the interveners' submissions.

In the analysis that follows, I examine the concepts of life, death, and morality by those opposed to physician-assisted dying and those who favour physician-assisted dying to unearth how nonreligion is conceptualized. An analysis of these three concepts provides a way to disaggregate the bigger picture of physician-assisted dying to examine the many elements at play in how such an act is understood. Although nonreligion and religion may not appear to be important elements in the broader picture of physician-assisted dying, a deeper examination of *Carter* reveals, much like Stuart Chambers (2011a, 2011b) has argued in his research,[17] that nonreligion and religion play a role in how physician-assisted dying is understood. Social norms are often entangled with nonreligious and religious sentiments. An analysis of these conflicting social norms reveals that not only does religion still matter in contemporary Canadian society, but also how nonreligion and religion are conceptualized when issues that divide Canadians are brought before the law.

A Changing Religious Landscape

Whatever one may think about secularization,[18] religion continues to weave its way through the social fabric of not only Canadian society, but also of global society (Sandberg 2014). [19] Lori

[16] There is a strong correlation between those opposed to physician-assisted dying and religious ideologies as well as those favouring physician-assisted dying and *nonreligious* ideologies.
[17] Chambers did not focus on nonreligion, but rather religion. My analysis then differs in this regard.
[18] For proponents of secularization theory see: Martin (1978); Wilson (1985); Bruce (2011); and Zuckerman (2008). For opponents of secularization theory see: Berlinerblau (2012); Hadden (1987); and Stark and Finke (2000).
[19] One need only read the news daily to see that religion still maintains a position of prominence in headlines. See, for example: "B.C. judge rejects constitutional challenge of polygamy law" (Karstens-Smith 2018); "Niqab-wearing

Beaman (2008) quite rightly points out that religion matters again. When issues of critical importance are discussed in the public realm, especially in societies where religious polarization is underway,[20] religion is often a factor of influence. This is not to suggest that the population of individuals who identify as religious is increasing, but is instead intended to draw attention to the renewed political importance of religion and the increasing visibility of diverse religious beliefs in the public sphere and the various challenges this religious diversity poses (Habermas 2006).

Data suggest that the number of those who identify as belonging to a religion is on the decline. Globally, for example, in Australia those identifying as religious has declined by 9% since 2011 as in 2016 only 60% of Australians identified as religious (Australian Bureau of Statistics 2016, 2011). Similarly, those identifying as religious in the United States has declined from 83.1% in 2007 to 76.5% of Americans in 2014 (Pew Research Center 2015); and in the United Kingdom, religious individuals now account for less than 50% of the total population (Woodhead 2016).

The decline of religious identification is also evident in Canada. The most recent census data reported by Statistics Canada indicates that overall rates of religious affiliation have been in decline in Canada since the 1960s—religion is not making its way back into the lives of the everyday Canadian (Clarke and Macdonald 2017).[21] In 2001, for example, 83% of the Canadian population identified as religious. This figure has dropped 7% and now only 76% of Canadians identify as religious (Statistics Canada 2011, 2001a). Regardless of the declining levels of

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woman starts driver training school just for women" (CBC News 2018); Church of Scientology to launch TV network (The Guardian 2018a); and "Vatican magazine tells Catholic church to stop using nuns as cheap labour" (The Guardian 2018b).

[20] For a detailed discussion of religious polarization in the United States, the United Kingdom, and Canada see Wilkins-Laflamme (2014).

[21] Clarke and Macdonald (2017, 209) point out that 55% of the Canadian population are now de- or un-churched.

religious identification in Canada, Canada is still very much a religious country. It would be erroneous to assume, that like the Canadian state itself, Canadian society is secular.[22]

Despite declining rates of overall religiosity, particularly in Canada, the religious diversity within these populations is *increasing* because of higher levels of transnational migration. Waves of migration have drastically altered the religious composition of various countries throughout the world (Burchardt 2017; Vertovec 2007). Again, in Canada recent census data reveals that 3.2% of the Canadian population identify as Muslim; 1.5% as Hindu; 1.3% as Sikh; and 1.0% as Buddhist (Statistics Canada 2011). In comparison, in 2001, 1.9% of the Canadian population identified as Muslim; 1.0% as Hindu; 0.9% as Sikh; and 1.0% as Buddhist (Statistics Canada 2001b). Despite these other religious traditions increasing in Canadian society, Thiessen cautions that:

> Canada is not as religiously diverse as the media, the state, and even some academics would have us believe. As Christian identification, belief, and practice slides, it is not to other religions mainly (even though religious diversity is on the rise). Christianity is losing ground as religious nones rapidly increase […]. (2015, 7)

Nonetheless, as Canada's religious population steadily decreases the diversity within this group is increasing. Consequently, this religious diversity then poses various challenges to the religious and cultural heritage of established societies (in this instance Canada)—usually by way of attempting to incorporate religious minorities, which are often met with resistance (Burchardt 2017; Zubrzycki 2012; Schuh et al. 2012).

[22] Secular is a contested term hence my use of quotes. In this instance, it simply refers to being without religion. Also, Canada is arguably a Christian country as roughly 67% of Canadians identify as Christian. Only 9% of the total of religious Canadians belong to religious traditions other than Christianity (Statistics Canada 2011).

The Rise of the 'Nones'

Interestingly, and of importance to this thesis, in these same societies where religious affiliation continues to decline there has also emerged a growing number of individuals who identify themselves as having no religion.[23] In societies around the world, these populations are rather sizeable. For example: 24% of the population in Canada, compared to 7.3% in 1981 (Statistics Canada 2011, 2001a);[24] 30% of Australians compared to 19% in 2006 (Australian Bureau of Statistics 2017); 22.8% of Americans up from 7.5% in 1990 (Pew Research Center 2015; The National Survey of Religious Identification 1991); and 50% of the population of the United Kingdom, compared to 31.4% in 1983 (Woodhead 2016), now identify as nonreligious. Decreasing institutional religious affiliation and the increasing religious diversity coupled with an increasing number of those identifying as having no religion is part of what Beaman (2017a) refers to as a 'new diversity' that is emerging in societies throughout the world.[25] Cumulatively, this increasing religious diversity and growing nonreligious populations pose various challenges to the dominant norms, laws, and practices in society.

In the Canadian context, the issues raised by this changing religious diversity and growing nonreligious population has put new pressures on social institutions such as education, healthcare, and law to respond to the needs of an increasingly diverse constituency. The

[23] I use the terms 'no religion' and 'nonreligious' interchangeably in this thesis. However, not all nonreligious individuals identify as having no religion. Having no religion is but one manifestation of being nonreligious. Beyer et al., for example, point out that nonreligious Canadians often declare some "affinity with […] religion" (2016, 13). For the purposes of this thesis, when an organization or individual is categorized as nonreligious I am referring to an organization or individual who does not identify with a religion.

[24] Those identifying as having no religion are the fastest growing group of individuals in Canada when it comes to matters of 'faith' (Pew Research Center 2013).

[25] To Beaman (2017a), this new diversity also includes a focus on indigenous spiritualties. Other instances of diversity exist. Vertovec (2007), for example, refers to 'super-diversity'. He argues that "In the last decade the proliferation and mutually conditioning effects of additional variables shows that it is not enough to see diversity only in terms of ethnicity, as is regularly the case both in social science and the wider public sphere. Such additional variables include differential immigration statuses and their concomitant entitlements and restrictions of rights, divergent labour market experiences, discrete gender and age profiles, patterns of spatial distribution, and mixed local area responses by service providers and residents. Rarely are these factors described side by side. The interplay of these factors is what is meant here, in summary fashion, by the notion of 'super-diversity'" (2007, 1025).

conjunction of the declining numbers of religious individuals and the increasing numbers of nonreligious becomes salient precisely because religion still matters. Tensions exist between the religious and nonreligious as these groups often occupy opposing stances concerning issues brought about by this changing diversity.[26]

It is within the context of this new diversity and its sometimes polarizing effects that this thesis is situated. This thesis examines how constructs of nonreligion and religion vary as the religious composition of society changes—the results of this thesis are a snapshot in time. This thesis is guided by the following question: given the changing religious diversity of Canada and the increasing nonreligious population, how is 'nonreligion' constructed by law in relation to physician-assisted dying in Canada?

Canada's Cultural and Religious Heritage

Historically, Christianity and Canadian churches have exerted considerable influence in Canada. "[Churches] succeeded in making social, economic, political, and constitutional concerns a part of their spiritual project" which resulted in the depiction of Canada as a "fundamentally religious nation" (O'Toole 2000, 41). Prior to Confederation in 1867, there existed an "informal separation of church and state in which the influence of religion and politics was intensified by the absence of church establishment" (O'Toole 2000, 42). As a result, Christianity became an important factor in the expansion of the Canadian state and its economy (O'Toole 2000, 42). As

[26] These tensions are only exacerbated because if "social cleavages that used to exist between individuals of different Christian denominations are currently reforming along a more secular/religious divide, that divide could extend to other aspects of society and harbor the potential for social conflict"—social conflicts that I think are already taking place in key debates in Canadian society (Wilkins-Laflamme 2014, 304). See for example the Trinity Western University Law School (a Christian university) debate in which several law societies in Canada have refused to recognize the degrees of those who graduate from this university's law school because of its community covenant which requires students to "agree to abstain from, among other things, sexual relations outside of heterosexual marriage" (Hennig 2017).

Clark points out (1968, 168), Christianity was of such importance in Canada that there exist few western democracies in the world where it has been of such importance.

Canadian census data from the early 20th century demonstrates the overwhelmingly dominant Christian composition of Canada. In 1921, for example, over 95% of the Canadian population identified as belonging to one of the numerous Christian denominations (Dominion Bureau of Statistics 1921, 568).[27] Those who did not identify as Christian accounted for less than 5% of the total population. Only 0.0067% of the population identified as Agnostic, 0.012% of the population as Atheist, 0.013% as 'Free Thinkers', and 0.24% as explicitly having no religion (Dominion Bureau of Statistics 1921, 570).[28] Cumulatively, those who did not identify as being religious composed approximately 0.27% of the *total* Canadian population in 1921. The censuses of 1931 and 1941 echo the prominence of Christianity in Canada. Both censuses indicate that more than 95% of the Canadian population identified as Christian (Dominion Bureau of Statistics 1931, 1941). Much like the data from 1921, those who identified as having no religion,[29] in both 1931 and 1941, account for less than 1% of the total population of Canada (Dominion Bureau of Statistics 1931, 1941).

Some caution must be used citing these numbers. Canadian census results privileged mainstream Christian, especially Protestant, denominations until 1981 and so other smaller Protestant, and non-Protestant, denominations were not listed as independent forms of religious identification and were lumped into the 'other' category (Clarke and Macdonald 2017, 76).

[27] Christian groups listed on the 1921 census are: Adventists, Anglicans, Baptists, Congregationalists, Greek Church, Lutherans, Mennonites (including Hutterites), Methodists, Mormons, Presbyterians, Protestants, Roman Catholics, and the Salvation Army.

[28] The 1921 Census uses the categories Agnostics, Atheists, Free Thinkers, and No Religion as distinct markers of identity. As an interesting fact, there existed more Confucians in Canada in 1921 than those who did not have a religion (Dominion Bureau of Statistics 1921, 570).

[29] Unlike the census of 1921, the census of 1931 only had the category 'no religion' and had not sub-divided this into Agnostics, Atheists, and Free Thinkers. The census of 1941 did not have any of these categories and instead lumped those who identified as having 'no religion' into the 'other' category (see Dominion Bureau of Statistics 1941).

Further, the censuses prior to 1971 were not self-enumerated[30] and so individuals who claimed to have no religion may have been mis-categorized as having not stated their religion, thus underrepresenting the category no religion. Clarke and Macdonald note that "the general assumption of the [census] instructions was that most people were something and, moreover, that they did belong to a specific religious body. The guidelines therefore encouraged enumerators to elicit as specific an answer as possible [rather than 'no religion']" (2017, 227). It was only in 1971 following the introduction of 'no religion' as a choice on the census that 'no religion' "became not only an option that one could choose, it also became—and this is even more telling—an openly accepted option. So No Religion went from being a tiny minority […] made up of dissidents and freethinkers to a large segment of society who embraced a world view and identity that was equally valid to being Christian" (Clarke and Macdonald 2017, 227). In certain instances, then, the percentage of Canadians who identified as Christian and as having no religion in the statistics cited above is quite likely inaccurate (they are probably underrepresented). Given the high proportion of the Canadian public identifying as Christian, however, it should come as no surprise that religion (read, Christianity) has had, and continues to have, a significant impact on Canadian public life.[31] The Christian population, as well as the various Churches in Canada, have had a historical influence on Canadian social norms and contributed to the evolution of Canada into a constitutional "mixture of vestigial state confessionalism and religious denominationalism" (Egerton 2000, 92).

[30] The census in Canada switched to a self-selected survey design in 1971. Before 1971 enumerators would personally question respondents and fill out the forms (Clarke and Macdonald 2017, 164). See also Statistics Canada (2015).

[31] In Canada, for example, the preamble to the *Canadian Charter of Rights and Freedoms* references the supremacy of God, Christian prayers are still used to open Parliament, Christian religious groups are still prominent as interveners in Supreme Court of Canada decisions, and Christian symbols (i.e., the Crucifix) still hangs in the Quebec National Assembly (Beaman 2017a).

Politicizing Christianity in Canada

Recent enshrinements of Christianity in various Canadian laws and legislation highlight the overtly Christian nature and history of Canada as depicted by the overwhelming majority Christian population.[32] Despite the overall declining religiosity in Canada since the 1960s, Canada still remains a "decidedly Christian" state (O' Toole 2000, 45). Christian traditions and values not only dominate the religious identity of Canada (O'Toole 2000, 45; Simpson 1988, 351) but so too have they become staples in key Canadians laws and human rights related documents.[33] For example, a reference to 'God' was added to the national anthem of Canada in 1967 and was also named in the Diefenbaker Bill of Rights.[34] Further, David Seljak points out that Canadian society is "residually Christian" meaning that Canada "still bears the imprint of its Christian past, and consequently has not addressed Christian privilege sufficiently" (2012, 10). Canadian social institutions are structured similarly to their Christian equivalents and the social norms and values "about what is allowable, reasonable, desirable or extreme" in Canadian society are very much indebted to Christian values (Seljak 2012, 10).[35] As Clarke and Macdonald point out, "the Catholic Church and Canada's larger Protestant denominations […] were once the custodians of the nation's conscience and the arbiters of its values" (2017, 234).

[32] See Lyon and Van Die (2000) for discussions on the politicization of Christianity in Canada.
[33] For an excellent discussion of the possible future of religion in Canada see O'Toole (2000).
[34] The preamble to the *Bill of Rights,* 1961 states in part:

> The Parliament of Canada, affirming that the Canadian Nation is founded upon principles that acknowledge the supremacy of ***God***, the dignity and worth of the human person and the position of the family in a society of free men and free institutions […] (emphasis added)

[35] According to Seljak, "the controversies we see around religion in Canada today occur when members of various religious communities refuse to live by [liberal Protestant] norms. For instance, when they run afoul of generally accepted norms of gender equality by wearing a hijab on a soccer field, or when they expect their religion to play a role in public life, for example, by asking for state funding of Jewish day schools" (2012, 10).

The overtly Christian nature of Canada is perhaps more recently demonstrated by the preamble of the Canadian constitution.[36] The constitution opens with the words: "Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law" (*Constitution Act* 1982, part I).[37] With this reference to God in the constitution, Canada, at the time, joined "forty other states whose constitutions [made] explicit acknowledgement of God, Allah, or the Creator" (Egerton 2000, 90). At the time of writing this thesis, Canada is now one of 116 other states whose constitution include reference to God or other deities (Constitute 2018).[38] As a result, 'God' occupies a position of prominence in Canada's political and legal landscape.[39]

Although the inclusion of God in the constitution may at first hint at some form of religious establishment and the restriction of the rights of those belonging to minority religious/nonreligious groups, the reference to God in the preamble complements various rights as protected by the *Canadian Charter of Rights and Freedoms* (*Charter*) (Ryder 2005, 177). Ryder notes:

> The preamble's references to the 'supremacy of God' and the 'rule of law' express a form of reconciliation between the secular nature of the state and the importance of protecting religious belief and practice. They underline the fact that the state is secular and must be neutral between religions, but that it should also nurture and protect religious expression. In this way, there is a complementarity, not a conflict, in the preamble's reference to the 'supremacy of God,' the Charter's guarantees of religious freedom and equality, and the promotion of multiculturalism. The text of the Charter as a whole suggests that the Canadian state should aim to secure a religiously positive pluralism in an even handed

[36] Formally known as the *Constitution Act,* 1982.
[37] God was not included in the preamble of the Canadian constitution to re-establish the dominance of Christianity in Canada following its decline since the 1960s. Instead, the constitutional reference to God is purely political. Prime Minister Trudeau had opted to include reference to God as the result of "tactical political calculations" to maintain the political support of conservative Christian groups (Egerton 2000, 107).
[38] Interestingly, as of March 2018, 116 out of 192 constitutions analyzed by the Constitution Project refer to God or other deities. See Constitute (2018). This increase from the 40 at the time of publication of Egerton's (2000) chapter may be the result of the increasing influence of religion in the public sphere (Habermas 2006).
[39] Canada's motto, Psalm 72: 8, *A Mari usque ad Mare*, is also inscribed on the walls of the Peace Tower in the Canadian Parliament buildings

> manner. This is best accomplished by a secular state that is neutral between religions but not neutral about religion. (2005, 177)

The preamble "represents a kind of secular humility" (Ryder 2005, 177). This means that there is recognition by the state that truths that have considerable influence on the way individuals live their lives exist outside the rule of law and that these differing sources of authority should be "nurtured" by state authority (Ryder 2005, 177). Thus, the constitutional reference to God may, in fact, strengthen claims brought before the courts by religious minorities precisely because the constitution allows for the recognition of both the rule of law *and* supremacy of God.

Religion and Physician-Assisted Dying (Before Carter)

The residually Christian nature of Canada has meant that Christianity has occupied a position of privilege in Canadian law, including the legal framing of death and dying when it comes to matters related to various forms of euthanasia (Chambers 2011a). Stuart Chambers (2011a, 2011b) argues that the 1993 *Rodriguez* decision demonstrates the indebtedness to Christian notions of life and death when it comes to matters related to physician-assisted dying and euthanasia. *Rodriguez* was the first challenge to the prohibition on physician-assisted dying that was heard at the level of the Supreme Court of Canada. Passive forms of euthanasia were practiced in Canada following the decriminalization of suicide in 1972 and have been repeatedly discussed since (Cormack 2000, 593; Florencio and Keller 1999). In 1984, for example, the Canadian Medical Association, in its "Joint statement on terminal illness", recognized the acceptability of passive forms of euthanasia stating that "it is the patient's right to accept or refuse treatment" and that "no resuscitation [as treatment is…] appropriate and ethically acceptable" (1984, 1357). Moreover, in 1992 the Quebec Superior Court, in its *Nancy B v. Hôtel-Dieu de Québec* decision, ruled that a patient was legally permitted to discontinue receiving

respiratory support and that such a death is considered natural and reasonable thereby protecting the physician from criminal responsibility.[40] The Court in the *Rodriguez* decision echoed the Quebec Superior Court's ruling, stating that:

> […] the physician has no choice but to accept the patient's instructions to discontinue [medical] treatment […] The doctor is therefore not required to make a choice which will result in the patient's death as he would be if he chose to assist a suicide or to perform active euthanasia (*Rodriguez*, p. 606)

What the *Rodriguez* decision introduced into the consciousness of Canadians was the possibility that physician-assisted dying might be an acceptable form of medical treatment in Canadian society.[41]

The *Rodriguez* decision was brought before the Supreme Court of Canada by Sue Rodriguez, a forty-two-year-old who had been diagnosed, much like Gloria Taylor in the *Carter* decision, with ALS. As a result, she was losing her "capacity to breathe without a respirator, to eat without gastrotomy and [would] eventually become confined to a bed" (*Rodriguez,* p. 531). At the time of the decision, Ms. Rodriguez had a life expectancy of between 2 and 14 months, but as noted in the Court's decision, her condition was rapidly deteriorating. Consequently, she wished to challenge section 241(b) of the *Canadian Criminal Code* which prohibited physician-assisted dying:

> Ms. Rodriguez [knew] of her condition, the trajectory of her illness and the inevitability of how her life [would] end; her wish [was] to control the circumstances, timing, and manner of her death. She [did] not wish to die so long as she still has the capacity to enjoy life. However, by the time she no longer [was] able to enjoy life, she [would] be physically unable to terminate her life without assistance. Ms. Rodriguez [sought] an order which [would] allow a qualified medical practitioner to set up technological means by which she might, by her own hand, at the time of her choosing, end her life. (*Rodriguez,* p. 531)

[40] See *Nancy B. v. Hotel-Dieu de Quebec (1992)*, 86 D.L.R. (4th) 385 (Que. S.C.).

[41] For a discussion on the debates between physician-assisted dying and passive euthanasia, see Callahan (2000); Quill and Battin (2004); Scoccia (2005); Lewis (2007); and Badham (2009).

Ms. Rodriguez applied to the Supreme Court of British Columbia[42] to have section 241(*b*) of the criminal be declared invalid. She claimed that section 241(*b*) violated her rights as protected under section 7, the right to life, liberty and security of the person; section 12,[43] the right to not be subjected to any cruel and unusual treatment or punishment; and section 15(1), equality rights of the Canadian constitution. The Supreme Court of British Columbia, however, dismissed her request, after which she appealed to the British Columbia Court of Appeal,[44] which also dismissed her appeal. Ms. Rodriguez then appealed to the Supreme Court of Canada, which also dismissed her claims. In a five to four ruling, the majority of the Court concluded that "the prohibition occasioned by s. 241(*b*) is not contrary to the provisions of the *Charter*" (*Rodriguez,* p. 615). Ms. Rodriguez died in 1994 by way of physician-assisted dying, despite it remaining illegal in Canada.[45]

While the decision is interesting, what is particularly noteworthy is the influence and presence of religion throughout the decision and how religion is constructed. As noted, the *Rodriguez* decision is not about religion, nor did Ms. Rodriguez bring any claims about religion before the various levels of courts. However, given the "morally laden" nature of physician-assisted dying, combined with the fact that an estimated 81.9% of the Canadian population identified as Christian in 1991, religion became part of the debate. Religion, or Christian ideology, was used as a guiding philosophy (Chambers 2011a, 2011b). As Lori Beaman and I have argued, "the moral framework that has been encapsulated in Canadian law and healthcare has been, until [recently], we argue, largely influenced by Christian[ity]" (Beaman and Steele 2018, 130). Ms. Rodriguez' request challenged this moral framework as it was the first such case

[42] *Carter v. Canada (Attorney General),* 2012 BCSC 886.
[43] Section 12 of the *Constitution Act 1982* states: "Everyone has the right not to be subjected to any cruel and unusual treatment or punishment."
[44] *Carter v. Canada (Attorney General),* 2013 BCCA 435.
[45] See Farnsworth (1994).

where the "intersection between morality and criminal law was put to a test" in matters related to physician-assisted dying (Martel 2001, 156). The challenges posed by the request to decriminalize physician-assisted dying in the *Rodriguez* decision provides a unique opportunity to map how religion was framed by Canadian law in the early 1990s. It is within the contours of the legal debates related to physician-assisted dying that the Christian nature of Canadian societal values become apparent.

Although there is a vast body of literature discussing the jurisprudence of the *Rodriguez* decision,[46] there also exists a body of literature that discusses the prominence of religion and how it is rendered in *Rodriguez.* This literature demonstrates that religion is understood explicitly as Christianity. In his doctoral research, Stuart Chambers analyzed the challenges that physician-assisted dying and euthanasia "posed to the sanctity of life ethos in Canada from 1972-2005" (2011a, 3). Chambers argued that "Canada is indebted to Christian notions when it comes to discussions involving an intentionally hastened death" (26). Chamber's points out the 'Christian-ness' of the sanctity of life ethos in Canada as well as the overall Christian framing of religion in *Rodriguez*.

In *Rodriguez* it was the law's reliance on metaphysical principles and absolutes (e.g., the sanctity of life) that resulted in the "prolonged suffering for Rodriguez" (Chambers 2011a, 227). The majority Court decision relied on a moral framework that valued the absolute *quantitative* value of human life rather *qualitative* value of life (Martel 2001, 160). The Court acknowledged that "the prohibition against physician-assisted suicide, by contrast, had always been absolute" (*Rodriguez,* at p. 541) and that "underlying society's approach to this problem had always been, and continued to be, the sanctity of life" (*Rodriguez,* at p. 542).

[46] See Cormack (2000); Jugnauth (2011); and Martel (2001).

Further, the Court also highlighted the fact that the law understood life as inherently sacred and so it was to be "enthusiastically revered" (Cormack 2000, 614). This builds on the notion of the religious idea of the sanctity of life, which "regards individual human life as holy, sacred, and of immeasurable value, regardless of the physical and/or mental quality of the person" (McManaman 2010, 24). In *Rodriguez,* the understanding of life was *rooted* in religion. In its discussion, the Court maintains that the sanctity of life is one of Canada's most fundamental values and therefore implies that to take life, or to kill, is inherently wrong. Cormack (2000) challenges this claim by arguing that such a claim is flawed because the law regarding killing in Canada is not absolute and so such an act is not always morally wrong. As a result, the sanctity of human life argument proposed by the Court is indebted to Christian values that have influenced medical and legal opinion related to physician-assisted dying (Chambers 2011b, 68).

In its reasoning, the Supreme Court also adopted the Christian understandings of the sanctity of life proposed by the Law Reform Commission of Canada. The Law Reform Commission of Canada asserted in its 1982 publication, *Working Paper 28: Euthanasia, Aiding Suicide and cessation of treatment*:

> Preservation of human life is acknowledged to be a fundamental value of our society. Historically, our criminal law has changed very little on this point. Generally speaking, it sanctions the principle of the ***sanctity of human life.*** (Law Reform Commission of Canada 1982, 36; emphasis added)

The Law Reform Commission could not accept decriminalizing access to physician-assisted dying, as it would challenge the religious and cultural heritage of Canada (Chambers 2011a, 158). The Commission remained committed to preserving life and upholding one of Canada's most "traditional attitudes"— the sanctity of life (Law Reform Commission of Canada 1982, 36).

Interestingly, Justice Sopinka claimed that the Court's understanding of the sanctity of life and the sacredness of human life was nonreligious. He stated:

> the generally held and deeply rooted belief in our society that human life is sacred or inviolable (which terms I use in the non-religious sense described by Dworkin (*Life's Dominion: An Argument About Abortion, Euthanasia, and Individual Freedom* (1993)) to mean that human life is seen to have a deep intrinsic value of its own). (*Rodriguez,* p. 585)

Following Dworkin's (1993) understanding of the sacredness of human life, the Court understood human life to be sacred because it has intrinsic value and that this value is independent of particular rights and values. Chambers points out that the very core of the Court's understanding of the sacredness of human life was therefore based on Christian religious tradition as it "presupposed stewardship"—a Christian notion of the sacredness of human life (Chambers 2011a, 233). The sanctity of life argument propagated by the Court was indeed religious and therefore an inadequate justification for continuing to prohibit physician-assisted dying and allowing the state intrusion into one's personal autonomy (Cormack 2000, 615; Martel 2001, 160). As Cormack points out, the value of life must not be understood in abstract terms, as it was in *Rodriguez,* because "life must be valuable to someone or for something" (2000, 615).

In its decision, the Court compared the Canadian *Criminal Code* to that of other Western states. The Court noted that the blanket prohibition on physician-assisted dying in the *Criminal Code* was the "norm among Western democracies" and that such a law had never been "adjudged to be unconstitutional or contrary to fundamental human rights" (*Rodriguez,* p. 605). The Court assumed that there existed a global consensus that access to physician-assisted dying should remain illegal (Cormack 2000, 611). What is interesting, however, is that the 'Western' democracies the Court drew on for comparison are all historically Christian. These included: The

United States of America, Austria, Spain, Italy, and the United Kingdom.[47] The Court concludes that such a prohibition in these countries supports and apply a narrow understanding, with few exceptions, of "the principle of the sanctity of life" (*Rodriguez,* p. 605). Such an approach is problematic as it fails to consider the "Canadian experience" that suggested that Canadians were in favour of reforming the *Criminal Code* (Cormack 2000, 611). Further, the claims put forth by the various medical and legal associations in these countries relied less on scientific evidence and facts and instead more on the Christian religious beliefs alluded to early (Chambers 2011b, 71). Comparing the *Criminal Code* of Canada to that of other historically Christian countries only further perpetuated Christian ideology in *Rodriguez.*[48]

Despite the prominence of Christian religious undertones throughout *Rodriguez*, the Supreme Court did not actually consider whether a religious purpose was behind the prohibitions in place against physician-assisted. One then wonders if the Court would have ruled differently had it considered this possibility. Derek Jugnauth's (2011) analysis of the *Rodriguez* case proposes that there was indeed a religious purpose behind section 241(b). Jugnauth argues that the Court would have most likely rendered a different decision (one favouring Ms. Rodriguez) if a religious purpose behind section 241(b) was identified noting that "the historical foundation for section 241(b) of the Canadian *Criminal Code* [was] to advance several tenets of the Christian faith" (2011, 240).

[47] In Italy, for example, 83.3% of the population currently identify as Christian; 78.6% of the population of Spain identify as Christian; and 80.4% of the population of Austria are Christian. Given the overall declining rates of Christianity globally, we can assume these percentages were significantly higher in 1993 when *Rodriguez* was decided (Pew-Templeton 2015). The Court did recognize that certain European countries had lifted prohibitions on physician-assisted dying. The Court discussed access to this in the Netherlands, Switzerland, and Denmark, but concluded that such a "trend supports the view that a relaxation of the absolute prohibition [of physician-assisted dying] takes us down [a] 'slippery slope'" (*Rodriguez,* p. 603).

[48] The tensions and conflicts over things such as life, death, and morality (which I will examine in this thesis) were also present in the intervener submissions to the Court in *Rodriguez.* For example, the interveners "embrac[ed] the rhetoric surrounding stewardship" and sought to promote the supremacy of God and the protection of human life as sacred (Chambers 2011a, 241; Martel 2001, 160). Chambers' analysis reveals that the majority of the interveners relied on "normative assumptions that reflected objectivistic metaphysics and the sanctity of life ethos" based on Christian understandings (2011a, 252).

Although the *Rodriguez* case was not necessarily about religion, religion was very much part of the decision—much the same as *Carter*. Religion was present in *Rodriguez* precisely because of various Christian opinions related to physician-assisted dying embedded within Canadian society, particularly Canadian law. The way in which the sanctity of life is discussed and portrayed throughout the decision reveals that religion, as it was constructed in *Rodriguez*, was inclusive of only Christianity. Such a rendering left little room for other forms of religious tradition, let alone nonreligion.[49]

All this discussion is to say that Christianity has been of ideological importance in Canadian law—particularly in reference to physician-assisted dying. The point of this discussion of *Rodriguez* is twofold: (1) to draw attention to what came before *Carter* and to highlight the *Carter* is not the first such decision related to physician-assisted dying in Canadian society; and (2), perhaps more importantly, that how religion is rendered and understood in Canadian law is very much dependent on the social and historical context. Religion was cast as Christian because of the dominance of Christianity in Canadian society in 1993. Returning to *Carter*, 22 years later and in a different social context, what is understood as physician-assisted dying is strikingly different—it seems to be conceptualized in a nonreligious framework. I argue that in *Carter* the Court sheds its indebtedness to Christian notions of death, life, and suffering identified by Chambers (2011a). More importantly for this thesis, there exists the emergence of something else—nonreligion. *Rodriguez* illustrates a narrative of physician-assisted dying, one grounded in religion, and *Carter*, as will become clear, makes clear a second, and opposite narrative to

[49] I am not suggesting here that sanctity of life is exclusive to Christianity. Instead, I draw attention to the fact that Christianity and how sanctity of life is interpreted in Christianity is intertwined in Canadian social institutions more so than other religious traditions. Sanctity of life is part of Judaism and Islam, for example, but the specific understandings of sanctity of life per these religions are not prominent in Canadian law.

physician-assisted dying—one that is nonreligious. It is within *Carter* that this transition from one narrative to the other is made evident.

Nonreligion and Religion as Fluid Concepts in Law

Although there exists literature that discusses how the law *generally* constructs religion[50] when addressing claims of religious freedom (Berger 2015; Sullivan 2005), I add nuance to these approaches by suggesting that more specific renderings of nonreligion and religion are created depending on the topic brought before the law. This nuanced approached emphasizes social context. As previously discussed, I understand nonreligion as a concept that is a social construct—it is fluid and not a fixed reality—so nonreligion (as well as religion for that matter) can be rendered in a multitude of ways. The law acts as a mirror and reflects society's perceptions of 'that which is not religious'. As both religious diversity and those identifying as having no religion increases, what society and the law categorize as nonreligion and religion will change.

The *Charter* protects multiple constitutional rights, including the freedom of religion under section 2(a). As increasingly diverse nonreligious and religious beliefs have become more prominent in Canadian society, issues relating to religious modesty coverings and vestments, employment, immigration, education, marriage rights, equality rights, and abortion have all been addressed by the law (Beaman 2008; Bibby 2004; Cragun 2016; Sandberg 2014). The Supreme Court of Canada is required to decide complex and controversial legal issues that are of extreme importance to Canadian society (i.e., physician-assisted dying), while at the same time balancing the needs of both religious and nonreligious Canadians.

[50] Nonreligion is largely absent from this discussion. I discuss this point in more detail in Chapter One.

The *Carter* decision is representative of the balancing of the needs of the religious and nonreligious alike. I say this because the Court's decision in *Carter* allows for both the nonreligious and religious to equally participate in Canadian society when it comes to matters related to physician-assisted dying. The nonreligious are permitted to end their lives when they so choose to avoid suffering, while the religious are still granted permission to endure suffering if they so wish. In other words, the shift from religion to nonreligion as a guiding philosophy in *Carter* allows the nonreligious and religious to act in accordance with their own beliefs. Though I cannot suggest causation, there is a correlation between the ever-increasing number of Canadians who identify as having no religious affiliation and the lack of religious ideology in the legal discourse about physician-assisted dying. *Carter* is, therefore, representative of this new era of (non)religious diversity and hints at the renegotiation of nonreligion and religion and shift from religion to nonreligion in Canadian law. In *Carter,* there is a shift in understanding of ***physician-assisted suicide*** from a religious framework to a nonreligious framework of ***physician-assisted dying***.

In this thesis, I am mapping elements of nonreligion at a particular moment in time using the *Carter* case an entry point into the discussion of religion and nonreligion. To understand religion and its 'other' (nonreligion) as fixed realities fails to acknowledge the fluidity and contingency that exist within and between these two categories and therefore ignores that moments in time are reflective of different *nonreligions*. Nonreligion, which is often mistaken as the simple negation of religion, represents much more than this. Instead, nonreligion is given positive content in *Carter*—nonreligion is given meaning based on how it *differs* from religion rather than how it *rejects* religion (Lee 2015; Quack 2014; Brown 2017). Religion, in many cases, is frequently folded into what is often categorized as 'nonreligion'.

Chapter Overviews

To address how nonreligion is constructed by Canadian law in the context of physician-assisted dying this thesis is divided into seven chapters. This chapter, the introduction, has provided a brief overview of the thesis as well as the social and historical context in which this research takes places. Further, it has briefly described what came before *Carter, Rodriguez,* and the Christian nature of this previous decision. Chapter One is a literature review and is intended to situate this thesis within the broader academic study of nonreligion and that of nonreligion and law. This chapter addresses several key terms used throughout this thesis. Chapter Two outlines the methodology used to conduct and analyze the data for this study. Chapter Two discusses a Foucauldian approach to discourse analysis which draws on the work of Jean Carabine (2001) and Kocku Von Stuckrad (2013) that is the methodological framework for this thesis. Chapter Three begins the analysis of nonreligion in the context of physician-assisted dying. This chapter focuses on the concept of "life" and how a transition from a narrative established by religion to a narrative established by nonreligion has occurred in *Carter*. In doing so, this chapter draws attention to how life was understood nonreligiously by the Court, as well as the interveners who favoured physician-assisted dying in *Carter*. Chapters Four and Five are much like Chapter Three, but these chapters discuss the transition from religious to nonreligious understandings of the concepts "death" and "morality", respectively. The concluding chapter reflects on the findings of this study and reflects on the research question that has guided this thesis. The chapter answers how nonreligion is conceptualized in *Carter* by drawing on the similarities between how the concepts of life, death, and morality are understood nonreligiously.

Conclusion

The law's construction of nonreligion sheds light on the complex relationship between nonreligion, religion, and law in a religiously diverse Canadian society. Thus,

> Better understanding the phenomenon of religious polarization ***in all its dimensions*** will allow us to better grasp its potential impact on […] other social domains. The religiously committed group not disappearing into nothing but rather stabilizing at lower levels in regions where religious unaffiliation has been on the rise for many decades could have important implications for social relations and policy. (Wilkins-Laflamme 2014, 304; emphasis added)

It is through this insight that we can develop a more thorough understanding of what must be done to ensure all Canadians, religious and nonreligious alike, are allowed full, inclusive participation in Canadian society. For these reasons, this study contributes to the understanding of religious pluralism, diversity, and the separation of church and state in Canada. This thesis also contributes to the gap in the literature related to the academic study of nonreligion.

Returning to my initial assumption of what I would be researching when initially accepting Dr. Beaman's offer of employment, I now realize I could not have been further from the truth. Nonreligion is not synonymous with the 'secular' and is more than the simple rejection of the religion (Lee 2015). Nonreligion is something different: while it does include phenomena that are without religion, it also acts as a catchall category for phenomena that perhaps have religious elements, or at least engage with religion in some way (Woodhead 2016; Quack 2014). Although the precise definition of nonreligion remains contested territory, this thesis attempts to demonstrate how the category of nonreligion is constructed in Canadian law and that such a construction changes depending on the context in which its negotiation takes place. This thesis, therefore, does not attempt to provide a conclusive definition of nonreligion and it is the ambiguity of this concept that leads me to my next chapter, one in which definitions are explored.

Chapter One: Literature Review

This chapter reviews general themes within the literature pertaining to the study of both religion and nonreligion to situate this thesis within these fields of study and to define the terms used throughout this thesis. Particular attention in this section has been given to nonreligion as it is the primary focus of this thesis. I have divided the scholarship into six subsections: (1) defining religion; (2) defining nonreligion; (3) measuring nonreligion; (4) reasons for becoming nonreligious; (5) The importance of studying nonreligion; and (6) religion and law. In addition to discussing these themes, this chapter identifies gaps in the literature that my research aims to address.

Defining Religion

To understand nonreligion, or as Ryan Cragun (2016) refers to it as "that which is not religious", one must first understand *that which is religious*. Much like nonreligion, religion is a contested term and so attempting to define it is complex. What is understood as religion differs from person to person and from context to context and so there is no universally agreed upon definition of religion. This, in turn, makes it that much more difficult to research "that which is not religious".

The complexity of the term religion has resulted in competing understandings of this term. One such understanding postulates that there is no "essence" to religion and when one attempts to define such a term, a polythetic approach should be used (Smith 1982, 18). Arnal and McCutcheon argue that "the concept of religion is a sufficiently artificial or synthetic construct such that its very creation is itself an implicit theorization of cultural realities" (2013, 18). Asad argues there is nothing essentially religious as these contextually based cultural realities are what

constructs what is understood as religious (2003, 25). Radical constructionists affirm that social reality consists of nothing more than text and discourse and so religion is constructed based solely on these (Beckford 2003, 3). Less radical forms of constructionism recognize not only the existence of text and discourse but also how the interaction of humans with one another construct meaning (Beckford 2003, 3).

Moving away from the understandings of constructionism above, James Beckford proposes a more modest social constructionist understanding of religion—an understanding I use in this thesis. In this approach Beckford does not deny the existence of "anything other than text and discourse [… and] seek[s] to analyse the processes whereby the meaning of the category of religion is, in various situations, intuited, asserted, doubted, challenged, rejected, substituted, re-cast, and so on" (2003, 3). Taking such an approach, in comparison to scholars such as Asad, Arnal, and McCutcheon leaves open the question as to whether religion indeed does have some essence—or is *sui generis*. Beckford does not deny, *a priori*, "that religion is some form of 'basic' […] impulse or need, although [he] does not find the evidence put forward to support such a view persuasive" (Beckford 2003, 3). Religion is thus a category used to denote specific types of "human knowing, feeling, acting and relating" (Beckford 2003, 4).

For much of the nineteenth and twentieth centuries, "many modernizers in the West, and elsewhere, advanced the idea that a certain kind of experience, whether characterized as religious, mystical, or spiritual, constituted the essence of 'religion' and the common core of the world's 'religions'" (Taves 2009, 3). Religion is also then conceived of as a social reality that is a distinct part of human life and is "construed as normative, singular, and prior to other human affiliations and forms of sociality. There are things in the world called 'religions' that are interacting with each other" (Hurd 2015, 11). Scholars such as Gerardus van der Leeuw, Rudolf

Otto, Mircea Eliade, and Ninian Smart "located the essence of religion in a unique form of experience that they associated with distinctively religious concepts such as the sacred […], the numinous […], or divine power" (Taves 2009, 3). Ninian Smart, for example, observes that there are seven dimensions "of religion which help to characterize religions as they exist in the world" (1998, 21). Such an approach, as Asad argues, encourages one "to take up an a priori position in which religious discourse in the political arena is seen as a disguise for political power" (1993, 28-29).[51] Needless to say, what is meant by religion is contested.

Defining Nonreligion

Ryan Cragun points out that it has only been in the past 10-15 years that scholars have begun to study nonreligion, primarily because of the growing population of those who have distanced themselves from religion[52] and the rise of the so-called "New Atheists" (Sam Harris, Richard Dawkins, Daniel Dennett, and Christopher Hitchens) (2016, 301). As early as 1971 Colin Campbell called for more attention to be given to nonreligion, or what he referred to as *irreligion,* but this went widely unnoticed. Given the infancy of this field of study, nonreligion and nonreligious individuals have not received the same kind of scholarly attention as religion and so the diversity which nonreligion entails remains to be explored (Cragun 2016, 301; Quack 2014, 440; LeDrew 2013). [53]

In addition to the relatively recent scholarly attention to nonreligion, the definitional consensus of nonreligion is further complicated because of the difficulties encountered when defining religion. As Campbell asserts, "the very disparate nature of religion makes the

[51] Hurd argues that "[r]eligion defined as an isolable object has become a mode through which political power operates" (2015, 11).
[52] These individuals are commonly referred to as the 'nonreligious' or 'nones' (Cragun 2016, 301; LeDrew 2013, 432).
[53] See also Zuckerman et al. (2016, 6).

identification of [nonreligious] attitudes" difficult (1971, 29). The nature of nonreligion has then become a catchall category in which various terms are equated and used to describe the same thing (Woodhead 2016).[54] For example, scholars use the term nonreligion and nonreligious to refer to irreligion; anti-religion; indifference to religion; agnosticism; atheism; nonbelief; unbelief; and infidelity to name a few (Zuckerman 2008; Zuckerman et al. 2016). Callum Brown argues that the term *atheism,* for example, should be used to describe those who are "living as if there is no god" (2017, 8). These definitions, however, all assume that an individual is without religion. Nonreligion is not necessarily the simple negation of religion (Wallis 2014). Abby Day notes the nonreligious "can bring into being a Christian identity related to social belongings" (2009, 192).[55] To add to this complexity, Quack (2014) uses the term nonreligion to refer to a group of understudied phenomena and relationships and does not intend it to denote clear boundaries between nonreligion and its other, religion.

While the scholars mentioned above use the terms nonreligion and nonreligious interchangeably with other terms, others have developed elaborate theories as to what constitutes nonreligion or the nonreligious. As mentioned above, one of the first scholars to propose a theory of nonreligion was Colin Campbell.[56] Campbell proposed that nonreligion (or irreligion as he referred to it) "however it is defined, must refer to all aspects of behaviour (belief, action, attitudes, and experience) in just the way religion does" (1971, 23)**.** Campbell goes on to claim that if any part of a population is unaware of an established or dominant religion, these people are unable to be religious or irreligious as to be either requires the acknowledgment of religion

[54] See also Campbell (1971); Day (2013, 2009); Evans (2016); Lee (2015, 2014, 2012a); Quack (2014); Zuckerman et al. (2016); Zuckerman (2008); and Wallis (2014).
[55] Voas (2009) also proposes an idea of 'fuzzy fidelity' which is used to describe individuals who are not regular church goers or nonreligious. Instead, these individuals remain loyal to religious traditions, but religion is of only minor importance in their life.
[56] Though Campbell's theory was focused on irreligion, it nonetheless became a starting point for other scholars to use.

(1971, 24)**.** Other theorists, like Beaman (2017b) and Beyer (2017)**,** consider nonreligion similar in nature to the dark matter of physics. That is, nonreligion is present in society, but has not been sufficiently studied or explored and so the effects of it are not yet properly understood (Beaman 2017b).

Lee takes a relational approach to nonreligion and describes it as any phenomenon that is understood in contradistinction to religion (2015, 32). Lee understands nonreligion and nonreligious practice as a description of "*meaningful* differentiation" (32; emphasis Lee's). Nonreligion becomes a term used to identify a characteristic, or quality, of something that is real in the world that is made "meaningful by the ways in which [phenomena] differ from religion" (32-33). Lee's theory of non-religion builds on Campbell's theory of irreligion by broadening its scope to consider how phenomena *differ* from religion rather than focusing (like Campbell) on how phenomena *reject* religion (33-34). This enables Lee to tie the study of the nonreligious and nonreligion to other social theories and philosophies. Lee's theory of nonreligion then includes definitions like anti-religion, atheism, agnosticism, and irreligion. What must be noted, however, is that it would be an error to equate these forms of nonreligion with the nonreligious or nonreligion itself. That is, atheism is a *form* of nonreligion, but nonreligion is itself *not* just atheism.[57]

Like Lee, Quack (2014) also defines nonreligion as any phenomenon that is not itself religious but only exists because it is dependent on religion. Quack calls for a relational understanding and approach to the study of nonreligion and the nonreligious. As Quack claims, "'nonreligion' is not to be understood as something that has a thing-like existence or as something that has clear definitions with primary and secondary features; instead, it should be used to denote the various ways that relationships between a religious field and positions

[57] This example of atheism is also clearly articulated by LeDrew (2013).

considered to be on the outside are established" (448). To Quack, the diversity of nonreligion and the nonreligious "ought to be studied in its own right and on the basis of empirical research that focuses on religious-nonreligious entanglements" (439).

Much like the overarching category of nonreligion, the various subcategories of nonreligion are also loosely defined and understudied, further adding to the complexities involved with the academic study of nonreligion (Quillen 2015, 25). Zuckerman et al. summarize this issue stating that "our main critique of extant scholarship is that secularity [nonreligion] in such scholarship remains undifferentiated. The various forms, types, and shades of [nonreligion] are overlooked or ignored, and all manifestations of irreligion are lumped together. Yet secularity comes in many shapes and sizes, and this diversity needs to be better understood and better investigated" (2016, 7). Though this summary by Zuckerman et al. demonstrates the ways in which various terms (in this instance, secularity and irreligion) can be used interchangeably with nonreligion, it highlights the fact that what we deem as subcategories of nonreligion (whether it be atheism, agnosticism, irreligion) are lumped together which leads to equating them with each other. The nuances and subtleties between the different *types* of nonreligion are often ignored (whether consciously or unconsciously) which has resulted in the neglect of nonreligious diversity. Just as nonreligion is plagued by definitional difficulties, so are the subsets of nonreligious identity because of the theoretical inconsistencies associated with the study of nonreligion.

Measuring Nonreligion

The lack of consensus among scholars as to who the nonreligious are, and what nonreligion entails, litters this category not only with theoretical difficulties as discussed above but also with

methodological difficulties, as we shall now see. Quack points out, studies of specific nonreligious beliefs and behaviours are incredibly limited especially "where different kinds of relations and different cultural settings constitute distinct modes of nonreligiosity" (2014, 444).

Measuring nonreligion and nonreligiosity is by no means an easy task. One way this difficulty is observable is by looking at census data, as censuses are not always accurate in representing the percentage of individuals who identify as having no religion (Lee 2012b, 3). For example, Lucy Lee points out the *United Kingdom Census 2001* indicated that 72% of the British population were Christian and 15% of the population indicated 'no religion'; however, the corresponding 2001 *British Social Attitudes* survey indicated that 43% of the population were Christian and 41% were of no religion (2012b, 3). The discrepancies between these two surveys were not because one was wrong and the other right, but instead, the two results "can be partly explained by question wording, the response options offered and the context in which the questions were asked" (Lee 2012b, 3). The generic nonreligious categories used in surveys fundamentally differ from traditional identification categories (i.e., Christian, Muslim, Jewish), because categories like 'no religion', 'not religious', or 'nonreligious' are often perceived as being negative in connotation and one may think that by selecting these categories his or her cultural identification lacks meaning (Lee 2014, 466). Stephen Bullivant observes that "many people who do not believe in God, and even perhaps some who actively disbelieve, may for a variety of social reasons" be hesitant to use the terms nonreligious, atheist, or other self-identifiers thereby perverting what is meant by an individual's response to what it means to be without religion (2008, 364). [58]

[58] Bullivant points out that "in some contexts [nonreligious markers of identify] carry decidedly negative connotations" because of a common misconception that those without religion are immoral or evil (2008, 364). See Schmidt (2016) for a detailed discussion on historic attitudes of religious nones.

Furthermore, simply selecting 'no religion' does not "reveal the beliefs, belongings, and behaviours that lie behind" such a marker of identification (Wallis 2014, 71). [59] What researchers deem as nonreligious may not be how respondents understand the nonreligious and nonreligion and the beliefs that such an ideology entails (including participating in what many may refer to as religious life). A recent Pew Research Center report indicates that religious nones in the United States may, in fact, be *more religious* than the nonreligious in Western Europe.[60] Such nuances in identity are not highlighted in traditional census questions. Qualitative research is then needed to understand how respondents to surveys interpret and understand what 'no religion' or nonreligion means and what an individual means by selecting such a category (Lee 2014, 467).

Finally, how one understands nonreligion is dependent on social and cultural context. For example, Campbell argues that "[nonreligion] can only be specified within a given social and cultural context, and this process of specification is crucial if we are ever to identify examples of irreligious belief and behaviour" (1971, 28). What constitutes the religious and the nonreligious in a given community differs from society to society and so attempting to determine how secular (the phrasing Zuckerman uses) or nonreligious (my phrasing) a society is, is by no means easy (Zuckerman et al. 2016, 76-77). Although Zuckerman's (2008) research primarily focuses on the nonreligiosity of Denmark, he highlights the fact that the nonreligiosity of Denmark is in and of itself unique, but so is the (non)religious identity of every other nation (see also Zuckerman et al. 2016, 78). Thus, just like measuring religiosity, measuring nonreligiosity and nonreligion is plagued with methodological difficulties.

[59] Religiosity and nonreligiosity can be measured and therefore determined in a multitude of ways (Zuckerman et al. 2016, 76-77).

[60] 13% of religious nones in the United States say that religion is very important in their lives, compared to 1% in Europe. Similarly, 20% of religious nones in the United States pray daily whereas only 1% do so in Europe. See Sahgal (2018).

Reasons for Becoming Nonreligious

While grand theories exist as to why communities and nations become nonreligious,[61] no one theory seems to apply accurately to all nations. For example, secularization theory holds that religion will be replaced by a rational, scientific understanding of how the world operates and therefore religion would be forced from important parts of social life (Cragun 2016, 309).[62] Included in secularization theory are the terms secular and secularism—both of which are troublesome and contested. Thus, there exist multiple meanings for the terms "secular" and "secularism" (Kosmin 2007, 2). For example, to be secular, and therefore a 'secularist' to Jacques Berlinerblau is to reject religious establishment (2012, 156). Further Asad proposes that the secular "is neither continuous with the religious that supposedly preceded it […] nor a simple break from it […] the secular is neither singular in origin nor stable in its historical identity, although it works through a series of particular oppositions […] the sacred and the secular depend on each other" (2003, 25-26). The secular may also refer to a period in time, which can be conceived "as [not] grounded in something higher than mere human action" (Taylor 2007, 25).[63] As a result, José Casanova argues that the secular is a "central modern category—theological-philosophical, legal-political, and cultural-anthropological—to construct, codify, grasp, and experience a realm of reality differentiated from 'the religious'" (2011, 54).

Similarly, the term "secularism" is also ambiguous. Berlinerblau understands this concept as "a political philosophy, which, at its core, is preoccupied with, and often deeply suspicious of, any and all relations between government and religion. It translates that preoccupation into various strategies of governance, all of which seek to balance two necessities: (1) the individual

[61] For an example, see Connolly (2011); Taylor (2007); and Thiessen (2015).
[62] There are 'hard' and 'soft' theories of secularization. 'Hard' theories stipulate that religion will become increasingly unimportant in modern society. 'Soft' accounts state that a connection between religion and modernity will continue. See Sandberg (2014, 60). For a more detailed discussion of secularization theory see Taylor (2007).
[63] See also Taylor (2007) for an in-depth discussion on secularity.

citizen's need for freedom of, or freedom from, religion, and (2) a state's need to maintain order" (2012, xvi). Likewise, Craig Calhoun echoes this understanding of secularism noting that "in general, political secularism hinges on a distinction of public from private and the relegation of religion to the private side of that dichotomy" (2011, 75).[64] Barry Kosmin points out that secularism involves a type of disenchantment referring to "an emptying out of magic, mystery, hints of transcendence, or a faith in realities, entities, or forces unseen but intuited and believed to be essential to human welfare and flourishing" (2007, 7). All of this is to say that secularization theory is contested and, although accounting for some forms of religious decline, does not account for levels of religiosity and nonreligiosity in the United States or even Asia.[65]

"Rational choice" theory developed by Stark and Finke (2000) proposes another way to account for the decline of those identifying as religious and attempts to account for the shortfalls of secularization theory. Rational choice theory assumes that a *demand* for religion remains constant, but the *supply* of religion fluctuates. In short, Stark and Finke (2000) believe that higher levels of nonreligiosity are the result of a faulty supply in religion. "Where religious markets are 'free' or unconstrained, a range of 'products' may proliferate, meeting 'consumer' interests and thus satisfying demand. Where markets are not free […] product diversity is constrained, many consumer interests are not met, and, satisfaction wanes. In other words, religious variety stimulates vitality; religious uniformity begets boredom and indifference" (Zuckerman et al. 2016, 61). Rational choice theory is often used to address the levels of religiosity and nonreligiosity in the United States as compared to Europe.

[64] To Calhoun, "unreflective secularism distorts much liberal understanding of the world—encouraging, for example, thinking about global civil society that greatly underestimates the role of religious organizations or imagining cosmopolitanism as a sort of escape from culture into a realm of reason where religion has little influence" (2011, 76).

[65] Much of the current literature that discusses nonreligion is then primarily focused in European and North American "Western democracies" and so little is known about nonreligion, particularly nonreligious identity, in non-Western countries and cultures (Cragun 2016, 313). There is then very much a need for research on nonreligion outside of the developed, Western world (Cragun 2016, 313).

Mark Chaves cautioned, however, that the metaclaims about rational choice theory are "misleading overstatements" and unjustified and therefore called for more empirical studies to be done to support such a theory (1995, 99). Reginald Bibby (2011) has done such a study, drawing on elements of rational choice theory in his studies of religion in Canada to conclude that we should expect a resurgence of religion in Canada.[66] Further McCullough et al.'s (2005) study on the religious development of individuals in adulthood support the predictions of rational choice theory when assessing the religious development of individuals during adulthood. Joel Thiessen also draws on rational choice theory yet is reluctant about its claims as he notes that he is "less convinced that individuals desire greater involvement in their religious group or that there is an unending desire for the things that religious groups offer" (2015, 172). In sum, there are multiple theories used to describe declining levels of institutionalized religion, all with their own drawbacks.[67]

Despite various reasons that attempt to explain why people and nations are nonreligious, the fact remains that trying to determine absolute reasons is a complex task. As Zuckerman et al. claim, "the question of whether humanity is becoming less religious or more secular and, if so, how, why, and to what extent, is so complex that a wide range of assumptions, assertions, expectations, and conclusions—many contradictory—have been sustained" (2016, 72). Different theories provide answers for the growing nonreligiosity in different geographic areas, but no one theory can account for all instances of religion's decline (Cragun 2016).

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[66] Joel Thiessen (2015) questions Bibby's conclusion when considering the lack of demand for the afterlife that the nonreligious have. Thiessen argues that "it remains surprising […] how and why Bibby and rational choice theorists continue to essentially guarantee a place for religious belief and practice moving forward because of the supposed unending desire for the reward of life after death found in religion" (2015, 120).

[67] All available theories used to describe religious decline have not been discussed here. There exist other explanations as to why individuals become nonreligious. For example, Christel Manning (2015) examines how religious nones raise their children and pass their beliefs onto future generations. Manning states that "the future growth of the unaffiliated contingent will depend in part on what the current generation of nones teaches their children" (2013, 149). A lack of religious education results in the formation of a generation of nonreligious individuals.

The Importance of Studying Nonreligion

Although the discussion of nonreligion above may have painted the academic study of nonreligion as being a field of study that is a bit of a mess, it remains a field of study that deserves scholarly attention. As Beaman says, "we have reached a tipping point: not only is a sizeable proportion of the population not engaged with religion but a different, immanent framework from which to understand the world is emerging" (2017b, 17). The secular has then become a "central modern category" which differentiates a nonreligious reality from a religious reality (Casanova 2011, 54). It is precisely because of these reasons that the academic study of nonreligion deserves scholarly attention. However, it is only through continued research into nonreligion and the nonreligious that we will be able to better understand religion's other and develop deeper understandings of what it means to be without religion.

It appears that a normalcy that assumes we are all religious and that we "owe our moral and intellectual condition to religion" (Beaman 2013, 141) is something that may have contributed to the lack of understanding of nonreligion and what it means to be nonreligious. States, and perhaps scholars, see "religious identity as the default beginning place" (Beaman 2013, 153). Using Beaman's (2013) idea of the 'will to religion', I suggest that perhaps the preoccupation with religion and the underlying assumption that we *need* religion has potentially resulted in a focus directed towards the study of religion and what it means to be religious, and away from the study of nonreligion. Also, as Campbell suggests, functionalism has traditionally caused individuals to focus on the positive consequences which religion has in society rather than on irreligion—or nonreligion (1971, 9).

The lack of attention given to nonreligion has also perhaps contributed to the absence of consensus, or at least added to the lack of awareness, as to what nonreligion and nonreligious

beliefs entail, as well as the difficulties associated with measuring what an individual means when he or she identifies as having 'no religion' on a survey. Scholars like Beaman and Beyer, Lee, Quack, Day, Wallis, and Zuckerman (to name but a few) have all begun to examine religion's other in greater depth. These scholars have moved away from traditional understandings of what it means to be without religion, to a more specific set of concepts and theories that help us understand nonreligion and the nonreligious in greater detail and as a distinct social reality.

As Zuckerman et al. observe, "there have always been nonreligious men and women. There exists evidence of skepticism, naturalism, secularism, and anticlericalism from thousands of years ago in ancient India, China, Rome, and Greece. And there were clearly doubters and nonbelievers in medieval Europe as well, even when the power of the Catholic Church was at its apex" (2016, 6). However, it has only been in the last 10-15 years that there has been an interest in the study of that which is not religious. As a result, this field of study remains in its infancy, and so further study is needed as this shifting demographic will potentially have a significant impact on the many realms of social life and public policy.[68]

Religion and Law

Much like literature pertaining to religion and nonreligion, there is an abundance of literature related to religion and law but there exists almost no literature discussing the relationship between nonreligion and law (Årsheim 2018).[69] This discussion is then intended to draw

[68] Lee points out that existential threads are woven together to form/determine existential cultures. She argues that "unreligious existential commitments are not always significantly intellectual in practice—just as religious ones are not always driven by theology" (2015, 160). In short, "religious culture can be found outside religious traditions" (Lee 2015, 159).
[69] Sandberg (2014) also points out the underdeveloped nature of the sub-discipline of nonreligion and law.

attention to how Canadian law interacts with religion, or systems of belief more broadly, to speculate how *nonreligion* and law may interact.

Benjamin Berger (2015) succinctly summarizes two of the most common starting points that are usually taken when studying the interactions of religion and the law. The first is "the overwhelming habit of legal scholarship […] to frame social and political issues as problems to be analysed using the authoritative categories and organizing tools of legal thought" (Berger 2015, 24). When using this approach, the law offers itself as "the authoritative frames of reference […] wherein, no matter how contested the debate, the terms of that debate are the terms offered by the legal system itself" (Berger 2015, 24). Such an approach results in the elimination of "the processes of contestation and exercises of power that went into the construction of those categories" in the first place, along with the tendency to assume a natural stopping point has been reached when the best interpretation of the law has been determined (Berger 2015, 25-26). A second common starting point in legal scholarship regarding religion is framing certain issues using "a philosophical frame" (Berger 2015, 28). This starting point is also criticized as "one [that] begins with a theoretical construct" instead of an account of human nature or human social and political institutions (Berger 2015, 29).

Rather than use these two approaches, Berger (2015) suggests that one approach law as culture (or Canadian Constitutionalism as culture). Such an approach draws attention to the fact that the "law renders religion, reforming and fitting religion within the contours of its own cultural mould, leaving behind as trimmings the liberally unruly dimensions of religion-as-lived" (Berger 2015, 192). It is beneficial to understand the law as a form of culture[70]—something that

[70] To Berger, culture refers to "an interpretive horizon, composed of sets of symbols and categories of thought, out of which meaning can be given to experience. It is a system of background understandings that inform, and the process by which we generate, our interpretations of our world" (2006, 17).

is experienced and frames experience—instead of from its traditional "managerial or curatorial perch" (Berger 2015, 17).

When one approaches Canadian law as culture, we begin to see that religion is rendered according to the cultural commitments of Canadian law. Religion is shaped according to the following three criteria in the Canadian legal system: 1) religion is individualistic; 2) religion is an expression of autonomy and choice; and finally, 3) religion is private (Berger 2015, 66). Sandberg (2014, 5) builds on this idea of religion as "private" by claiming that judges operate under the assumption that religion must not be brought into the public realm. Sullivan also reasserts this idea of a legally defined religion by claiming that "ordinary religion, that is, the disestablished religion of ordinary people, fits uneasily into the spaces allowed for religion in the public square and in the courtroom" (2005, 138). Assessing law as culture promotes a deeper understanding of religion's interaction with the law. It is through this lens that it becomes apparent that the law defines religion in a specific way and anything outside of this legal definition of religion is considered "false religion" (Sullivan 2005, 144), or as I would argue, nonreligion (only, of course, if one understands nonreligion as meaningfully differing from *religion*).

By rendering religion in a specific way, the law distinguishes between 'true' and 'false' religion when cases involving religious freedom[71] are brought before courts. Such a distinction, as Sullivan observers, results in "serious political and constitutional concerns" (2005, 144) and challenges the state's duty of religious neutrality (Ryder 2005). As Beaman points out, "courts interpret claims to religious freedom against a backdrop of religious normalcy that is rooted in

[71] Beaman argues that "in order to gain some understanding of the way in which religious freedom is being interpreted by the courts, it is essential to situate the discussion in the context of the current climate of fear and risk, paying particular attention to the social construction of otherness and the dominant narratives that otherness is seen to challenge, threaten, or put at risk" (2008, 140).

mainstream Protestant (and in Canada, Protestant and Roman Catholic) hegemony" (2003, 321). So, although the courts have a predefined notion of what constitutes legal religion, this very definition is created in relation to mainstream Protestant and Roman Catholic religious norms.[72] The state may then side with, or favour, religion in religious freedom cases because of an assumed religious normalcy, or acceptance of religion that fits within the confines of the law's rendering of religion (Ryder 2005; Berger 2015). In fact, Berger (2015) points out that the law favours religion as defined by the culture of Constitutionalism. In the case of Canadian Constitutionalism, it is Protestant and Roman Catholic religious normalcy.

All of this is to say that in cases of religious freedom, there can only be *one* kind of acceptable religion. Acceptable forms of religion are "closely regulated by law" (Sullivan 2005, 8). Canadian law is only capable of tolerating religious beliefs and practices, so it is only religion as approved by the law (a specific Christian model) that is protected whereas all other religions are often restricted, and in some cases prohibited (Berger 2015, 128; Sullivan 2005, 154).

The law influences religion and in turn, religion is capable of influencing the law. While perhaps the latter relationship is less prominent in 21st century society, the influence of the law on religion is of paramount importance in Canadian and global society—especially considering the influx of legal cases addressing the protection of religious freedom, which as Sandberg points out, "has move[d] away from 'binary' approaches to adjudicating [religious freedom] rights on the part of the judiciary" (2014, 270).[73] Law is capable of framing religion in a way that may not necessarily be the religion practiced by appellants in legal cases and so while (at least in Canada) freedom of religion is constitutionally protected, the law is not always successful in providing

[72] This is the case in other jurisdictions like that of England, where the legal framework of religion has been shaped by the historic influence of the Church of England (Sandberg 2014, viii).

[73] The binary approach Sandberg refers to is one that forces "claimants to choose between their religion and the rights they would normally enjoy under State law" (2014, 267). Such an approach fails to appreciate "the way in which religious identities are constructed and reconstructed as part of everyday social life" (Sandberg 2014, 267).

such protection. Understanding this interaction of religion with the law is then of paramount importance when examining the place and role of (non)religion in contemporary society.

Given that literature related to nonreligion and law is virtually non-existent (Årsheim 2018) the purpose of the discussion above was twofold: (1) to demonstrate how the law and religion interact; and (2) to draw attention to the fact that perhaps the law may interact in a similar fashion with nonreligion as it does with religion. This is not to say that the law will negotiate nonreligion in the same exact way that it does with religion, but more broadly suggests that just as Canadian law regulates religion, it may also regulate nonreligion.

Nonreligious worldviews have become more prominent within certain legal cases as we shall see in *Carter*. Just as religion has been influential in law making (Perry 2009) so has nonreligion (especially when contrasting the *Rodriguez* decision to the *Carter* decision), yet scholarly attention has not been given to the emergence of nonreligion in these court decisions that call for new, or revisions of existing, laws. I hope to address this gap in the literature by assessing the role that nonreligion plays within the Supreme Court while at the same time, examining the way in which the Supreme Court conceptualizes nonreligion. While the study of nonreligion is in its infancy, so is the study of *nonreligion* and law. Therefore, gaps in the current literature exist when it comes to examining and assessing the presence and influence nonreligion exerts in the legal realm.

Conclusion

This chapter has discussed major themes within the disciplines this thesis is situated—nonreligion and (non)religion and law. The majority of this chapter addressed general themes associated with the study of nonreligion, while the remaining part of the chapter discussed the

study of religion and law. Literature related to nonreligion and law remains scarce, so several generalizations regarding nonreligion and law were made based on the way religion interacts with the law.

The literature on nonreligion highlights several key themes: 1) the problems inherent with trying to define religion; 2) the resulting problems with attempting to define religion's other, nonreligion; 3) methodological difficulties faced when attempting to measure nonreligion and nonreligious beliefs; 4) various reasons as to why people and nations become nonreligious; and 5) the importance of studying nonreligion. These themes raise awareness of what the current literature adequately explores and where gaps remain that need further study and research to fill.

The remainder of this literature review addressed literature that pertains to the study of religion and law. General themes that emerged from this literature include: 1) law's definition of religion; 2) the implications on religious freedom because of law's definition of religion; and 3) the lack of literature and research available that assesses the relationship between nonreligion and law. Further exploration into this field of study will yield much needed results to fill in the gaps in the literature. While I do not propose that this thesis will fill all these gaps, my research will address how nonreligion is rendered by Canadian law, in the context of physician-assisted dying.

Chapter Two: Methodology

This thesis is a *socio-legal* analysis of the Supreme Court of Canada's *Carter* decision. The purpose of such an analysis is to highlight the ways in which nonreligion is constructed in the contemporary *legal* discourse about *physician-assisted dying*. Three things are key to my analysis: First, I employ a sociological methodology[74] which, unlike the rigors of law, provides for more analytical flexibility. Sociological data does not always abide by specific rules (Smart 2009, 301). I am not confined to the rules of legal analysis, but rather the shades of gray that sociological studies provide. Carol Smart argues that qualitative sociological methods can allow one to uncover the "nuanced and sometimes quite contradictory narratives which could be drawn out and woven into different perspectives" (2009, 298). A sociological approach allows me to appreciate the intricacies involved in such research and supports my assessment that understandings of ideas are never neutrally produced and such understandings are constantly in flux (Smart 2009, 303).[75] Second, this study focuses on the *legal* discourse about physician-assisted dying and so my conclusions regarding how nonreligion is rendered are representative of the law's conceptualization of this phenomenon and not that of medicine or science.[76] Third, my conclusions are also specific to the concept of physician-assisted dying. This implies that how nonreligion is constructed in *Carter* may be different from how nonreligion is conceptualized in other types of matters related to, for example, prostitution[77] or pornography.[78] The purpose of this chapter is threefold: (1) to describe the underlying theoretical presuppositions of discourse

[74] I do not use the tools of legal analysis for reasons related to my lack of competency in the intricacies of law and its practice.
[75] Smart also argues that "if we accept that there is not a fixed or core meaning behind what is said or drawn or depicted, then looking for (various) traces of meanings in the words used or the images created seems a fruitful way forward" (2009, 303).
[76] For example, The Ottawa Hospital (2017) in Ottawa, Canada, refers to physician-assisted dying as 'medical assistance in dying' or 'MAID'. The terminology used in medical discourse is very different than in legal discourse.
[77] See *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101.
[78] See *R. v. Butler*, [1992] 1 S.C.R. 452.

analysis; (2) to discuss discourse analysis as a method; and (3), explain the methodology I developed to conduct my research.

Theoretical Underpinnings

Key to my analysis is the notion that nonreligion (as well as religion) is a concept that is culturally produced. Nonreligion is a "form of cultural work", and is rendered by institutions, people, texts, rituals, practices, theology, things, and ideas (Orsi 2003, 172).[79] Put more simply, nonreligion is the product of discourse (von Stuckrad 2013). Although itself a contested term (much like nonreligion and religion),[80] this thesis uses a Foucauldian approach to the meaning of discourse.[81]

Foucault resists the temptation to reduce the term 'discourse' to something specific and instead defines discourse more broadly, treating discourse:

> sometimes as the *general domain of all statements*, sometimes as *an individualizable group of statements*, and sometimes as a *regulated practice* that accounts for a certain number of statements. (1972, 80; emphasis added)

[79] I focus on how nonreligion and religion are lived experiences rather than some organized, neatly confined, and institutionally defined phenomena (Orsi 2003; McGuire 2008; Beyer 2015). In taking this approach, however, I do not intend to dismiss the idea that religion can in fact exist independent from human culture. Religion to some individuals is very real and has substantial meaning.

[80] Much like nonreligion and religion, this notion of discourse is also contested. For example, Jørgensen and Phillips point out that discourse is often used "indiscriminately, often without being defined. The concept has become vague, either meaning almost nothing, or being used with more precise, but rather different, meanings in different contexts" (2002, 1). See also Fairclough (1992; 2010, 3).

[81] Others defined discourse differently. Jørgensen and Phillips define discourse as "a particular way of talking about and understanding the world (or an aspect of the world)" and that underlying such an idea is the notion that "language is structured according to different patterns that people's utterances follow when they take part in different domains of social life, familiar examples being 'medical discourse' and 'political discourse'" (2002, 1). Kocku von Stuckrad, for example, defines discourses as "practices that organize knowledge in a given community; they establish, stabilize, and legitimize systems of meaning and provide collectively shared orders of knowledge in an institutionalized social ensemble. Statements, utterances, and opinions about a specific topic, systematically organized and repeatedly observable, form a discourse" (2013, 15). See also Keller (2011, 8) for a similar understanding of discourse. Teemu Taira more generally defines discourse as a set of statements which themselves produce a "particular version of events" (2013, 28).

Borrowing from Foucault (1972), Carabine (2001) and von Stuckrad (2013), I understand discourse in a general sense: discourse is a collective of statements[82] that, when combined, form what is understood as an individualizable 'thing'. Discourse is a way of organizing knowledge.[83] Discourse, or this way of organizing knowledge, is not merely "neutral and transparent" and therefore does not just simply describe the world in which we live, rather this ordering of knowledge constructs our social reality (Wetherell 2001, 392) as well as stabilizes and legitimizes this reality (von Stuckrad 2013, 15).[84] By conducting a discourse analysis I am examining the ways in which law organizes knowledge about physician-assisted dying.

In the context of this thesis, physician-assisted dying is socially constructed as such precisely because of the statements (both verbal and non-verbal) that relate to what has become known as physician-assisted dying. More importantly, nonreligion is a concept that is given meaning by the legal discourse about physician-assisted dying because of repeated, coherent statements related to the concept of nonreligion that bind "in some way to produce both meanings and effects in the real world" (Carabine 2001, 268). Another way of thinking of this is that discourses are "socially and historically constructed rules designating 'what is' and 'what is not" (Carabine 2001, 275). Discourse thus has force and is ultimately productive (Carabine 2001, 268).[85] In the context of *Carter*, the legal discourse about physician-assisted dying designates what is and what is not and produces what is understood as physician-assisted dying drawing attention to what constitutes nonreligion.

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[82] "Statements" here refers to all forms of communication, both verbal and non-verbal that contribute to the knowledge of whatever is being discussed. Discourse can therefore include metaphors, images, and texts, all of which produce a particular reality (Burr 2003, 64).

[83] Discourses do not, however, exist in isolation and instead overlap and contribute to one another (Fairclough 2010).

[84] See also Fairclough (1992, 3).

[85] Carabine observes that discourses "produce the objects of which they speak […] In other words, they are constitutive; […] Discourses are also productive in that they have power outcomes or effects. They define and establish what is 'truth' at particular moments" (2001, 268).

Method

Stausberg and Engler argue that theory plays a role in the construction of research design, and therefore "impacts the role of methods" (2011, 10). Thus, the theoretical underpinnings of one's research often dictate what methods are best used. This is not a one-way relationship, however, and the opposite is also true—methods often influence the theory of one's research. Assuming that discourse is constructive, and that reality is socially produced, this thesis uses discourse analysis to gather and analyze data related to how discourse renders the concepts nonreligion and religion in the *Carter* decision.[86] Discourse analysis is not simply the study of language, nor a study of discourse "in itself" but rather is an analysis of the "dialectical *relations between* discourse and other objects, elements or moments, as well as analysis of the 'internal relations' of discourse" (Fairclough 2010, 4).[87] These relations include those between physician-assisted dying and the authority of various professional discourses such as human rights and medicine.

Although multiple understandings of discourse analysis exist (see Taylor 2001) I have opted to approach discourse analysis with a focus on power, building on Jean Carabine's (2001) Foucauldian perspective of discourse analysis. Specific to this approach is the entanglement of discourse, power, and knowledge and the effects, or process of normalization, that such a relationship has on society.[88] Carabine argues that:

> Discourses can be powerful because they specify what is and what is not. Not all discourses have the same force. Some discourses are more powerful than others and have more authority or validity […] To understand discourse we have to see it as intermeshed with power/knowledge where knowledge both constitutes and is constituted through discourse as an effect of power. If our study of discourse is to be ***more than a study of***

[86] Discourse analysis, however, is contested as a method in and of itself. See Kocku von Stuckrad (2013); Taira (2013); and Hjelm (2011). For the purposes of this thesis, discourse analysis is a method.
[87] Fairclough notes that "dialectical relations are relations between objects which are different from one another but not what I shall call 'discrete', not fully separate in the sense that one excludes the other" (2010, 4). Further, discourse analysis is not simply an analysis of what is included in discourse. As Beaman argues, "[w]hen one analyzes the discursive process, that which is excluded from the bounds of the possible must be attended to as thoroughly as that which is included" (2008, 36).
[88] Discourse, power, and knowledge are an interconnected triad (Carabine 2001, 267).

> ***language, it must look also at the social context and social relations within which power and knowledge occur and are distributed.***[89] (2001, 275; emphasis added)

It is this power of discourse to constitute the framework within which physician-assisted dying is understood that is of interest in *Carter.* Previously the power lay with religion (as was seen in *Rodriguez*), but in *Carter* there exists a discursive shift to a new, 'other' (what I will refer to as nonreligion) that establishes the framework within which physician-assisted dying is conceptualized.

An approach that focuses on power allows one to analyze the historical and social contexts in which the debates pertaining to physician-assisted dying have taken place. This approach also highlights how social context has shaped our perception of physician-assisted dying and the various social attitudes that are paramount to this understanding. This means of analysis allows me to address how nonreligion is "operationalized and supported institutionally, professionally, socially, ***legally*** and economically" (Carabine 2001, 276).

Methodology

Using the above understanding of discourse analysis, Carabine (2001) provides a guide to conducting a Foucauldian genealogical discourse analysis by breaking such a process into 11 steps.[90] I employed these guidelines as a framework to establish a similar approach to discourse analysis for this research. Much like Carabine I first selected the topic of my research. As discussed earlier, *Carter* resulted in the decriminalization of assisted-dying in Canada. I chose

[89] This understanding of discourse analysis is based on Foucault's notion of 'genealogy' which was a "methodological approach [Foucault] used to study discourse to reveal power/knowledge networks" (Carabine 2001, 275). Similarly, this thesis seeks to highlight the power/knowledge networks inherent in the legal discourse of physician-assisted dying to reveal the construction of the concepts nonreligion and religion.

[90] Carabine's (2001, 281) approach to Foucauldian genealogical discourse analysis consists of: (1) selecting the topic; (2) knowing the available data; (3) identifying themes; (4) looking for inter-relationships between discourses; (5) identifying discursive strategies; (6) highlight absences and silences in the data; (7) look for counter-discourses; (8) identify effects of the discourse(s); (9) provide background context; (10) contextualize the discourse in the power/knowledge of the specific period; and (11), identify limitations of the data/research.

the *Carter* decision as a case study (rather than primarily considering the medical discourse about physician-assisted dying) because of my on-going interest in the intersections of law, religion, and nonreligion as well as my continued interest in the social, political, and legal debates pertaining to physician-assisted dying within the context of a growing nonreligious population in Canada. In addition, the *Carter* decision is fundamentally different from the *Rodriguez* decision. Religion in *Carter,* as will be demonstrated, is no longer a guiding principle so I was interested in analyzing what had changed. Was there something missing in *Carter*, or had religion been replaced with something else?

Having identified the topic of my study I then proceeded to assess the possible sources of data available for such an analysis. Naturally, I first read the Court's decision on *Carter.* The *Carter* decision is a total of 67 pages and reflects the unanimous decision of the Supreme Court of Canada. The decision outlines the facts of the case before the Court, the judicial history of the case (e.g., the decisions of lower courts prior to its arrival before the Supreme Court of Canada), previous judicial precedent, and the reasons for the Court's judgement. The Court's decision was one major source of data for my research.

Another considerable source of data was the submissions of interveners granted leave in the case. In Canadian law, third parties to the case (i.e., those who are not appellants, nor respondents to the case) are often granted leave (permission) to intervene in a legal argument in which they may have a vested interest. These interveners provide written submissions to the Court (facta) that contain information that may aid the Court in making its decision. In *Carter,* there were 26 parties who were granted intervener status in the case. Not all of these interveners submitted an individual factum (some interveners submitted a combined factum) and so there is a total of 20 submissions. These submissions provided fruitful additional data. Unlike the Court,

these interveners were either religious or nonreligious and so were excellent sources of data to provide insight into how nonreligion (as well as religion for that matter) is constructed in the legal discourse about physician-assisted dying. Of these 26 interveners, 12 were religious and the remaining 14 were nonreligious. [91] Combined, the Court's decision and all of the intervener facta provided over 300 pages of raw data for my study. Below is a table of the interveners involved:

***Carter* Interveners**	
Religious	**Not-religious[92]**
1. Association for Reformed Political Action Canada 2. Canadian Federation of Catholic Physicians' Societies 3. Canadian Unitarian Council 4. Catholic Civil Rights League 5. Catholic Health Alliance of Canada 6. Christian Legal Fellowship 7. Christian Medical and Dental Society of Canada 8. Euthanasia Prevention Coalition — British Columbia 9. Euthanasia Prevention Coalition 10. Evangelical Fellowship of Canada 11. Faith and Freedom Alliance 12. Protection of Conscience Project	1. Alliance of People With Disabilities Who are Supportive of Legal Assisted Dying Society 2. Association québécoise pour le droit de mourir dans la dignité 3. Attorney General of Ontario 4. Attorney General of Quebec* 5. Canadian Association for Community Living 6. Canadian Civil Liberties Association 7. Canadian HIV/AIDS Legal Network 8. Canadian Medical Association 9. Council of Canadians with Disabilities 10. Criminal Lawyers' Association (Ontario) 11. Dying With Dignity 12. Farewell Foundation for the Right to Die 13. HIV & AIDS Legal Clinic Ontario 14. Physicians' Alliance against Euthanasia*
	Religious: 12 ***Not-religious: 14*** **Total 26**

[91] Interveners identified as being religious affiliated or alternately, did not so identify. For those that did not identify as being religious, I consulted their respective websites to confirm their religious/nonreligious affiliation.

[92] I did not consult the facta of the nonreligious interveners marked with an asterisk (*) as these facta are in French. I do not speak French and so I did not think it was appropriate to use a translating tool as I would miss the nuances and subtleties in a language I am not familiar with.

Once I had identified these sources of data I then began a close reading of the documents to establish familiarity. I started with the Court's decision to understand who was involved, why such a claim was brought before the Court, and what the outcome was. Once completed, I then consulted the intervener submissions to analyze why these interveners were interested in the case, what additional information these interveners had to offer, and whether these groups were supportive or against changes to the prohibitions in place. Following this initial close reading, I then re-read the Court's decision and the intervener facta, coding for explicitly religious and nonreligious language. After this initial coding, another re-read was completed. The purpose of this re-reading was twofold: (1) to further establish familiarity with the source material; and (2), to identify key concepts in the legal discourse about physician-assisted dying. The concepts that I identified were: the individual; the community; dignity; suffering; morality; death; suicide; freedom of choice; freedom of religion; life; autonomy; the right to security; conscience; faith-based institutions; Western democracy; and science.[93] It became clear that these concepts were part of the legal discourse about physician-assisted dying (this suggests that physician-assisted dying is itself the result of the intertwining, or intersection, of other discourses). It is also important to note that in Canada many of these concepts (such as life, death, and morality) have been traditionally understood as religious because of the cultural and religious heritage of Canada, therefore these concepts provide insight into how nonreligion might be rendered if they are understood outside of a religious framework. Much like the discourse about physician-assisted dying, how these concepts are understood is the result of their interaction with other discourses (such as religion and nonreligion) and so the identified concepts provide an avenue

[93] Other terms were present in the source material but did not appear often enough to warrant going into further detail with them.

through which to explore how nonreligion is woven within the legal discourse about physician-assisted dying more generally.

Once I had identified these concepts I began to code the *Carter* decision as well as the intervener facta for occurrences of these concepts to determine how they were conceptualized. Coding was completed by hand using the text highlighting feature and shapes tool in Adobe Reader. I assigned each concept a corresponding colour and then the concepts were noted in the documentation using a square to bracket the text. The colour of this square was the colour assigned to the concept identified. Each concept was assigned a unique colour. Following this initial coding, I further coded the concepts according to whether they were discussed in an explicitly religious way, or nonreligious way according to whether or not there was reference to religion/religious doctrine. To complete this step of the coding the actual text was highlighted using the corresponding colour for explicitly religious language or nonreligious language. Religious language was highlighted in yellow and nonreligious language was highlighted in grey.

When all the source data had been coded I moved beyond a simple content analysis by examining the power to constitute the framework (now a nonreligious framework because of the absence of the transcendent) within which physician-assisted dying is understood. To do so, I began to look at the relationships between these identified concepts and the strategies used to construct such concepts. I was also looking for *absences* in the discourse. What, for example, was missing? Why was this missing? Was the omission of certain things intentional? Other questions I sought to answer included: how, for example, were understandings of life involved in how death is understood? Was religion still used in any capacity to understand death, or is it nonreligious? How was morality constitutive in the overall rendering of physician-assisted

dying? Again, was morality understood in reference to religion? In seeking to understand these relationships, I also began looking for resistances to these understandings, that is, those notions of the same concepts identified that were dominantly held positions. I noticed religious interpretations of the identified concepts where eclipsed by nonreligious understandings of these same concepts.

Having identified and coded for these concepts and whether they were discussed in religious or nonreligious ways, as well as identifying absences and resistances to conceptual understandings in the decision and facta, I then questioned how, for example, were concepts at the heart of religious doctrine in Canada (death, life, and morality—the concepts analyzed in this thesis) now discussed in the legal realm and consequently applied in Canada? Had these notions been 'stripped' of religious language and become *nonreligious*? Did law now understand, for example, life as being nonreligious and therefore a defining feature of what was to be included in the broad category of nonreligion? If so, how did this contribute to the legal discourse of physician-assisted dying? These are some of the effects I explored. In doing so, I examined the normalization of nonreligious understandings in *Carter* of once religiously understood concepts. By this I mean I assessed how the power of a nonreligious narrative helped construct knowledge about physician-assisted dying thereby "conveying messages about what is the norm and what is not" (Carabine 2001, 274).[94] The way in which key concepts were discussed, and consequently contributed to the discourse about physician-assisted dying, promoted a new and acceptable way for the law, and by extension the Canadian public, to understand assisted-dying.

[94] Carabine asserts that "normalization establishes the measure by which all are judged and deemed to conform or not. This normalization process produces homogeneity through processes of comparison and differentiation. However, we should not think of normalizing judgement as simply about comparing individuals in a binary way—as in good/bad, mad/sane or healthy/ill. It is also a 'norm' towards which all individuals should aim, work towards, seek to achieve, and against which all are measured—'good' *and* 'bad', sick *and* healthy, 'mad' *and* 'sane', heterosexual and homosexual" (2001, 278).

Conclusion

This chapter has highlighted the method and methodology used in my analysis of the *Carter* decision. Foundational to my analysis is the presupposition that discourse, though a contested term, both constructs the world in which we live and is produced itself through social interaction. I have therefore defined discourse as a collective of statements that, when combined, form what is understood as an individualizable 'thing'—discourses are a way of organizing knowledge. Thus, the binding of statements (verbal and nonverbal) about nonreligion construct how this concept is understood at a certain period in time (Carabine 2001). Discourses are then "variable ways of 'speaking of' an issue which cohere or come together to produce the object of which they speak" (Carabine 2001, 273). To analyze the legal discourse about physician-assisted dying as well as the concepts nonreligion and religion, I employed discourse analysis as a method, which, for the purposes of my research, assesses the characteristics of discourses and the effects these discourses have on a certain society. Inherent in this approach is the relationship between discourse, power, and knowledge.

My research ultimately examined the relationships at play in the contemporary, legal construction of the concept of nonreligion in the legal discourse about physician-assisted dying. This analysis assessed the interplay between discourse, power, and knowledge involved in such a shift and whether a new guiding nonreligious ideology (as opposed to a religious ideology) had been established. In short, I examined how nonreligion was constructed by law through the examination of how this concept was interwoven with other major concepts that contribute to the overall legal discourse about physician-assisted dying. The combination of these themes (as well as others which I have not focused on) constitutes, to use the words of Carabine (2001), the 'truth' that is physician-assisted dying.

The analysis chapters that follow examine how the concepts life, death, and morality in *Carter* are now understood nonreligiously rather than religiously (this transition includes the introduction of new language or the transformation of existing language). To perform this analysis, I compared the nonreligious understandings of selected concepts with traditional religious understandings of the same concepts. Given the cultural and religious heritage of Canada, which I discussed in the introduction to this thesis, such concepts can precisely be understood, in their original sense, as religious/Christian in Canada. This thesis operates within the framework of Canada's religious and cultural heritage which is predominantly Christian and therefore argues traditional conceptions of life, death, and morality are at their core religious.

Just as Beaman claims that "courts interpret claims to religious freedom against a backdrop of religious normalcy that is rooted in mainstream Protestant [and Catholic…] hegemony" (2003, 321), this paper argues concepts such as death, especially physician-assisted dying, are at their very core ingrained with Protestant and Roman Catholic theological assumptions pointed out by Chambers (2011a) in the previously mentioned *Rodriguez* decision. This then allows for us to understand contemporary notions of physician-assisted death in relation to historical understandings of physician-assisted death that have been, in the Canadian context, religious. In short, it is through examining dominant themes and categories in the legal discourse of physician-assisted dying in *Carter* against a Christian backdrop that the presence of something else, nonreligion, becomes apparent.

Before I continue, however, I wish to provide a brief but important methodological note. The terms 'religion' and 'Christianity' are used interchangeably in the following analysis chapters unless noted otherwise. I use these terms in a very specific way: the religious interveners in *Carter* were almost exclusively conservative Christians and so 'religion' and

'Christianity' refer to conservative Christianity. Nonreligion then refers to phenomena that are understood in relation to conservative renderings of Christianity.

As a consequence, the analysis that follows does not address the diversity of Christian beliefs in Canadian society when it comes to matters related to physician-assisted dying. The omission of this diversity is largely the result of: (1) the same religious (i.e., conservatively Christian) groups intervening in Canadian legal cases; and (2) the law forces people to work in ideals. As Carol Smart argues, in law "non-legal knowledge is […] suspect and/or secondary. Everyday experiences are of little interest in terms of their meaning for individuals. Rather these experiences must be translated into another form in order to become 'legal' issues and before they can be processed through the legal system" (1989, 11). The translation of religious interpretations of physician-assisted dying into something compatible with Canadian law has ultimately excluded differing religious (both Christian and non-Christian) understandings of physician-assisted dying from *Carter.*

Chapter Three: A New Understanding of Life

> *'Everyone' lives in different circumstances, experiences life in different ways, and lives within the ambit of his or her own personal abilities, characteristics and aptitudes. The meaning of the term 'life' in the context of s. 7 includes a full range of potential human experiences. The value a person ascribes to his or her life may include physical, intellectual, emotional, cultural and spiritual experiences, the engagement of one's senses, intellect and feelings, meeting challenges, enjoying successes, and accepting or overcoming defeats, forming friendships and other relationships, cooperating, helping others, being part of a team, enjoying a moment, and anticipating the future and remembering the past. Life's meaning, and by extension the life interest in s. 7, is intimately connected to the way a person values his or her lived experience. The point at which the meaning of life is lost, when life's positive attributes are so diminished as to render life valueless, when suffering overwhelms all else, is an intensely personal decision which 'everyone' has the right to make for him or herself.* (Factum of the Appellants, Lee Carter, Hollis Johnson, Dr. William Shoichet, The British Columbia Civil Liberties Association and Gloria Taylor, at para. 26)

Carter is important as it not only draws attention to the fact that there are two distinct legal narratives about physician-assisted dying in contemporary Canadian society but also, and perhaps more importantly, that there has been a transition from one of these narratives to the other. As I have previously discussed, the moral framework within which physician-assisted dying was narrated in *Rodriguez* was very much established by religion which is something Chambers (2011a, 2011b), Jugnauth (2011) and others have argued. In *Carter,* the moral framework within which the narrative of physician-assisted dying is rendered is established by something outside of religion which I am arguing is nonreligion.[95] The analysis chapters that follow document this shift from a religious to nonreligious narrative of physician-assisted dying in *Carter* by focusing on three key concepts: life, death, and morality. In this chapter I discuss life.

[95] Certain scholars argue that *Carter* and Canada's physician-assisted dying legislation is still indebted to Christian notions of the concepts I discuss throughout my analysis. O'Reilly and Hogeboom argue that the dominant medical orientation toward physician-assisted dying in Canada is "backed by a dominant religious orientation" (2017, 715). As will become clear in my analysis when one compares how those opposed to physician-assisted dying understand life, death, and morality to those that favour physician-assisted dying religion occupies little-to-no position of prominence in how these new concepts are framed.

Canada has been predominantly a Christian nation (O'Toole 2000).[96] Canadian social institutions, values, and norms have all been influenced by Protestant and Roman Catholic ideology, but with the introduction of a "new diversity" in Canada, competing narratives about what constitutes life have emerged. To address these competing narratives, and to examine the shift from one narrative to another, I examine traditional religious understandings of life put forth by the interveners opposed to physician-assisted dying in *Carter* as well as nonreligious understandings propagated by those who favoured physician-assisted dying. This analysis helps draw tentative conclusions of how nonreligion might be rendered in law. My analysis reveals that the narrative of life in *Carter* transitions from an understanding shrouded in religion, which typically dictates that:

> Our society recognizes that morally, religiously, philosophically, human life merits special protection. This recognition of life's fundamental importance has often been expressed by the concept of the sanctity of human life. One expression of this concept is that because ***life is God given and we merely hold it in trust***, we should not then interfere with it or put an end to it. (Law Reform Commission of Canada as quoted in the Factum of the Intervener, The Evangelical Fellowship of Canada, at para. 10; emphasis added)[97]

To a narrative outside of the realm of religion in which:

> [the right to ***life,*** liberty and security of the person] ***must not be imbued with a religious view of the sanctity of life***, but rather with ***secular*** *Charter* values, including respect for autonomous individual decision-making. (Factum of the Intervener, Dying With Dignity, at para. 3; emphasis added)

The notion of life rendered outside of a religious framework is what is ultimately reflected in the decision of the Court. When discussing life, the Court ruled:

> Section 7 is rooted in a profound respect for the value of human life. But s. 7 also encompasses life, liberty and security of the person during the passage to death. ***It is for this reason that the sanctity of life 'is no longer seen to require that all human life be preserved at all costs'.*** (*Carter,* at para. 63; emphasis added; internal quote from *Rodriguez,* p. 595)

[96] See also Model and Lin (2002) for an analysis of how non-Christians fare in Canadian (as well as British) society.
[97] This assertation by the Law Reform Commission of Canada was also used in *Rodriguez.* See Chambers (2011a).

Although the Court uses the phrase sanctity of life, it does so in a way where there is no reference to the sacred or religion as was the case in *Rodriguez.* The Court has appropriated religious language and rendered it nonreligious (Beaman and Steele 2018).

When assessed further, the nonreligious rendering of life in *Carter* reveals that life is reconceptualized in three related but distinct ways, which include: (1) the idea that, within a specific set of circumstances, a person can freely and justifiably end his or her life if he or she so wishes; (2) the value of life is determined according to how a person lives his or her life; and (3) life is understood subjectively with an emphasis on the quality of how one lives. In the discussion that follows, I examine these three ways in which life is defined. To do so, I take into consideration the traditionally religious understandings of life that are articulated by the interveners in *Carter* who were opposed to physician-assisted dying and compare these with nonreligious understandings of life as presented by both those who favoured physician-assisted dying and the Court. Each section below begins with a brief analysis of how life has been understood religiously to better document the shift toward a nonreligious understanding of life.

A Matter of Choice—Justifiably Ending Life

In *Carter,* those who opposed physician-assisted dying understood life as a gift from God. In essence, "the central component of […] Christian theological [thought] is that humans are those who are made in the image of God—the *Imago Dei"* (Evans 2016, 5). The sacredness of human life and the understanding that humans are granted the gift of life made in the image of God is articulated in *Carter* by multiple interveners who opposed physician-assisted dying.[98] The Association for Reformed Political Action Canada (ARPA), for example, argued that:

[98] This understanding of life was also pervasive throughout *Rodriguez* (see Chambers 2011a, 2011b).

> ARPA Canada respectfully submits that sanctity or dignity do not come from human ability, superiority, or some sort of social contract. ***Rather it is because God, as our Creator, set humanity apart from the rest of creation and made us in His image.*** (at para. 17; emphasis added)

The intervener The Catholic Health Alliance of Canada also reiterated this when it noted that, "as Roman Catholic organizations, the institutions represented by the Alliance recognize the ***sanctity of life*** and the dignity of the ***human person who is made in the image of God***" (at para. 5; emphasis added). Similarly, the Evangelical Fellowship of Canada also argued that understanding humans as being created in the image of God results in all humans having "inestimable worth" and that "such [worth] is the bedrock of civilized nations, and of Canada's Constitutional order. It is the animating principle of our criminal law" (at para. 1).

The conceptualization that humans are created in the image of God and that life is ultimately God's gift to humankind is closely connected to the sanctity of life argument. As McManaman states, "the Sanctity of Life mentally regards individual human life as holy, sacred, and of immeasurable value, regardless of the physical and/or mental quality of the person. You can place a price on things, but not on the human persons who are created by God and who are called by God, each one, to union with Him in the unimaginable joy of eternal life in heaven" (2010, 24). Humankind is then, according to Christianity as portrayed by the interveners in *Carter*, god-like and has an "intrinsic value" (Factum of the Interveners, The Christian Medical and Dental Society of Canada and the Canadian Federation of Catholic Physicians' Societies, at para. 5).

The sanctity of life argument was pervasive throughout the facta of those opposed to physician-assisted dying in *Carter*. The intervener The Evangelical Fellowship of Canada, for example, argued that "the most fundamental *Charter* Value is the ***sanctity of human life***" (at paras. 8-9; emphasis added). Life is "***sui generis*.** It is not a personal possession to be bartered

away, but rather constitutes a ***sacred trust*** […] the unique nature of human life as a sacred trust means ***that individual autonomy is subject to inherent limits in respect of intentional killing*** (even if 'consensual')" (Factum of the Intervener, Evangelical Christian Fellowship of Canada, at para. 1; emphasis added). Similarly, the Christian Legal Fellowship claimed, "the intentional taking of all human life is exceptionlessly wrong, no matter whose life it is, no matter what the circumstances" because of its sacred nature (at para. 4).

Consequently, understandings of life propagated by those who opposed physician-assisted dying in *Carter* are "consistent with the Judeo-Christian faith" (Factum of the Intervener, Association for Reformed Political Action Canada, at para 17). Life, as traditionally understood in Canadian society and by the interveners opposed to physician-assisted dying in *Carter*, was to be revered absolutely (McManaman 2015, 25). According to the religious narrative presented by those opposed to physician-assisted dying, there is never a justifiable reason for a person to end his or her life. Any form of physician-assisted dying or the taking of one's own life is just as wrong as murder and is a rejection of God's plan. Life, to these interveners, is inviolable because of its transcendent nature. Life can only to be taken away according to God's will. Understood in this way, there is no choice to live or die and so life cannot be justifiably ended by a person who seeks to do so.

Compared to the narrative employed by those opposed to physician-assisted dying in *Carter*, the facta of those who favoured physician-assisted dying and the Court's decision highlight a shift away from understanding life as a gift from God. This shift enshrined life with the notion that a death by way of physician-assisted dying is indeed justifiable if a person wishes to end his or her life. Such a justification is independent of the transcendent and is instead grounded in the affirmation that, when addressing physician-assisted dying, how a person

conceptualizes his or her life and how he or she wishes to live is a matter of individual human autonomy and therefore commands respect. This nonreligious narrative directly challenges the traditional Christian belief in the "sanctity of life" as presented by those opposed to physician-assisted dying. The intervener, The Canadian HIV/AIDS Legal Network and the HIV & AIDS Legal Clinic Ontario, who favoured physician-assisted dying, argued, for example, that the sanctity of life should not be used to more generally understand life—an approach taken in *Rodriguez* (at para. 14).

To the interveners who favoured physician-assisted dying, conceptualizations of life include the option for a person to justifiably end his or her life should he or she so choose. For example, the Canadian Civil Liberties Association argued that a person should have "the right to make the fundamental ***decision to end one's own life***"—not some God like figure (at para. 12; emphasis added). Similarly, the intervener the Farewell Foundation for the Right to Die and Association québécoise pour le droit de mourir dans la dignité (FF/AQDMD) reiterated a nonreligious understanding of life that emphasized autonomy when they claimed that:

> FF/AQDMD respectfully ask this Court to support the straightforward notion that the ***free, informed, and voluntary choice of an individual to end his or her own life is the choice of that individual rather than the choice of society.*** The normative principle at work is respect for individual autonomy, not compassion or mercy for suffering. (at para. 25; emphasis added)

Dying with Dignity also reiterated that should an individual not wish to suffer and live in a state of fear and dread, he or she should have the ability to "make autonomous personal decisions about end-of-life matters" (at para. 4)

The Court adopted the above framing of life when it acknowledged that the *Criminal Code* infringed upon the "fundamental choice" an individual should have concerning when he or she is to die and how he or she lives his or her life (*Carter* at para 63). Having said this, the

Court also claimed that "the sanctity of life is one of [Canada's] most fundamental societal values" (*Carter,* at para. 63). This seems contradictory at first as the Court seemingly adopted the religious understanding of life presented above. But what is interesting here is that there is no reference to the sacred in the Court's discussion of the sanctity of life (something, as Chamber's [2011] points out, was present in *Rodriguez*).[99] Instead, the Court bypassed the notion of the sacred and went on to immediately conclude "***the law has come to recognize that, in certain circumstances, an individual's choice about the end of her life is entitled to respect***" (*Carter,* at para. 63; emphasis added).

Bypassing the notion of the sacred implies the Court's use of the sanctity of life is not rooted in religion. The Court simply ruled that the sanctity of life, as related to section 7 of the *Charter* was to be understood as recognizing "a profound respect for the value of human life" (*Carter,* at para. 63). The Court did not use this notion of life religiously, but instead recognized, much like the interveners who favoured physician-assisted dying, that there exists a profound respect for human life, which includes respecting the decisions one may make regarding the end of his or her life. In this light, the Court's use of sanctity of life is not to suggest that life is sacred, nor a gift from a transcendental figure, but instead something that one is rightfully permitted to *experience* rather than *endure*. As expressed by the Court, one has the "right to life", not a "duty to live". The Court ruled that:

> [An absolute prohibition on physician-assisted dying] would ***create a 'duty to live', rather than a 'right to life',*** and would call into question the legality of any consent to the withdrawal or refusal of lifesaving or life-sustaining treatment. (*Carter,* at para. 63; emphasis added)

Using such a phrase suggests that the Court has adopted the language of the religious narrative, but instead infused it with a different meaning that is perhaps mutually understandable to both

[99] See *Rodriguez,* p. 585.

the nonreligious and religious alike.[100] Referencing the sanctity of life carries a certain weight perhaps not achievable by other means. No longer does it mean that the taking of human life is wrong and prohibited, but instead that decisions concerning one's own life deserve respect.

Life's Value is Derived from Living

Conceptualizations of life that include the idea that it is justifiable for a person to prematurely end his or her own life ultimately questions how the value of one's life is determined. Through the analysis of the submissions of those who favoured physician-assisted dying and the Court's decision, it is evidenced that how life is rendered includes the assumption that how a person values his or her life is associated with being able to freely choose when and how to die.[101] To those who favoured physician-assisted dying it seemed as though there was the understanding that a "good life", or a life of value, is one in which there are times when death is preferable to living,[102] whereas the "good life" for those opposed to physician-assisted dying is all about life until a natural death.

McManaman (2010, 24) and the religious interveners in *Carter* state that life, as understood by Christian doctrine, is of immeasurable intrinsic value because of the underlying assumption that life is a gift from God. It is because of this that Christian doctrine as portrayed in *Carter* stipulates that regardless of the physical and/or mental suffering a person may experience, his or her life is still of value (McManaman 2010, 24). This notion proposed by McManaman is

[100] Habermas argues that "every citizen must know and accept that only secular reasons count beyond the institutional threshold that divides the informal public sphere from parliaments, courts, ministries and administrations […] the truth content of religious contributions can only enter into the institutionalized practice of deliberation and decision-making if the necessary translation already occurs in the pre-parliamentarian domain, i.e., in the political public sphere itself" (2006, 10).

[101] The Canadian Unitarian Council indicated, however, that there was "no societal consensus or universal meaning as to what 'life as a value' mean[t]" (at para. 16).

[102] To Gloria Taylor, for example, death was preferable to suffering as her doctors were causing her harm by keeping her alive. See The Fifth Estate, 2012, "The Life and Death of Gloria Taylor," The Fifth Estate video, 32:10. http://www.cbc.ca/fifth/episodes/2012-2013/the-life-and-death-of-gloria-taylor.

evident in the facta of those opposed to physician-assisted dying in *Carter*. For example, the Association for Reformed Political Action Canada argued that "absolute prohibitions of assisted suicide are necessary for upholding ***the sanctity of human life***. Exceptions based on ***subjective determinations of the value of a person's life*** will radically destabilize the protection that law provides to the vulnerable" (at para. 29). This intervener also quoted Wesley J. Smith who suggested that human life is valuable precisely because humans are human (at para. 38). For those opposed to physician-assisted dying, the value of an individual's life is not subjective, but rather objective. Life is valuable because it is an inviolable gift from God.

The above religious understanding of life, however, is something that the narrative of those who favoured physician-assisted dying did not portray. The conceptualization of life by these interveners, as adopted by the Supreme Court, suggests that the value of someone's life is determined by how a person is able to live his or her life. Life, in and of itself, is not necessarily of value. How a person perceives his or her life is what determines the value of this person's life. A life only has value so long as a person is able to live and end his or her life according to his or her own terms. Prohibiting individuals from ending their lives devalues the lives of those having to live in a state of suffering (Factum of the Interveners, Farewell Foundation for the Right to Die and Association québécoise pour le droit de mourir dans la dignité, at para 34). The Farewell Foundation for the Right to Die and Association québécoise pour le droit de mourir dans la dignité succinctly argued, for example, that:

> The government overlooks, condones, excuses and even requires the use of lethal force from time to time. ***Human life has a high value but it is not superordinate***. (at para. 35; emphasis added)

Similarly, those who favoured physician-assisted dying focused on the subjective category of personhood when it came to determining the value of one's life:

> ***We value human life not because of physical existence, but because of the existence of our personhood***, which includes the marvelous human capacity to feel joy and suffering and love, to form our own conceptions of the meaning of existence to be conscious that we live and that we will die, and to make decisions about how we will live and indeed about how we will die. (Factum of the Interveners, Canadian Unitarian Council, at para 17; emphasis added)

In contrast to the view of those who opposed assisted-dying, the decision to end one's life does not inherently question or even diminish the value of one's life. Instead, those who favoured physician-assisted dying articulated the view that such a decision can *increase* the value of one's life. The Canadian Unitarian Council, for example, stated:

> The reasons we respect human life so deeply and defend it with rights are inextricably related to fundamental notions of self-determination and human dignity. ***Exercising choice over the manner and timing of one's death is not inherently inconsistent with 'life as a value';*** when made by someone who is decisionally competent, terminally ill and grievously suffering, the choice can instead be an ***expression of the very qualities that make human life so valuable***. (Factum of the Interveners, Canadian Unitarian Council, at para. 18; emphasis added)

The above understandings of life challenge the assumption that humans possess an inherent value through dignity by birth.[103]

The interveners who favoured physician-assisted dying, including the Canadian Civil Liberties Association, argued that forcing one to "endure indeterminate suffering and fear" *detracts* from the value of one's life thereby challenging this notion of an inherited life of value through birth (at para. 27). The value of an individual's life is, in some way, determined by the autonomy afforded to an individual. The Canadian Unitarian Council emphasized the importance of autonomy in determining the value of an individual's life when it argued that:

[103] Those who opposed physician-assisted dying very much believed that humans possess inherent value simply by being human: "***All humans equally possess inalienable dignity simply by being human***. This dignity is not based on ability, age, or any other characteristic. This basic human worth is granted to us and is not something that an individual can chose to forfeit, either for themselves or another" (Factum of the Intervener, Association for Reform Political Action Canada, at para. 4; emphasis added).

> Indeed, ***if self-determination as a value were subservient to 'life as a value' in the sense of the preservation of physical existence, then it would be appropriate for the criminal law to prohibit the refusal or withdrawal of life-preserving treatment*** and for the common law of battery to make an exception for life-saving medical treatment. ***However, '[t]he right to determine what shall, or shall not, be done with one's own body, and to be free from non-consensual medical treatment, is a right deeply rooted in our common law', 'even if the withdrawal from or refusal of treatment may result in death'.*** We allow for decisionally-competent patients to choose to die by refusing life-saving treatment, or requiring its withdrawal, precisely because of the paramountcy we accord to the value of self-determination. (at para. 19; emphasis added)

Since the Supreme Court did not recognize an objective understanding of life, it did not explicitly discuss this idea of the "good life" in its decision. Instead, it implied an understanding of the "good life" through its discussion of liberty. The Supreme Court concluded:

> We agree with the trial judge. An individual's response to a grievous and irremediable medical condition is a matter critical to their dignity and autonomy. The law allows people in this situation to request palliative sedation, refuse artificial nutrition and hydration, or request the removal of life-sustaining medical equipment, but denies them the right to request a physician's assistance in dying. ***This interferes with their ability to make decisions concerning their bodily integrity and medical care and thus trenches on liberty***. And, by leaving people like Ms. Taylor to endure intolerable suffering, it impinges on their security of the person (*Carter,* at para. 66; emphasis added)

By recognizing that a person's choice about wanting to end his or her life is worthy of respect, the Supreme Court acknowledged that the value of life can be diminished by infringing upon an individual's right to liberty. The Supreme Court recognized that *personhood* equates to the "good life" for the nonreligious and not just *life* itself (Factum of the Intervener, Canadian Unitarian Council, at para 17). The Supreme Court seemingly rejected the traditional religious understanding of the "good life" and shifted toward a nonreligious understanding of the "good life" through its recognition of the consequences of infringing someone's liberty. This implies that the Court does believe in some form of the "good life".

A Subjective Life

The third way in which life is reframed in *Carter* is that life is to be understood as subjective. Life is not necessarily about living *per se* (i.e., objective), but instead how life is framed by those who favoured physician-assisted dying and the Court includes a focus on the quality of a person's life as decided by the person. In this understanding there is no "duty to live" and so life is not necessarily existential in nature. This understanding of life stands in contrast to the religious narrative of life, which includes the notion that life is to be understood as existential and *only* as existential and is therefore to be held in high regard (McManaman 2010). The Association for Reformed Political Action Canada, for example, provided a detailed overview of the existential nature of life and how such an understanding is fundamental to human rights in general:

> A. Canadian jurisprudence and public policy hold the right to ***life as existential***;
> B. ***Western philosophy and theology***, upon which our law is partly grounded, hold the right to ***life to be existential***;
> C. A qualitative approach to the right to life necessarily results in a ***subjective standard for the right to life which is untenable***;
> D. When the right to life is interpreted as ***anything other than existential***, the concept of human dignity is severely diminished;
> E. An ***existential understanding of the right to life*** requires absolute prohibitions of assisted suicide;
> F. The right to liberty and security of the person are dependent upon and cannot be divorced from the adjoining right to life;
> G. Properly understood, ***the right to life is a necessary grounding for all human rights in the Charter***. (Factum of the Interveners, Association for Reformed Political Action Canada, at para. 3; emphasis added)

The Association for Reformed Political Action Canada argued:

> Our society may feel obliged to grant the request of those who seek state-condoned death. But doing so means constructing a new moral foundation that is capable of upholding the right to life. If that foundation is subjective, it will ultimately mean that human becomes 'merely another animal in the forest. In the forest, it is strength that determines superiority. The weak must learn to hide. (at para. 39).

Similarly, the Attorney General of Canada also promoted an existential idea of life in its understanding of section 7's life interest, when this intervener argued that:

> Chief Justice Finch, dissenting in the Court of Appeal, would have recognized a new, much broader scope to the 'life' interest in s.7. The majority of the Court of Appeal correctly concluded, however, that such an interpretation of 'life' would effectively swallow the liberty and security interests whole, and was inconsistent with both the majority's reasoning in Rodriguez and this Court's post-Rodriguez characterizations of 'life' in cases such as *Chaoulli*. ***Other courts have also refused to interpret a constitutional right to life as encompassing a right to terminate life***. (at para. 77; emphasis added)

These interveners, as well as other interveners opposed to physician-assisted dying, denied the possibility of life being a subjective category as this would devoid the sacred nature that God has bestowed upon it. The sacredness that God has bestowed upon life is a belief that is "deeply rooted in [Canadian] society" (Factum of the Intervener, Association for Reformed Political Action Canada, at para. 19; original quote from *Rodriguez,* p. 585).

In contrast, life is framed as subjective by the interveners who favoured physician-assisted dying. The nonreligious narrative focuses on what goes into *living* and how to improve one's life, rather than exclusively focusing on *living* no matter the circumstances and/or cost. Dying with Dignity made this strikingly clear when it claimed that "life should not be interpreted in a manner that is purely existential" (at para. 6). This approach to life is reiterated by other interveners who favoured physician-assisted dying. The Alliance of People with Disabilities Who Are Supportive of Legal Assisted Dying Society pointed out that people should have the right and capacity to make "a subjective evaluation" of their life (at para 25). Similarly, the Council of Canadians with Disabilities and the Canadian Association for Community Living asserted that life, as defined by qualitative means (e.g., physical and or physiological pain/suffering), occurs along a highly subjective spectrum (at para 30). And finally, the Canadian

Civil Liberties Association, argued that to understand "life" as an objective category would devalue human dignity and self-determination (at para. 7).

The Court did not adopt this nonreligious notion of a subjective, or qualitative, approach to life and instead abided by legal precedent that has rejected the qualitative approach to life. The Court in *Carter* reasoned that "we see no reason to alter [this] approach in this case" (*Carter,* at para. 62). The Court, therefore, rejected the notion of a qualitative, non-existential, approach to life put forth by many of those who favoured physician-assisted dying. Having said this, in this situation the Court recognized the legitimacy of both religious and nonreligious narratives of life, but for this specific rendering of life, rather than taking the authority away from the religious narrative and placing it within the nonreligious narrative, the Court attempts to balance the two narratives.

In its decision, the Court concluded: "we do not agree that ***the existential formulation of the right to life requires*** an absolute prohibition on assistance in dying, or that individuals cannot 'waive' their right to life" (*Carter,* at para. 63; emphasis added). Further, the Court went on to suggest that "an individual's choice about the end of ***her life is entitled to respect***" (*Carter,* at para. 63; emphasis added). This respect is articulated by the Court when it ruled:

> the ***prohibition on physician-assisted dying is void*** insofar as it deprives a competent adult of such assistance where (1) the person affected clearly consents to the termination of life; and (2) the person has a grievous and irremediable medical condition (including an illness, disease or disability) that causes enduring suffering that is intolerable to the individual in the circumstances of his or her condition. (*Carter,* at para. 4; emphasis added)

Although the Court upholds an existential view of life in its decision, the Court recognized the existence of competing narratives. Here we might see the Court as engaging in a balancing act that provides an exception for people who do not necessarily understand life religiously to carry out end of life practices as they see fit while maintaining that those who understand life

religiously can continue to do so and act accordingly. Despite the Court's seeming adoption of a religious understanding of life, the Court's existential understanding of life in this instance is not grounded in religious claims or the sacred as was the case with the religious interveners above and in *Rodriguez*. Just like the sanctity of life argument presented above, there exists an appropriation of religious language here by the Court (Beaman and Steele 2018).

Conclusion

The decision of the Court in *Carter* and the submissions of the interveners who favoured physician-assisted dying map a shift away from a religious narrative and toward a nonreligious narrative about life and more generally physician-assisted dying. It is through this shift we see a move away from religion. Once understood as a sacred gift from God, life has been reconceptualized in a way where the transcendent plays little role. How life is framed in *Carter* includes: (1) the idea that, within a specific set of circumstances, a person is able to freely and justifiably end his or her life if he or she so wish; (2) the value of life is determined according to how a person lives his or her life; and (3) life is understood subjectively with an emphasis on the quality of one's life. These three features are analogous to a triptych in the sense that all three are separate, but interconnected to form a broader understanding, or picture, of life. It is within this understanding that we see the displacement of religion with nonreligion. Nonreligion is not necessarily the rejection of religion (as we see with nonreligious interveners rejecting the claim that humans are made in the image of God), but also inclusive of adopting religious language and restructuring it to provide substance to new, normative claims (e.g., the Court's use of the sanctity of life). Underlying this nonreligious approach to life is also the notion of autonomy.

The intervener the Canadian Unitarian Council hinted at this by arguing that the "objections to an autonomy-based conception of the life interest should be rejected" (at para. 24).

Unlike the analysis above, how life was conceptualized by the Court in *Rodriguez* was very much dependent on religious conceptualizations of life (Chambers 2011a). However, in *Carter* the Court recognized an alternative narrative of life and physician-assisted dying when it decided:

> ***The legislative landscape on the issue of physician-assisted death has changed in the two decades since Rodriguez.*** In 1993 Sopinka J. noted that no other Western democracy expressly permitted assistance in dying. By 2010, however, eight jurisdictions permitted some form of assisted dying: the Netherlands, Belgium, Luxembourg, Switzerland, Oregon, Washington, Montana, and Colombia. The process of legalization began in 1994, when Oregon, as a result of a citizens' initiative, altered its laws to permit medical aid in dying for a person suffering from a terminal disease. Colombia followed in 1997, after a decision of the constitutional court. The Dutch Parliament established a regulatory regime for assisted dying in 2002; Belgium quickly adopted a similar regime, with Luxembourg joining in 2009. ***Together, these regimes have produced a body of evidence about the practical and legal workings of physician-assisted death and the efficacy of safeguards for the vulnerable.*** (*Carter,* at para. 8; emphasis added)

Despite the absence of religion in much of the narrative about life, how life is framed by the Court and the interveners who favoured physician-assisted dying in *Carter* does not represent the death of religion, but rather repositions religion as one voice in the discussion about life and what it entails. This analysis reveals that the Court recognized the legitimacy of both narratives of life (religious and nonreligious) and attempted to navigate these competing narratives by, at least in cases relating to physician-assisted dying, reducing the authority of the religious narrative to define life for all Canadians. To develop a more thorough understanding of this notion of nonreligion, I now turn to the theme of death to further assess how nonreligion is constructed in the legal discourse about physician-assisted dying.

Chapter Four: Death as Liberation from Suffering

> *This case is about those so unfortunate as to have grievous and irremediable conditions that cause intolerable suffering. It is about those who know there are states of being literally worse than death and wish to embrace the latter in the time and manner of their choosing. It is about those who are - because their disability prevents them from acting alone - denied the autonomy and respect accorded to able-bodied people and, instead, categorically labeled incapable of judging their own best interests, and either driven to end their lives pre-emptively while able or abandoned to their suffering. But it is also about a broader group who need and deserve the peace of mind and improved quality of life that comes with knowing that should their suffering become intolerable, a peaceful and dignified physician-assisted death ("PAD") will be an available choice.* (Factum of the Appellants, Lee Carter, Hollis Johnson, Dr. William Shoichet, The British Columbia Civil Liberties Association and Gloria Taylor, at para. 1)

In the previous chapter I examined the shift from a narrative of physician-assisted dying grounded in religion (i.e., traditional, conservative Christianity) to one established within a framework of nonreligion by assessing how the concept of life has been reconceptualized in *Carter*. To further accentuate this shift in narratives, I turn my focus in this chapter to the concepts of death, a self-chosen death (suicide as per those opposed to physician-assisted dying), and suffering. Much like life, there are two competing narratives of death and suffering that exist simultaneously throughout *Carter*.

In *Carter*, the emerging prominence of a nonreligious rendering of death coincides with: (1) the simultaneous increase of Canadians who identify as having no religion; and (2) the decline of institutionalized religion in Canada. The changing nonreligious and religious demographic has prompted a shift toward new notions of an after life and death in Canadian society.[104] The shift toward new understandings of an after life and death has thereby resulted in changing understandings of how death is generally understood in Canada. According to the

[104] Here I do not suggest that the growing population of Canadians who identify as having no religion has *caused* new perceptions of an after life and death to exist in Canadian society. Rather, these understandings have probably existed for some time but were not dominant understandings in Canadian society as they are now. There is simply a correlation between the increasing percentage of Canadians identifying as having no religion and the new dominant understandings of an after life and death.

Angus Reid Institute, there is a link "between views on [life after death] and the religious identity and behaviours of Canadians" (Angus Reid Institute 2015). As Canadians become less religious, notions of death seem to be devoid of a transcendent afterlife. As a result, in contemporary Canadian society only 42% of Canadians believe there is life after death; 35% of Canadians are uncertain about a life after death; and 23% of Canadians *believe that there is no life after death* (Angus Reid Institute 2015). If we recall the proportion of Canadians who are religiously unaffiliated, the 23% of Canadians who do not believe in life after death strongly and positively correlates with the percentage of Canadians who identify as having no religion. Canadians who identify as having no religion are less likely to believe in life after death (Angus Reid Institute 2015).[105]

The changing perceptions of an afterlife in Canadian society have not only influenced how death is framed but has also led to the questioning of the social acceptability, and reframing of physician-assisted dying in Canada. As the Angus Reid Institute (2015) claims:

> Beliefs about [physician-assisted dying] and life after death do interweave. Specifically, Canadians who believe in an afterlife are more reticent to endorse physician-assisted suicide, while those who don't believe there is life after death are more supportive.[106]

Practicing Evangelical Protestants were the most opposed to physician-assisted dying—approximately 63% of these individuals opposed physician-assisted dying (Angus Reid Institute 2014). In contrast, 88% of Canadians with no religious identity; 93% of agnostic Canadians; and 90% of Canadian atheists all supported physician-assisted dying.[107] In short, Canadians who

[105] Only 21% of those who identify as having no religion; 10% of agnostics; and 6% of "self-described atheists" believe in life after death (Angus Reid Institute 2015).
[106] "Those who do not believe there is life after death voice much stronger approval for assisting death while those who believe the departed may live on in some form are more reticent to hasten the departure (54% strongly approve versus only 29% respectively)" (Angus Reid Institute 2014).
[107] These numbers are somewhat similar to those who identify as "non-practicing Christians." 86% of these individuals approve of physician-assisted dying (Angus Reid Institute 2014). In general, "[m]ost Canadians believe legalizing physician-assisted suicide would do more good than harm (74% versus 26% who take the opposite view)"

favoured physician-assisted dying were "less likely to have an affiliation with any religion" (Angus Reid Institute 2014). [108] Given the increase of those who identify as having no religion in Canada, when *Carter* was heard by the Supreme Court of Canada Canadians were less concerned about preserving the notion of an afterlife and instead "want[ed] the [Court] to give greatest weight to 'the desire of people to end their lives at the place and timing of their choice'" (Angus Reid Institute 2014).

These changing Canadian conceptualizations of death and physician-assisted dying ultimately mirrored how these concepts were render in *Carter.* In particular, death and physician-assisted dying once traditionally understood in religious terms (as seen in *Rodriguez*) moved away from being understood within a religious framework. The religious framework stipulated that:

> The Canadian constitutional order presents a further legal and conceptual difficulty with courts drawing the line anywhere outside the ***inviolability principle***. As Sopinka J. cautioned in *Rodriguez,* 'we have no assurance that the exception can be made to limit the taking of life to those who are terminally ill and genuinely desire death.' Absent the inviolability principle, it seems unlikely that any criteria can be articulated—any lines drawn—that will withstand *Charter* scrutiny under s. 15(1). ***Once death has been accepted conceptually as a potential benefit, as the Appellants urge, on what grounds could it be refused to those who seek it?*** (Factum of the Intervener, Christian Legal Fellowship, at para 32; emphasis added)

In addition, the religious framework also perceived physical dependence as preferable to death. Consider, for example, the Attorney General of Canada's fear of the denormalization of physical dependence through the decriminalization of physician-assisted dying:

> [Physician-assisted dying] ***leads to the normalization of assisted suicide and euthanasia and denormalization of physical dependence. The re-enforcement of the societal message that death is preferable to physical dependence*** must be taken into account in assessing whether the protection provided by the impugned provisions creates a

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(Angus Reid Institute 2014). In total, 79% of Canadians approved of physician-assisted dying in some capacity in 2014 (Angus Reid Institute 2014).

[108] According to the Angus Reid Institute, individuals who do not identify as having a religion hold firmly "on the right to die across a range of scenarios, and embrace the debate as a sign of social progress" (2014).

> discriminatory distinction. (Factum of the Respondent, Attorney General of Canada, at para. 134; emphasis added)

In comparison, in the nonreligious framework death became a potential benefit, and a choice among many, to end intolerable suffering:

> The freedom to choose the time and manner of one's death is ***a fundamental one*** (liberty); the right to bring an ***end to suffering*** at the point it becomes intolerable (security to the person), and not beforehand in order to have self-determination at all (life), even more so. (Factum of the Appellants, Lee Carter, Hollis Johnson, Dr. William Shoichet, The British Columbia Civil Liberties Association and Gloria Taylor, at para. 123)

In *Carter,* death became a choice worthy of respect (*Carter,* at para. 63). The Court ruled that:

> We agree with the trial judge. An individual's response to a grievous and irremediable medical condition is a matter critical to their dignity and autonomy. The law allows people in this situation to request palliative sedation, refuse artificial nutrition and hydration, or request the removal of life-sustaining medical equipment, but denies them the right to request a physician's assistance in dying. This interferes with their ability to make decisions concerning their bodily integrity and medical care and thus trenches on liberty. And, by leaving people like Ms. Taylor to endure intolerable suffering, it impinges on their security of the person. (*Carter,* at para. 66)

To nuance this reframing of death and suffering I suggest these concepts have been reconceptualized in four key ways throughout *Carter.* These ways include: (1) death as liberation from suffering; (2) a self-chosen death is both rational and natural; (3) a shifting language pertaining to physician-assisted dying—from suicide/killing to dying; and (4) death as a medical treatment. Much like I did in the previous chapter, I assess the co-existing but competing narratives of death that are woven throughout *Carter* to demonstrate how the balance has transferred from one narrative to the other, or from the religious to nonreligious. To do so, I again consult the traditionally religious understandings of death and suffering as presented by the religious interveners in *Carter* that have been present in Canadian society because of their influence in shaping Canadian attitudes towards death and dying (Angus Reid Institute 2014). I

then compare these religious understandings to conceptualizations of death and physician-assisted dying that are established within a nonreligious framework.

Death as Liberation from Suffering

Perhaps the most striking shift in *Carter* related to the concept of death, is that death ultimately becomes a mode of escape. Death as presented by the nonreligious interveners in *Carter* is thought of as a type of *liberation*. In *Carter,* those who favoured physician-assisted dying challenged the narrative of those who opposed physician-assisted dying who suggested that suffering should be embraced and endured.

To those who opposed physician-assisted dying in *Carter* the emphasis was on preserving dignity and human value through palliative care (Beaman and Steele 2018). To these interveners, "suffering is a positive aspect and experience of life" and is to be embraced and "understood as having a spiritual element. It is not something one should fear or want to be released from" (Beaman and Steele 2018, 136). The Catholic Health Alliance of Canada, for example, claimed that:

> Alleviating pain is accomplished through palliative sedation and continuous palliative sedation, without the need to end the patient's life. Unlike physician-assisted suicide where its aim is to end the patient's life to alleviate pain, the aim of continuous palliative sedation is alleviating the pain, not sedating the patient. (at para. 11; emphasis theirs)

Further, this intervener also claimed that:

> The Alliance submits that the proper way to provide dignity in death to terminally ill patients and patients in pain then, is by comforting and caring for them through the use of palliative care, while continually affirming their worth, value and dignity, not by ending their life. (at para. 12)

The Evangelical Fellowship of Canada also reiterated this 'culture of care' when it argued that:

> The EFC [(Evangelical Fellowship of Canada)] is in agreement with the submissions of the Christian Legal Fellowship which set out how the *Charter* Value of the sanctity of

> human life is supportive of the equality of all persons and a ***medical ethical culture of care rather than killing.*** (Factum of the Interveners, The Evangelical Fellowship of Canada, at para. 20; emphasis added)

To the interveners opposed to physician-assisted dying, there is an emphasis on care and on the notion that a self-hastened death (framed as killing) is not a viable option to relieve suffering. The Christian Legal Fellowship echoed this understanding of death and suffering when it argued that "[d]eath is not a medical procedure to which one may consent…" (at para. 41). In the context of *Carter*, an intentionally hastened death becomes "an active choice of death over life" and is something that is morally reprehensible and should not be considered a form of medical treatment or medical care (Factum of the Intervener, Association for Reformed Political Action Canada, at para. 12).

The emphasis on palliative care to relieve suffering that is proposed by those opposed to physician-assisted dying echoes traditional Christian understandings of a transcendent suffering (Beaman and Steele 2018). Charles Selengut claims that "Christianity encourages greatly the life of the spirit [and…] places great value upon avoiding bodily temptations and accepting pain and suffering as sacred activity and promises religious rewards to those who do so" (2003, 193). Those opposed to physician-assisted dying draw on the idea that suffering is to be embraced (not feared) as a positive experience encompassing a spiritual element. The Catholic Health Alliance of Canada, for example, claimed that "suffering is a total, human, ***spiritual experience***; it requires attention to the deeper issues of meaning at end of life" (at para. 6; emphasis added). In recognizing the spiritual experience of suffering, this intervener went on to argue that "assisted suicide is not a solution to pain and that permitting it would result in grave harm" (at para. 44). Similarly, The Catholic Health Alliance of Canada quoted Pope John Paul II who claimed that:

> ***Euthanasia must be called a false mercy, and indeed a disturbing 'perversion' of mercy.*** True 'compassion' leads to ***sharing another's pain;*** it does not kill the person

> whose suffering we cannot bear. Moreover, the act of euthanasia appears all the more perverse if it is carried out by those, like relatives, who are supposed to treat a family member with patience and love […] (at para. 25; emphasis added)

Likewise, the intervener the Evangelical Fellowship of Canada also noted that:

> It is an understatement to say that dying is hard – hard for the person who is dying, hard for their family, hard for their community. While on the one hand death can involve elements of love, culmination, satisfaction, and release, it can also involve pain, suffering, helplessness, and loss. ***But it is grievously misdirected compassion which posits killing as the antidote to what is hard about dying or, in the ultimate irony in the claim for assisted suicide, as the way to uphold life. The very real difficulties on the path towards death do not violate human dignity. Killing does***. (at para. 4; emphasis added)

Underlying the notions of suffering above, is this assumption that suffering is to be endured and that human value and dignity is to be preserved only through the use of palliative care (Beaman and Steele 2018).

In comparison, those who favoured physician-assisted dying asserted that those seeking assistance in dying do so out of "a genuine desire to manage their own suffering, and the timing and means of their own death" (Factum of the Interveners, Criminal Lawyers' Association, at para. 37). The intervener Dying with Dignity, for example, claimed that "the criminal prohibition on [physician-assisted dying] deprives many grievously ill individuals of the peace of mind afforded by ***having the choice*** over the ***timing and manner of their own death***" (at para 5; emphasis added). The idea of choice is further evidenced by the intervener The Alliance of People with Disabilities Who Are Supportive of Legal Assisted Dying Society, who argued "***the availability of choice*** in the mode and timing of one's own death is a central concern of the ***values of autonomy and dignity***" (at para 2). To these interveners, it is death itself and having the choice to die when experiencing intolerable suffering that upholds human value and dignity (Beaman and Steele 2018).

The Court reiterated the idea put forward by the interveners who favoured physician-assisted dying that death can uphold human value and dignity. In its decision the Court implicitly recognized that death is part of a person's right to life, liberty, and security and that an individual should have the right to choose death:

> ***the prohibition on physician-assisted dying infringes the right to life, liberty and security of Ms. Taylor and of persons in her position***, and that it does so in a manner that is overbroad and thus is not in accordance with the principles of fundamental justice. It therefore violates s. 7. (*Carter,* at para. 56; emphasis added)

The Court's acknowledgment that the prohibitions on physician-assisted dying infringed s. 7 of the *Charter* implies that the Court recognized that an individual should have a choice as to when he or she should die if they are in a similar state of suffering to that of Gloria Taylor. Consequently, suffering to those in favour of physician-assisted dying need not be endured if a person so chooses.

When death is framed as a way to relieve suffering, suffering is then conceptualized as a negative and as something that takes away from one's value and dignity. Those who favoured physician-assisted dying expressed a desire to mitigate the amount a person should suffer. The intervener Dying with Dignity claimed that "without access to medically assisted dying, many individuals are compelled to endure a prolonged and/or physically painful death against their wishes" (at para. 5). Likewise, the Canadian Civil Liberties Association echoed this, stating that:

> terminally ill individuals who wish to die [… are] ***instead forced to endure indeterminate suffering and fear.*** In addition to protracted physical suffering, ***they experience the mental suffering of knowing they have been rendered incapable of choice and must live without control over their own bodies and their futures***. (at para. 27; emphasis added)

As a result, "some individuals who are grievously and irremediably ill seek a peaceful and hastened death […] due to their 'existential suffering' resulting from profoundly diminished

quality of life and a subjective experience of loss of dignity" (Factum of the Interveners, Dying with Dignity, at para. 18).

The Supreme Court also reiterated this negative understanding of suffering. The Court portrayed suffering as intolerable and, in doing so, "refused to imbue suffering with merit for a higher purpose or cause" (Beaman and Steele 2018). The Court concluded that "the prohibition [of physician-assisted dying] violates the s. 7 rights of competent adults who are suffering intolerably as a result of a grievous and irremediable medical condition [and] is not justified under s. 1 of the *Charter*" (*Carter*, at para. 3). Further, the Court ruled that:

> An individual's response to a grievous and irremediable medical condition is a matter critical to their dignity and autonomy. The law allows people in this situation to request palliative sedation, refuse artificial nutrition and hydration, or request the removal of life-sustaining medical equipment, but denies them the right to request a physician's assistance in dying. This interferes with their ability to make decisions concerning their bodily integrity and medical care and thus trenches on liberty. ***And, by leaving people like Ms. Taylor to endure intolerable suffering, it impinges on their security of the person.*** (*Carter,* at para. 66).

Suffering then becomes a physical reality and not "a total, human, spiritual experience [that] requires attention to the deeper issues of meaning at the end of life" (Factum of the Interveners, Catholic Health Alliance of Canada, at para. 6). The aim of physician-assisted dying is not simply to end a person's life as the Catholic Health Alliance suggested above, but rather to end "suffering that is no longer tolerable" (Factum of the Interveners, Alliance of People With Disabilities, at para. 2).

When suffering is understood as undesirable, death is conceptualized as a form of liberation. Death is a way to free oneself from the suffering and pain he or she may experience. Underlying this approach is an emphasis on autonomy and the respect for a person's desire to die at a time of his or her choosing:

> An autonomy-based view of the s. 7 life interest is indeed distinct from, though related to, the security of the person and liberty interests. The security of the person guarantee protects individuals from state violations of their physical and psychological integrity. The liberty interest provides individuals with 'an irreducible core of personal autonomy' wherein they may make 'fundamentally or inherently personal' decisions. ***The life interest, on the other hand, encompasses freedom from state interference in decisions regarding life and death***. While the life interest is, appropriately, related to security of the person and liberty, inclusion of it within s. 7 reflects the supreme importance to our human dignity of our ***freedom from state interference over our own life and death decisions.*** (Factum of the Intervener, Canadian Unitarian Council, at para. 25; emphasis added)

Consequently, the "termination" of one's life is a way to ensure one does not endure "suffering that is intolerable" if one so wishes (*Carter,* at para. 127).

Inherent in this shift toward a nonreligious understanding of death is that death is given meaning according to how a person experiences death. Death's meaning is no longer stipulated through some transcendent bestowal of meaning or through the spiritual enduring of suffering. The nonreligious interpretation of death gives rise to the idea of a 'good death'. A good death is one in which a person has full control over his or her last moments in the world and can end his or her life according to his or her own terms, so they do not have to endure the prolonged suffering that often accompanies death. This idea of a good death stands in contrast with those who opposed physician-assisted dying who, like The Evangelical Fellowship of Canada, argued that a good death cannot include the intentional taking of life because "there is never such a thing as a good killing" (at para. 3).[109]

The nonreligious notion of the good death was articulated by the intervener Dying With Dignity when it quoted the testimony of Professor Pabst Battin:

> ***People have their own conceptions of a good death*** and, for a significant number, ***a good death entails being able to say farewell in a composed and conscious manner and to depart from life on those terms.*** For some, this is a source of contentment and personal

[109] The Evangelical Fellowship of Canada noted that "ethically, morally, legally, and constitutionally, dying and killing are drastically different things" (at para. 3). In this quote the Evangelical Fellowship of Canada equates physician-assisted dying with killing.

> achievement in and with the experience and very act of dying .... For these people, a forced choice between the options of terminal sedation and unbearable suffering, effectively, and absolutely, deprives them of their preferred experience of a life-defining moment. (at para. 5; emphasis added; ellipsis in original)

The Canadian Medical Association (CMA) also presented this idea of a good death when it argued that in certain jurisdictions physician-assisted dying has become an "ethically" approved part of end of life care (at para. 15). Therefore, just as the Canadian Unitarian Council claimed, an individual should be freely able to decide upon the time and place of one's own death, providing it does not interfere with the principles of fundamental justice (at para 22). The Court adopts the idea of a good death presented by those who favoured physician-assisted dying by framing death and having the choice of a self-hastened death as a conscious, "fundamental choice" (*Carter,* at para. 63).

A Self-Hastened Death as Rational and Natural

According to the interveners that favoured physician-assisted dying, people who seek an assisted death are considered to have made a rational decision and are ultimately referred to as "rational moral agents" (Factum of the Interveners, Criminal Lawyers' Association, at para. 37). [110] In contrast, to the interveners opposed to physician-assisted dying people who sought a self-hastened death are simply referred to as 'moral agents' (Factum of the Interveners, Evangelical Fellowship of Canada, at para. 35). The use of the phrase 'rational moral agents' by those who favoured physician-assisted dying implies that a self-chosen death itself must be a logical option that one is able to rationally invoke when he or she so chooses. Death is framed as something logical, precisely because there exists a logical decision regarding physician-assisted dying, as

[110] This is not to say, however, that all decisions regarding end of life treatment are rational as there are instances of coercion (see Factum of the Interveners, Criminal Lawyers' Association, at para. 37). Instead, this suggests that death has been reframed as a rational phenomenon and therefore those who seek access to such phenomenon are indeed rational themselves.

one can either opt for or against access to such medical care. In many cases, those seeking physician-assisted dying are doing so on the basis of objective medical decisions (Factum of the Interveners, Canadian Medical Association, at para. 20). As a result, people who seek an assisted death are "informed and competent adults" (Factum of the Intervener, Dying With Dignity, at para. 1).

The point I wish to make here is that the interveners who favoured physician-assisted dying, as well as the Court, accepted that a person's decision pertaining to his or her own death can be both logical and rational. In contrast, those opposed to physician-assisted dying did not present this idea of self-hastened death as a logical and rational death. To those opposed, death is something that cannot be freely chosen and if it is it is sinful (as described above) because, according to the religious interveners in *Carter,* it is unjustifiable to violate the gift of life granted to humans by God. A self-hastened death is then inherently unnatural. Those opposed to physician-assisted dying argued that a person's death becomes *unnatural* when it occurs prematurely:

> The right to life in s. 7 should not be redefined in (necessarily subjective) 'qualitative' terms which will inevitably devalue all of us who will, whether by accident, disease, or age, reach a stage where our capacities are slipping away. ***It should also not be turned on its head and used to demand an unnaturally early death***. (Factum of the Intervener, The Evangelical Fellowship of Canada, at para. 33).

A premature death is unnatural because it violates the supposed desire that "human beings have a ***natural instinct*** to live" (Factum of the Intervener, Catholic Health Alliance, at para. 9; emphasis added).

On the other hand, death framed as rational builds on the idea presented above that an individual can freely choose when he or she is to die. The intervener the Alliance of People With Disabilities hinted at the rationality of a self-hastened death when arguing that people who seek

physician-assisted dying, in most cases, are "capable of making ***rational***, voluntary, and independent decisions to hasten their own deaths" (at para. 4; emphasis added). The Court also accepted the rationality of a self-hastened death:

> This right ***to 'decide one's own fate'*** entitles adults to direct the course of their own medical care […]: it is this principle that underlies the concept of 'informed consent' and is protected by s. 7's guarantee of liberty and security of the person […] [***The***] ***right of medical self-determination is not vitiated by the fact that serious risks or consequences, including death, may flow from the patient's decisions.*** (Carter, at para. 67)

If the decision to die is rational, as presented by both the interveners who favoured physician-assisted dying and the Court, this implies that the death that follows is also rational. A self-hastened death is ultimately framed as rational because the interveners that favoured physician-assisted dying and the Court recognized that people can make an informed decision about the end of their lives.

In addition to being rational, physician-assisted dying is also rendered as natural by the Court when it decided that the prohibitions on assisted-dying violated s. 7 of the *Charter.* The conclusion of the Court suggests that physician-assisted dying can be part of a person's natural passage to death:

> s. 7 also encompasses life, liberty and security of the person during ***the passage to death***. It is for this reason that the sanctity of life 'is no longer seen to require that all human life be preserved at all costs' (Rodriguez, at p. 595, per Sopinka J.). (*Carter,* at para. 63)

The Court's decision does not mention the naturalness of death, but in protecting the *process* of dying, the Court thereby implies *how* someone dies, or reaches death, does not negate the naturalness of death itself when it comes to matters related to physician-assisted dying.

From Suicide and Killing to Dying

The shifts we have seen and discussed above pertaining to death and suffering draw attention to another striking transition that has taken place within *Carter.* In *Carter* we see that physician-assisted dying is no longer primarily referred to as *suicide* or *killing* (as seen in *Rodriguez*)*,* but rather as *dying.* A shift towards a new conceptualization of physician-assisted dying, one that is not established in a religious framework, is reflected in the language used in the process of death (Beaman and Steele 2018). Language acts as a means of normalization and therefore challenges the status quo (see Fairclough et al. 2007). In *Carter,* the language used to describe physician-assisted dying challenges previous assumptions about death and discursively frames it as something else. Death, as understood by those who opposed physician-assisted dying reflects these previous assumptions. When referencing physician-assisted dying these groups use judgmental language, which hints at the immoral nature of a self-hastened death (Beaman and Steele 2018). The language employed by these interveners include: 'assisted suicide', 'intentional killing', 'kill', 'death', and 'suicide' more generally (Beaman and Steele 2018). Consider for example the following quotes from interveners opposed to physician-assisted dying:

> Our society may feel obliged to grant the request of those who seek state-condoned ***death.*** (Factum of the Intervener, Association for Reformed Political Action Canada, at para 39; emphasis added)
>
> Alleviating pain is accomplished through palliative sedation and continuous palliative sedation, without the need to end the patient's life. Unlike ***physician-assisted suicide*** where its aim is to ***end the patient's life***… (Factum of the Interveners, The Catholic Health Alliance of Canada, at para. 11; emphasis added)
>
> The prohibition against ***intentional killing*** also protects persons indirectly by countering negative attitudes towards the vulnerable and dependent. It protects persons by de-normalizing ***suicide*** and discouraging its acceptance as a choice-worthy option. (Factum of the Interveners, Christian Legal Fellowship, at para. 14; emphasis added)
>
> All the benefits of the prohibitions, including the avoidance of unwarranted deaths of vulnerable individuals, must be weighed against the impacts on those seeking access to

> ***physician-assisted suicide or euthanasia***. (Factum of the Respondent, Attorney General of Canada, at para. 160; emphasis added)
>
> At trial, the appellants challenged the *Criminal Code of Canada* provisions prohibiting ***physician-assisted suicide.*** They raised a division of powers argument alleging the impugned laws invaded provincial jurisdiction over health matters under s. 92(7), (13) and (16) of the *Constitution Act, 1867*. (Factum of the Respondent, Attorney General of British Columbia, at para. 6)

The language used by these interveners draws attention to the fact that no matter how one is to take his or her life it is viewed as intentional killing and cannot be considered a 'good' death (Beaman and Steele 2018).

On the other hand, the interveners who favoured physician-assisted dying framed death very differently through their use of language. These interveners suggested that the act of choosing the timing of one's own death can, in fact, be a moral act using language such as: 'physician-assisted dying'; 'physician-assisted death'; 'medical assistance in dying'; and 'assisted dying' more generally (Beaman and Steele 2018). Consider the language used by the following interveners who favoured physician-assisted dying:

> An absolute prohibition on ***physician-assisted dying*** that rests on the concern that such a practice would threaten people with disabilities, due to their particular potential vulnerability and susceptibility to coercion, denigrates and is paternalistic of the disability community. (Factum of the Interveners, The Alliance of People with Disabilities who are Supportive of Legal Assisted Dying Society, at para. 16; emphasis added)
>
> The CMA [Canadian Medical Association] accepts that the decision of whether or not ***medical aid in dying*** should be allowed as a matter of law is for lawmakers, not medical doctors, to determine. (Factum of the Interveners, Canadian Medical Association, at para. 5; emphasis added)
>
> Without access to ***medically assisted dying***, many individuals are compelled to endure prolonged and/or physically painful death against their wishes. Factum of the Interveners, Dying With Dignity, at para. 5; emphasis added)

The Court recognized this discursive shift when it found that:

> For the purposes of their claim, the appellants use ***"physician-assisted death" and "physician-assisted dying" to describe the situation where a physician provides or***

> ***administers medication that intentionally brings about the patient's death, at the request of the patient.*** (*Carter,* at para. 40; emphasis added)

In doing so, the Court specifically elected to adopt the language of the interveners who favoured physician-assisted dying:

> The main issue in this case is whether the prohibition on ***physician-assisted dying*** found in s. 241(*b*) of the *Criminal Code* violates the claimants' rights under ss. 7 and 15 of the *Charter*. (*Carter,* at para. 40; emphasis added)

The Court's use of this comes even though the *Criminal Code* at the time of *Carter* (as well as in various parts of the *Criminal Code* as it stands now) used the term "suicide":

> 241. Every one who
>
> (a) counsels a person to commit ***suicide***, or
> (b) 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.

The Court recognized the contested nature of the two narratives of physician-assisted dying in *Carter* and opted to adopt the narrative of dying established outside of religion. The use of this new narrative is also reflected in the current version (revised since *Carter*) of the *Criminal Code.* Section 241(2) of the *Criminal Code* which states:

> No medical practitioner or nurse practitioner commits an offence under paragraph (1)(b) if they provide a person with ***medical assistance in dying*** in accordance with section 241.2. (emphasis added)[111]

The move away from the phrases killing, death, and suicide to dying provides for another way to conceive of death itself. Rather than simply an act, death becomes a process. The process of death is highlighted by the transition from the emphasis on the noun *death* to the verb *dying.* The intent behind physician-assisted dying is to change the way in which someone *dies* and to enable individual control (instead of some transcendent figure) over the *process* of death, in an

[111] See sections 241.3 through 241.7 of the *Criminal Code* for similar wording.

attempt to alleviate suffering. Death is therefore not only inclusive of the final act of actually ceasing to live, but also how one reaches this point. Inherent in this shift is the move away from a religious approach, which emphasized suicide and killing as immoral and instead toward a view of a self-hastened death as a moral decision made by a competent patient (Beaman and Steele 2018).

Death as Medical Treatment

The shifting narrative surrounding death that we see in *Carter* ultimately gives rise to the notion that death in and of itself *can* be a form of medical treatment. As Beaman and I have previously argued, there has been a shift towards science-based knowledge in the understanding that surrounds death in *Carter* (Beaman and Steele 2018). This is perhaps most clearly demonstrated by the use of the term 'physician' in the phrase 'physician-assisted dying'—both throughout the decision of the Court and in the facta of the interveners. The inclusion of the physician in the process of dying implies that someone trained in medical science (at least in the Canadian context) can occupy a position in the process of one's death (Beaman and Steele 2018). This it not to suggest that the physician has replaced a transcendental figure and now determines when one should die, but instead that the physician simply acts as someone to aid in a process that is already taking place. The intertwining of medical discourse with that of death normalizes the role an immanent another can play in the death of an individual.

This shift to medical care is quite drastic when one considers the discourse of those opposed to physician-assisted dying. In particular, a Catholic physicians' group rejected physician-assisted dying as medical care claiming that:

> The practice of western medicine has, for the last 2,400 years, been guided by the *Hippocratic Oath* which clearly prohibits assisted suicide. ***Indeed, physicians swearing***

> ***the Hippocratic Oath swear that: 'I will neither give a deadly drug to anybody if asked for it, nor will I make a suggestion to this effect' […] the central core of medicine […] is to heal and to make whole.*** (Factum of the Interveners, The Christian Medical and Dental Society of Canada and the Canadian Federation of Catholic Physicians' Societies, at paras. 10-11; emphasis added)

Similarly, the Attorney General of Canada rejected the idea of physician-assisted dying as medical care to relieve suffering:

> The consistent view of most of the ***major medical associations***, in Canada and abroad, remains where it was at the time of *Rodriguez: **opposed to physician-assisted death***. That there are individuals among the memberships of those organizations who oppose the official view and would assist patients to take their lives if the law permitted them to, is no different than it was at the time of *Rodriguez.* That reputable scholars can mount an ethical case for either position is not at all surprising. None of this is evidence of a shifting societal consensus, as the trial judge fairly concluded. (Factum of the Respondent, Attorney General of Canada, at para. 93; emphasis added).

The Attorney General of Canada also argued:

> The prohibition is also designed to discourage everyone, even the terminally ill, from choosing death over life, and to guard against ***the negative social messaging that would result from a system that condones suicide as an appropriate form of relief from suffering.***[112] (at para. 147; emphasis added)

Likewise, the Euthanasia Prevention Coalition and Euthanasia Prevention Coalition-British Columbia asserted that the intentionally *killing* of patients by doctors is not health care and that no such legal or "factual" reason exists to stray from the previous *Rodriguez* decision (at para. 6). To these interveners, physician-assisted dying can *never* (at least at the time of the *Carter* hearing) constitute a form of medical treatment (Factum of the Intervener, Evangelical Fellowship of Canada, at para. 36).

To those who favoured access to physician-assisted dying, assisted death was in fact considered a valid form of medical treatment and thus intended to act as a way to relieve suffering. It is these interveners who demonstrate a shift towards science in their understanding

[112] This claim by the Attorney General of Canada is contradictory as suicide was already legal in Canada at the time of *Carter* and so it was not against the law for an individual to take his or her life at any time for any reason, including if one was terminally ill and suffering.

of death (Beaman and Steele 2018). The Canadian Medical Association claimed that "assisted-dying is considered ethically sound and part of ***end of life care***" (at para. 15; emphasis added). Further, assisted-dying includes aspects of medical care such as diagnosis, prognosis, and the prescription of lethal drugs (Factum of the Interveners Farewell Foundation for the Right to Die and Association québécoise pour le droit de mourir dans la dignité, at para 26). In addition, the Interveners the Farewell Foundation for the Right to Die and Association québécoise pour le droit de mourir dans la dignité argued that:

> 'physician-assisted dying' be defined as 'a death for which the assistance was rendered to an adult person certified by a ***physician*** to be fully informed, non-ambivalent, competent, free from coercion and undue influence who has personally requested assistance. The 'assistance' rendered by the ***physician is the certification, the medical information and medical opinions provided to their patient, and the assessment of competence and free choice of the patient***. (at para 30; emphasis added)

These interveners very much emphasized scientific knowledge in physician-assisted dying (Beaman and Steele 2018).

The Court also moved physician-assisted dying into the realm of medical science when it concluded that:

> the prohibition on physician-assisted dying deprived Ms. Taylor and others suffering from grievous and irremediable ***medical conditions*** of the right to life, liberty and security of the person. (*Carter,* at para. 70; emphasis added)

With the removal of the absolute prohibition on physician-assisted dying by the Court, death and physician-assisted death underwent a transformation and thus became understood as a form of medical treatment that is ethically acceptable and an integral part of what it means to be human (*Carter,* at paras. 66-134). It is through the decriminalization of physician-assisted dying that the Court discursively constructed death as a way to medically alleviate suffering.

Conclusion

Death and suffering, much like life, have undergone a reconceptualization in *Carter*. Traditional religious notions of what constitutes death and how it is to be understood have given way to a nonreligious notion of what death entails. In *Carter,* death is rendered as a form of liberation from worldly suffering. Physician-assisted dying is an ethically acceptable form of medical treatment tied to modern notions of science. Physician-assisted dying is now understood not as a form of suicide or killing, but as a natural and meaningful way to die. As a result, an assisted death is a rational death and the decision to die by way of physician-assisted dying is one made by "rational moral agents". Consequently, the Court in *Carter* ruled that death and dying are both a fundamental part of living claiming that:

> ***the right to life included a right to die with dignity, on the ground that 'dying is an integral part of living'*** (p. 630). (*Carter,* at para. 60; emphasis added)

Thus, "an individual's choice about the ***end of her life is entitled to respect***" in Canada (*Carter* at para 63; emphasis added). This stands in contrast to the notions of death embedded with Christian theological assumptions proposed by those who opposed physician-assisted dying.

As with the shift in the conceptualization of life, *Carter* reveals that in the nonreligious conceptualization of death the role of the transcendent plays a diminished role in how the concept of death has been reframed. Instead, there is an emphasis on the individual and consequently autonomy and choice. Rather than God, or some other transcendental figure determining the value of one's life or the place and timing of one's death, the individual is now able to determine how his or her life is valued and if such value is maintained through his or her *choice* to die if he or she is experiencing "intolerable" suffering. This framing of death draws attention to the importance of autonomy in a narrative about physician-assisted dying established

by nonreligion. The next chapter continues to examine this shifting narrative and the role of the transcendent and prominence of autonomy when it comes to matters of morality.

Chapter Five: What is Right?

> *I would rather my Granddaughter know that Grandma is going to die. We've picked a good day, we've picked our favourite day, Sunday, the day we go to Hardy Falls. And after this day the healing begins, and Grandma will be there, just a little to the right of the North Star, watching over you and helping you.* (Gloria Taylor)[113]

Much like the previously discussed concepts of life and death, there are two competing narratives of morality that exist simultaneously in *Carter.* One narrative exists within a framework established by religion.[114] Given the historical importance and influence of Christianity in Canada in shaping the moral attitudes of Canadians toward various controversial social issues this religious narrative is indebted to Christian theology as presented by the religious interveners (Chambers 2011a; Angus Reid Institute 2016). The other narrative, as was also the case with the concepts life and death, is situated within a framework established by nonreligion.

As Smith argues, the moral worlds and worldviews of individuals are governed primarily by the realms of philosophy and religion (2010, 8).[115] Given the emergence of a new (non)religious diversity in Canada, *Carter* then evidences a transition in how morality is understood in relation to physician-assisted dying. As religion (i.e., traditional, conservative forms of Christianity) loses traction in Canadian society what emerges is a morality, or a public

[113] This statement was made by Gloria Taylor in a CBC documentary video. See: The Fifth Estate, 2012, "The Life and Death of Gloria Taylor," *The Fifth Estate* video, 10:42. http://www.cbc.ca/fifth/episodes/2012-2013/the-life-and-death-of-gloria-taylor.

[114] While used in abundance throughout the intervener facta, the interveners fail to define what is meant by the various derivates of the terms "morals" and "morality". This can be confusing as there are multiple ways in which the term morality is used (Hitlin and Vaisey 2010). For the purposes of this discussion, I approach morality in its broadest sense adopting Bernard Gert's (2005) understanding of morality. In this light, morality broadly refers to "an informal public system" that governs the behaviour of individuals and includes such things as rules, and virtues—all of which have the primary goal of lessening harm (Gert 2005, 14). Moral rules are therefore actions that are either permitted or prohibited in a given society (Gert 2005, 110).

[115] This is not to say that *all* moral worlds are only comprised of the philosophical and/or religious, but that the majority of moral worlds are somehow interconnected with these disciplines. I simply make this point to highlight that religion is often a powerful contributor to conceptions of morals and, more broadly, morality in contemporary society.

system, that is framed outside of religion.[116] According to the Angus Reid Institute (2016) there is a growing proportion of Canadians whose moral guidance is situated outside of religion. In 2016, Traditional Absolutists[117] represented 21% of the Canadian population; Religious Moralists[118] accounted for 25% of the Canadian population; Nonreligious Moralists[119] comprised 37% of the Canadian population; and Amoralists[120] represented 17% of the total population of Canada (Angus Reid Institute 2016). More broadly speaking, 54% of the Canadian population in 2016 did not derive notions of right or wrong from religion. Only 13% of Canadians cited religion/God as being "***most important*** in developing […] personal moral values" (Angus Reid Institute 2016; emphasis added). Consequently, 55% of Canadians considered physician-assisted dying "always or usually morally acceptable" and a further 14% did not consider it a moral issue at all (Angus Reid Institute 2016).[121]

Morality, as conceptualized in *Carter*, coincides with the changing moral attitudes of Canadians presented above. In *Carter,* how morality is framed transitions away from a religious framework and toward a nonreligious framework. Those opposed to physician-assisted dying in *Carter* framed morality as being something grounded in religion and the transcendent. Consider, for example, the following quote:

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[116] I am not concerned with the essence of morals and moral theory in this chapter, but rather how morality is constructed in *Carter*.

[117] "Traditional Absolutists are defined by their strong belief in God and their hardline approach to questions of sexual morality. This group's responses most closely resemble those of Evangelical Christians. Indeed, fully half (50%) of the Evangelicals surveyed find themselves in this segment" (Angus Reid Institute 2016).

[118] "Religious Moralists share many of the same values held by the Traditional Absolutists. What sets them apart is their shared conviction that morality extends beyond so-called 'ten commandments' issues. Unlike the Traditional Absolutists, many Religious Moralists see buying a fur coat (64%) or a gas-guzzling SUV (62%) as morally wrong" (Angus Reid Institute 2016).

[119] "Non-Religious Moralists take a more permissive approach to morality. While members of this group tend to agree with the Religious Moralists on societal and environmental issues, they diverge significantly on questions of sexual morality" (Angus Reid Institute 2016)

[120] "Amoralists are the group most likely to say [things are] 'not a moral issue.' Where they do have an opinion on the morality of a given issue, they're generally more likely to say things are acceptable rather than wrong" (Angus Reid Institute 2016).

[121] Only 32% of Canadians consider physician-assisted dying as "always or usually morally wrong" (Angus Reid Institute 2016).

> An indeterminate number of Canadian healthcare providers consider Physician assisted death ***immoral or unethical for reasons of conscience or religion***. (Factum of the Intervener, The Catholic Civil Rights League, the Faith and Freedom Alliance and the Protection of Conscience Project, at para. 3(a); emphasis added)

In contrast, those that favoured physician-assisted dying in *Carter* recognized and framed the morality of physician-assisted dying outside the realm of religion. The Canadian Civil Liberties Association, for example, claimed that:

> Everyone should be able to make ***deeply personal decisions about their life*** — including, for example, deciding that there would be greater dignity in death than life, or in making the informed personal choice about whether or not to end one's own debilitating suffering. (at para. 8; emphasis added)

In addition, the existence of multiple types of morality was recognized by those who favoured assisted-dying:

> Further, as there is no different or higher harm in PAD [physician-assisted dying] than is inherent in the legal end-of-life practices, then it must be the case that the differential treatment arises because of ***improper reliance on morality***. There is no fundamental ***social conception of PAD as immoral,*** and predicating the differential treatment on ***a particular conception of morality is itself impermissibly unconstitutional.*** (Factum of the Appellants, Lee Carter, Hollis Johnson, Dr. William Shoichet, The British Columbia Civil Liberties Association and Gloria Taylor, at para. 86; emphasis added)

In this quote, the Appellants recognized that the morality of physician-assisted dying has been understood according to a *particular conception* of morality (i.e., Christianity) in Canadian society. The above quote implies that conceptions other than the once dominant framing of morality do indeed exist in Canadian society. The Court also recognized competing moral claims when it ruled:

> ***These competing moral claims*** and broad societal benefits are more appropriately considered at the stage of justification under s. 1 of the Charter (*Bedford*, at paras. 123 and 125)." (*Carter*, at para. 79; emphasis added)

In *Carter,* how morality is rendered reflects the changing religious diversity in Canada. As Canadians become less religious there is the inclination to understand morality within a nonreligious framework. In this chapter, as I have done in the previous analysis chapters, I

examine this shift from a morality established in a religious framework to one that is understood in the context of a nonreligious framework. I argue that morality has been reconceptualized in three ways. First, the individual is the source of moral authority; second, the focus of morality is the individual; and third, when morality is discussed it is done so using what I refer to as supplemental language—language that implies a moral position but also supplements/enhances this position with something else like autonomy. To track this reconceptualization of morality, I once again incorporate traditional religious understandings of morals and morality into my analysis because of the aforementioned influence Christianity has had in shaping the attitudes of Canadians toward controversial social issues.

The Individual as the Source of Moral Authority

Perhaps one of the most noticeable changes in how morals and morality are conceptualized in *Carter* is demonstrated by the authority behind sources of morality. Underlying the ideas of morality put forward by those opposed to physician-assisted dying was the presupposition that morality is derived from religious belief. Consider, for example, the following quotes from those opposed to physician-assisted dying:

> A healthcare provider's objection to participating in physician-assisted death may equally arise from ***his or her religious beliefs***. (Factum of the Interveners, the Catholic Civil Rights League, the Faith and Freedom Alliance and the Protection of Conscience Project, at para. 16; emphasis added)

> Physician-assisted death [is] immoral or unethical for reasons of conscience ***or religion*** [and these…] views are ***consistent with the current Canadian legal framework***, which would be fundamentally changed if physician-assisted death were decriminalized. (Factum of the Interveners, the Catholic Civil Rights League, the Faith and Freedom Alliance and the Protection of Conscience Project at para. 3; emphasis added)

> The Alliance is concerned that if the impugned provisions of the *Criminal Code* are struck, faith-based health-care institutions may be required to engage in assisted suicide

> despite their ***religious and moral objections to it***. (Factum of the Intervener, The Catholic Health Alliance, at para. 2)
>
> ***The Catechism of the Catholic Church, as well as a number of other authoritative texts within the Church, clearly set out that suicide is morally wrong and unnatural***. Indeed, the Catechism of the Catholic Church specifically condemns the taking of innocent life. (Factum of the Intervener, The Catholic Health Alliance of Canada, at para. 24; emphasis added)
>
> For a Catholic, and a Catholic health-care institution, the provision of health-care services is a ***religious calling and a form of worship***. The health-care institution then, is the mechanism through which some ***Catholic individuals carry-out their faith*** and benefit from their s. 2(a) *Charter* right to freedom of religion. (Factum of the Intervener, The Catholic Health Alliance of Canada, at para. 32; emphasis added)
>
> A Catholic health-care institution does not perform abortions as doing so would conflict with ***Catholic teaching.*** Similarly, if assisted suicide were permitted, ***Canon Law and Catholic teaching would require that the Catholic health-care institution not engage in assisted suicide.*** (Factum of the Intervener, The Catholic Health Alliance of Canada, at para. 40; emphasis added)

The statements above made by those opposed to physician-assisted dying resonate with notions of morality as framed by Christian doctrine. Christianity acts as a type of *moral compass* that creates "strong moral presumptions against certain kinds of behavior" (Fedler 2006, 26)—something illustrated in the above quotes. To Christians, a moral life is one in which sin is avoided by abiding by the conduct set out in the bible as well as other authoritative texts (Weaver 2011, 31; Simmons 2016, 2). Therefore, the authority figure behind morality to Christians (as they are portrayed by the religious interveners in *Carter*) is not the individual, but rather a transcendental figure, God. Underlying these notions of morality as expressed by those opposed to physician-assisted dying, is precisely this idea that religion, or a transcendent being, dictates what is, or is not, acceptable moral behaviour. In this sense, morality is not subjective, but rather universal and absolutist.

When one considers morality as framed by those who favoured physician-assisted dying in *Carter* there is a shift away from a divine authority figure dictating what is moral behaviour.

The interveners who favoured physician-assisted dying spoke of morals and morality as governed not by religion and some divine figure, but instead by the individual.[122] Morality then takes on subjective characteristics. Various interveners draw attention to this understanding of morality grounded in the individual and outside of religion/the transcendent. The Canadian HIV/AIDS Legal Network and the HIV & AIDS Legal Clinic of Ontario argued that:

> A law must be defensible entirely on ***secular terms*** in order to be valid constitutionally. To support a criminal law on the basis of claims ***rooted in any religion*** (or even ostensibly 'all' religions) amounts to state imposition of faith that is fundamentally at odds with *Charter* protections. This is particularly egregious where (as here) the impugned laws strike at the heart of personal freedom with the consequence of causing grave, avoidable suffering." (at para 5; emphasis added)

Similarly, the intervener Dying with Dignity claimed that "this Court must, however, adopt an interpretive approach that reflects the ***secular nature*** of the Canadian state. The scope and parameters of constitutional rights and freedoms cannot be dictated by the ***doctrines of any particular faith***" (at para. 3; emphasis added). Though these interveners are discussing the basis of the *Criminal Code,* this argument draws attention to the fact that the Canadian state should not legislate physician-assisted dying based on religious moral frameworks.

Instead, the moral framework within which an individual who is seriously ill decides to access physician-assisted dying should be guided by the individual seeking treatment. The perceived rightness of physician-assisted dying should be the result of an individual's own inclinations toward physician-assisted dying. This approach to morality is articulated by The Canadian HIV/AIDS Legal Network and the HIV & AIDS Legal Clinic of Ontario who claimed that "the fundamental right of all Canadians [is] to make ***personal decisions*** about [physician-assisted dying]" (at para. 11; emphasis added). The moral assumptions about physician-assisted dying are inherently personal to those who favoured physician-assisted dying and are not defined

[122] For example, 49% of Amoralists (a term used by the Angus Reid Institute) responded that rationality and reason are most important when developing personal moral values (Angus Reid Institute 2016).

by certain religious standards (Factum of the Interveners, The Canadian HIV/AIDS Legal Network and the HIV & AIDS Legal Clinic of Ontario, at para. 18). Consequently, this approach to the morality of physician-assisted dying emphasized autonomy:

> The animating values underpinning s. 7, therefore, are self-determination and human dignity. Section 7 is not a promise that the state will take such steps as are necessary to provide for each person the interests listed therein; ***it is rather a guarantee that the state will not interfere with each person's control over those interests, except in accordance with fundamental justice.*** (Factum of the Interveners, Canadian Unitarian Council, at para. 21; emphasis added)

To return to a point I made previously in Chapter Four, individuals who wish to hasten their death, because they are grievously ill, are referred to not as immoral beings, as suggested by the interveners opposed to physician-assisted dying, but instead as rational moral agents or "autonomous moral agent[s]" (Factum of the Interveners, Criminal Lawyers' Association, at para. 31). This implies two things: (1) an individual has agency and is ultimately autonomous; but also (2) that one is *moral* because he or she acts in accordance with his or her *personal,* subjective understanding of what is right or wrong when it comes to matters related to physician-assisted dying.

When morals are understood as being sourced from the individual the moral focus in *Carter* shifts away from the perceived morality of a self-hastened death toward to morality of withholding a person's ability to choose the timing and manner of his or her death. The primary moral concern regarding physician-assisted dying for those who favoured physician-assisted dying in *Carter* is not the act of physician-assisted dying itself, but rather the withholding of this act as a medical treatment to relieve suffering. The Canadian Medical Association highlights this shift when it argued that "it seems ***wrong*** to deny grievously ill patients the option of medical aid in dying simply because of systemic inadequacies in the delivery of palliative care" (at para. 20; emphasis added). Similarly, the Canadian Unitarian Council claimed that:

> The gravamen of her claim is not the battery and assault committed against her; rather, it is that the law forces her to continue living when she no longer wishes to do so […] While [the prohibition on physician-assisted dying] does not necessitate the continuation of a battery, it does visit upon patients the ***cruel injustice*** of being forced to continue living in grievous suffering and irremediable illness, no matter how free, uncoerced and understandable their wishes to the contrary may be […] The prohibition on physician-assisted death constitutes a ***grave and unjustifiable violation*** of the s. 7 right to life. (Factum of the Interveners, Canadian Unitarian Council, at para. 27)

Although the immoral nature of denying someone access to physician-assisted dying is not referenced directly in the above quote, the use of the phrases 'cruel injustice' and 'grave and unjustifiable violation' hints at the immoral nature of withholding from someone the ability to choose such an act. In a similar light, the Court also recognized, in the first paragraph of its decision I might add, that the prohibitions on physician-assisted dying resulted in those who were subject to intolerable suffering having to make a "cruel" choice between ending life prematurely or suffering until one dies "from natural causes" (*Carter,* at para. 1).

Given the immoral nature of withholding access to physician-assisted dying from an individual who is suffering intolerably, the *moral* approach (or the right thing) for those who favoured physician-assisted dying is to allow access to physician-assisted dying to those who are suffering intolerably:

> A decision to die made by a competent, interminably ill and grievously-suffering patient does not violate any ***moral*** consensus within our society […] A choice to die in the face of incurable illness and grievous suffering is therefore not ***antithetical to any fundamental moral conception integral to our society***, as it would need to be for the prohibition on physician-assisted death to be justified on ***moral*** grounds. To the contrary, self-determination and human dignity underlie the paramount value we place on human life and inform s. 7 of the *Charter* and the life interest included within it. Far from weighing against the legalization of physician-assisted death, the s. 7 life interest guarantees to ***each individual the freedom to make the ultimate decision*** to live or die ***according to one's own religious and ethical beliefs*** and conceptions of how to honour and uphold the value of life. (Factum of the Interveners, Canadian Unitarian Council, at paras. 4-5; emphasis added)

The Court also echoed and reinforced this understanding through its judgement when it ruled that "the prohibition on physician-assisted dying ***deprived*** Ms. Taylor and others suffering from grievous and irremediable medical conditions of the right to life, liberty and security of the person" (*Carter,* at para. 70).

As a result, there exists a shift in how morality is conceptualized in *Carter*. For those opposed to physician-assisted dying, notions of morality are grounded in traditional, conservative Christian doctrine. For those who favoured physician-assisted dying, morals are instead dictated by the *individual.* Morality becomes subjective (much like concept of nonreligion itself), rather than objective, and the moral nature and acceptableness of physician-assisted dying is at the discretion of the individual. Morals and morality, much like death and suffering, are now immanent, rather than transcendent as historically understood according to traditional forms of Christianity as portrayed by the interveners who opposed physician-assisted dying in *Carter* (Beaman and Steele 2018).

Individualistic Morality: What's Best for the Individual

Like the notion that in a nonreligious framework the source of morality is the individual, it is also evident in *Carter* that in the context of physician-assisted dying, morality concerns what is best for the individual. In *Carter* there is less emphasis on *community* and *interdependency*. This is not to suggest that there has been a complete abandonment of the collective good in *Carter*, but rather that what the collective good entails has changed. The collective good in *Carter* is about what is best for an individual and how he or she can participate fully as a member of society, rather than what is best for society thereby stipulating how an individual can fully participate within that society.

The interveners who opposed physician-assisted dying in *Carter* propagated this communal nature of morality, and the restrictions about what is acceptable moral behaviour. To these interveners, not only is everybody expected to follow the same moral guidelines in Canadian society, but morals and morality are intended to regulate and also promote social behaviour that benefits society as a whole—the focus is not on the individual. The intervener The Catholic Civil Rights League, the Faith and Freedom Alliance and the Protection of Conscience Project, for example, argued that Canadian society is interdependent in the sense that Canadians "rely on each other to make it function" (at para. 35). This understanding, that Canadian society is interdependent, implies that for Canadian society to function smoothly, Canadians have a moral duty to one another. This duty is further highlighted by this same intervener:

> This ***interdependency***, association and relationship with others, is at the root of our collective compassion and our legal and ***moral duties to each other***. It also forms the basis of our democratic processes, our social programs, our 'multicultural heritage' and diversity and ***social fabric.*** (at para 36; emphasis added)

To those opposed to physician-assisted dying, the focus is not on the individual and how he or she can participate fully in society, but instead on what is *best* for Canadian society thereby regulating moral behaviour. Physician-assisted dying to those opposed in *Carter* was considered antiethical to both Canadian values and the rights stipulated in the *Charter* precisely because an intentionally hastened death is contradictory to what is deemed as the 'communal' good for Canadian society (Factum of the Interveners, Council of Canadians with Disabilities and the Canadian Association for Community Living, at para. 18).

The communal aspect of morality was also emphasized by those who opposed physician-assisted dying when discussing the implications of decriminalizing physician-assisted dying in Canada. For example, the Evangelical Fellowship of Canada hinted at how society as a whole is implicated in the morality of physician-assisted dying when it claimed that:

> The lynchpin of the equality-based demand for assisted suicide is the conflation of suicide with killing. Suicide is a solitary act. In stark contrast, assisted 'suicide' is a ***social act*** where someone aids and abets the killing and in which ***all of society is complicit*** through legal sanction. (Factum of the Intervener, Evangelical Fellowship of Canada, at para. 38; emphasis added)

According to this intervener, not only is the individual immoral because of intentionally killing himself or herself, but so too is Canadian society because of the inherently collective nature of morality in the context of physician-assisted dying.

In *Carter,* there is a shift away from this communal understanding of morality by both those who favoured physician-assisted dying as well as the Court. This shift accentuates a desire to focus instead on the *individual* aspect of the moral implications of physician-assisted dying and how these aspects can promote a collective good that is centred around promoting full and equal participation in Canadian society. Not only has the individual become the source of moral behaviour (as discussed in the section above), but moral judgements are to rest upon what is best for the *individual* and how such judgments can promote full participation in Canadian society by granting Canadians access to physician-assisted dying.

This notion of morality focusing on the individual is perhaps best voiced by the Canadian Unitarian Council who stated that:

> There is nothing approaching that level of ***societal consensus,*** either now or 20 years ago, that would indicate that an absolute ban on physician-assisted dying in the circumstances sought by the appellants is required by the fundamental values of ***our society or is essential to its proper functioning.*** (at para. 13; emphasis added)

In this moral judgment, there is an inherent recognition that the functioning of society does not rest upon (among many things) the morality of physician-assisted dying. Instead, what is of importance is not what is best for the community as a whole, but rather what is best for an individual's life and what will allow this person to participate fully in Canadian society. This approach to morality is further supported by the Canadian Civil Liberties Association who noted

that the individual, not a community of people (e.g., medical profession), should make the ultimate decision as to whether or not choosing death is better than choosing to live a life of suffering (at para. 9).

The prominence of the individual in relation to morality is further promoted by the Canadian Civil Liberties Association in its discussion of other ways individuals are able to *legally* end their life in Canadian society. In doing so, this intervener claimed that to make the decision to end one's life is "not regarded as absolutely undesirable by the ***state in every context***. An ***individual's decision*** to end his or her life for religious, altruistic, or patriotic reasons is justifiable or even valued by the state, but the individual's choice to end life in order to alleviate his or her own suffering is not" (at para. 11). This assertation draws attention to the fact that the morality related to other instances of a self-hastened death do indeed focus on the individual.

In its decision, the Court adopted this individual notion of morality proposed by the interveners who favoured physician-assisted dying. The Court draws attention to the individual, not the community when it concluded that:

> the appropriate remedy is therefore a declaration that s. 241(*b*) and s. 14 of the *Criminal Code* are void insofar as they prohibit physician-assisted death for ***a competent adult*** who (1) clearly consents to the termination of life; and (2) has a grievous and irremediable medical condition […] that is intolerable to ***the individual*** in the circumstances of ***his or her condition.*** (*Carter,* at para. 127; emphasis added)

In this passage there exists no reference to the community thereby leaving the moral judgement of such an act up to the *individual.*

This approach to morality, focusing on the individual's moral judgement rather than a communal morality, is also reflected in the medical discourse related to whether or not physician-assisted dying *should* be performed by medical professionals. Unlike those medical professionals opposed to physician-assisted dying who reject such treatment citing

institutional/communal moral concerns, the focus for those who favoured physician-assisted dying was the individual and what was best for the individual. The Canadian Medical Association (CMA), for example, claimed that "if the law were to change, the CMA would support its members who elect to follow ***their conscience***" (at para. 2; emphasis added). The CMA then goes on to explain that "no physician should be compelled to participate in or provide medical aid in dying to a patient, either at all, because the ***physician conscientiously objects to medical aid in dying***, or in individual cases in which the physician makes a clinical assessment that the patient's decision is contrary to the patient's best interests. Notably, no jurisdiction that has legalized medical aid in dying compels physician participation" (at para. 27; emphasis added). Again, nowhere in this claim is there the suggestion that a person's morality needs to be based on the idea that the communal good is only about what is best for society as a whole. Rather, the focus in these statements is on the individual and whether he or she perceives physician-assisted dying as just and how this judgment best benefits the individual having to carry out an assisted death.

Consequently, the decision as to whether physician-assisted dying is morally acceptable is determined according to what is best for the individual (Factum of the Interveners, Canadian Medical Association, at para. 17). With this in mind, what is understood as the collective, or communal good has changed in a nonreligious framework of physician-assisted dying. To the Court as well as the interveners that favoured physician-assisted dying the communal good is, as I have mentioned, not about what is best for society. Instead, the communal good is understood as what is best for an individual to participate fully and equally in Canadian society. In this light, the individual is an integral part of the collective. In this rendering of morality, the collective is disaggregated into its individual components to determine what is best when it comes to matters

pertaining to physician-assisted dying. In summary, morality as it concerns physician-assisted dying in *Carter* has shifted from focusing on what is best for society and now rests upon the moral judgements of the individual and what is best for him or her in the context of physician-assisted dying. The collective good pertaining to physician-assisted dying in a nonreligious framework is not about what the majority wants, but rather what allows for the full and equal participation of all Canadians when it comes to matters related to physician-assisted dying.

A Shifting Language

As was the case concerning death in the previous chapter, in *Carter* there also exists a shift in language used by those who favoured physician-assisted dying and the Court when discussing morality. Returning to the notion that language acts as a means of normalization (Fairclough et al. 2007), the language employed to discuss morality and morally laden issues in *Carter* challenges previous assumptions about morals and morality related to physician-assisted dying. When those who were opposed to physician-assisted dying discussed physician-assisted dying and consequently conceptualized morality in their arguments, they used language such as: morals, morality, ethics, ethical, and good. Consider the following examples taken from the submissions of those opposed to physician-assisted dying and the language used when discussing morals and morality:

> If healthcare providers were required to kill a patient, either ***morally*** or legally, this obligation would be an extraordinary departure from modern Canadian law […] in modern Canada there is no obligation to kill, not even in military combat (Factum of the Interveners, The Catholic Civil Rights League, the Faith and Freedom Alliance and the Protection of Conscience Project, at para. 18; emphasis added)

> An indeterminate number of Canadian healthcare providers consider physician-assisted death ***immoral or unethical*** for reasons of conscience or religion. Their views are consistent with the current Canadian legal framework, which would be fundamentally changed if physician-assisted death were decriminalized. If this change were

> implemented, these healthcare providers would be confronted by demands that they directly or indirectly participate in what they consider to be ***immoral*** activities." (Factum of the Interveners, The Catholic Civil Rights League, the Faith and Freedom Alliance and the Protection of Conscience Project, at para 3; emphasis added)
>
> ***Ethically, morally*****,** legally, and constitutionally, dying and killing are drastically different things. There can be such thing as a ***good*** death. There is never such a thing as a ***good killing***. (Factum of the Intervener, Evangelical Fellowship of Canada, at para. 3; emphasis added)
>
> Compulsion to perform any act one finds to be ***morally reprehensible*** cannot be justified by section 1 of the *Charter*." (Factum of the Interveners, The Christian Medical and Dental Society of Canada and the Canadian Federation of Catholic Physicians' Societies, at para. 48; emphasis added)
>
> CCD/CACL submit that there is a ***logical, factual, ethical*** and legal distinction between AS/E [assisted-suicide and euthanasia] and end of life treatment, based on intention. AS/E are not medical treatment. (Factum of the Interveners, Council of Canadians with Disabilities and the Canadian Association for Community Living, at para. 22; emphasis added)

This use of the bolded terms in the quotes above exists throughout the entirety of the submissions made by those opposed to physician-assisted dying. The use of such language may be a strategic attempt to frame those who favoured physician-assisted dying as lacking morals.

Those who favoured physician-assisted dying, used a very different language when determining the moral nature of physician-assisted dying. These interveners used language such as: values, autonomy, choice, and ideology. The use of such terms does not imply those who favoured physician-assisted dying lack morals or do not make moral judgements. Rather, these people are making moral judgments and do indeed frame physician-assisted dying as moral, but the language used by these individuals enhances, or supplements, the moral nature of physician-assisted dying through the use of more positive language. When these individuals discuss the moral nature of physician-assisted dying, and ultimately take a moral stand, it is done so using very specific language with a very different tone. Consider the following:

> To be clear; the Legal Network and HALCO do not submit that the protection of life is a ***trivial value***, especially the protection of the lives of those most at risk of having their ***autonomy disrespected***. (Factum of the Interveners, The Canadian HIV/AIDS Legal Network and the HIV & AIDS Legal Clinic Ontario, at para. 16)
>
> An objective that departs from the ***basic values*** of our constitutional order in favour of a particular ***ideology*** cannot hope to justify a deprivation of life, liberty, or security because it will be inconsistent with those same constitutional underpinnings. (Factum of the Interveners, The Canadian HIV/AIDS Legal Network and the HIV & AIDS Legal Clinic Ontario, at para. 19)
>
> A portion of the CMA's membership believes that patients should be ***free to choose*** medical aid in dying as ***a matter of autonomy***. (Factum of the Intervener, Canadian Medical Association, at para. 4)
>
> The criminal prohibition on assisted suicide ***deprives*** many grievously ill individuals of the peace of mind afforded by having ***choice*** over the timing and manner of their own death. (Factum of the Interveners, Dying with Dignity, at para. 5)

Such approaches to the moral nature of physician-assisted dying do not explicitly use the terminology of morality when taking a moral stand on physician-assisted dying. Instead, these interveners passed moral judgment by using language that implies a moral position, but at the same time enhance their moral position by supplementing this positionality with something else like autonomy.

The Court does not use the language of morals and morality, but instead uses the enhancing/supplemental language employed by the interveners who favoured physician-assisted dying. Though the Court recognized that competing moral claims existed in *Carter* (as outlined in the introduction to this chapter), the Court used the terms moral and morality sparingly: only 3 times in its decision. However, the entire decision is essentially about the contested moral nature of physician-assisted dying and so when the Court ruled that the prohibitions on physician-assisted dying were unconstitutional, it ultimately passed a moral judgment. The Court ruled that:

> We have found that the prohibition [on physician-assisted dying] infringes the claimants' s. 7 rights. (*Carter,* at para 125).

Despite the lack of explicit reference to morality by not using the words "morals" or "morality" the above quote in and of itself is a moral judgement. This moral judgement, however, was framed using supplemental language, similar to the language used by the interveners who favoured physician-assisted dying that emphasizes autonomy:

> It is clear that anyone who seeks physician-assisted dying because they are suffering intolerably as a result of a grievous and irremediable medical condition 'does so out of a deeply personal and fundamental belief about how they wish to live, or cease to live' (ibid.). The trial judge, too, described this as a decision that, for some people, is "very important to their sense of dignity and personal integrity, that is consistent with their lifelong values and that reflects their life's experience" (para. 1326). ***This is a decision that is rooted in their control over their bodily integrity; it represents their deeply personal response to serious pain and suffering. By denying them the opportunity to make that choice, the prohibition impinges on their liberty and security of the person.*** (*Carter,* at para. 68)

Implicit in the Court's conclusion was that an individual's rights are infringed precisely because the prohibitions in place prevented a person from having the *choice* to choose the time and place of his or her death. Providing individuals with the constitutionally protected *choice* to choose when they die implies that Court has passed a moral judgement on physician-assisted dying—a judgement that is perhaps best read as: physician-assisted dying is just, so long as the individual choosing such a medical treatment believes this to be so.

Conclusion

The concept of morality provides another avenue through which one can assess a shift toward a nonreligious framing of physician-assisted dying. In summary, morality when it comes to matters of physician-assisted dying, has been reconceptualized in three ways. First, the individual is the

source of moral authority; second, the *focus* of morality is the individual; and third, when morality is discussed it is done so using supplemental language.

First, morality as presented by the interveners who favoured physician-assisted dying highlights that it is the individual who is responsible for determining whether or not a self-hastened death is or is not moral behaviour. Second, the moral nature of physician-assisted dying is not dependent on benefiting the whole of society. Rather, morality is reframed as emphasizing what is best for the individual. This reconceptualization shifts the understanding of morality away from what was previously reliant on the collective, or communal, good of society and the accompanying regulation of physician-assisted dying. Instead, this shift ensures what is best for the individual, so that he or she is afforded full and equal participation in Canadian society when it comes to matters of physician-assisted dying. Finally, morality is conceptualized using supplemental language to highlight the importance of choice and autonomy when it comes to passing moral judgment on physician-assisted dying. Underlying such conceptualizations of morality is "a respect for the alternative perspective" (Factum of the Intervener, The Canadian Medical Association, at para. 4).

As with life and death, *Carter* evidences that morality related to physician-assisted dying has been reconceptualized within a nonreligious framework. In this reconceptualization, the transcendent plays a much less important role and has been overshadowed by an emphasis on autonomy. This framing of morality, as in the framing of life and death, draws attention to the importance of personal choice when it comes to rendering nonreligion in the context of physician-assisted dying. It is to the importance of autonomy that I now wish to turn to in my conclusion.

Conclusion: Toward Nonreligion

> *The closer we get to the end of this journey, the more contradictions we'll accumulate—confusing issues we once thought were clear. I suppose the good news is, that's how we'll know we're finally getting somewhere interesting.* (Flint, Black Sails, Season 10, Episode 4, February 19, 2017)

This thesis is written at a time when the social context of Canada is dramatically changing. Historically, Canada has been a fundamentally religious nation since its inception as a country in 1867. As O'Toole (2000) argues, church involvement in constitutional concerns has depicted the Canadian state as a Christian nation. Christianity has played a prominent role in shaping the attitudes of Canadians when it comes to controversial social issues, such as physician-assisted dying. Since the 1960s, however, Christianity has slowly been losing its foothold in Canadian society (Clarke and Macdonald 2017). Fewer and fewer Canadians are now identifying as belonging to Christianity while more Canadians have started identifying as belonging to religions other than Christianity (Statistics Canada 2011, 2001b). Included in this diversification of religious belief is also the fact that more Canadians are now identifying as having no religion. The increase in individuals identifying as having no religion is perhaps the critical factor in this analysis. Religious nones currently comprise approximately 24% of the Canadian population compared to 7.3% in 1981 (Statistics Canada 2011, 2001a). Clarke and MacDonald argue, however, that the total percentage of *nonreligious* Canadians is, in fact, higher suggesting that 55% of the Canadian population are now "de- and non-churched" (2017, 209).

The increasing religious diversity in Canada, coupled with an increasing nonreligious population has resulted in a new diversity in Canadian society. This new diversity provides alternative narratives to how certain controversial topics have been traditionally framed in Canadian society. As a result, there is a transition away from historically dominant religious

narratives of issues such as abortion and same-sex marriage. Traditionally, these issues have been understood within a framework established by religion, but that is changing. As I have argued in this thesis, there is an emerging nonreligious narrative gaining traction in *Carter* when it comes to understanding physician-assisted dying.

Carter, and physician-assisted dying, act as a window through which the shifting social landscape of Canada and the emergence of a new way of framing life, death, and morality can be seen. The analysis of physician-assisted dying and the concepts life, death, and morality in this thesis has revealed that as the religious composition of Canadian society changes (i.e., the social context), certain ways of thinking and framing issues gain more authority and power than others. In the case of physician-assisted dying, as referenced in law, a narrative framed by nonreligion is becoming more authoritative than the previous narrative enshrouded in religion. The emergence of a new narrative places pressures on various social institutions when it comes to balancing the needs of an increasingly diverse nonreligious and religious population. In many instances, tensions arise when addressing controversial social matters as the nonreligious and religious often occupy opposing stances.

It is within the context of this new diversity and competing narratives that surround controversial social matters that this thesis is situated. This thesis asked: given the changing religious diversity of Canada and the increasing nonreligious population, how is nonreligion constructed by law in the legal discourse about physician-assisted dying in Canada? To be specific, I sought to analyze how nonreligion was rendered in the Supreme Court of Canada's 2015 *Carter* decision.

This research question proved challenging because *Carter* is not primarily about religion, or nonreligion, but rather equality rights. I then had to take an indirect approach in my analysis to

unearth how nonreligion was rendered in *Carter*. This indirect approach involved isolating key concepts that are included in narratives about physician-assisted dying in the context of law. These concepts were life, death, and morality. This concluding chapter summarizes the findings of the discourse analysis of the Court's *Carter* decision as well as the intervener facta of this case and, generalizing from these results, answers the focus of this thesis: how nonreligion is constructed by Canadian law in the context of physician-assisted dying.

Summary of Findings

As previously mentioned, *Carter* is not explicitly about either religion or nonreligion, and so I took an indirect approach to study the negotiation of nonreligion in this case. By indirect, I mean that I was not necessarily looking for an explicit reference to religion and nonreligion, but rather I analyzed certain concepts integral to the understanding of physician-assisted dying that are themselves interlaced with religion and nonreligion. Although I identified multiple key concepts present in *Carter* and the intervener facta, this thesis has focused on life, death, and morality. To conduct this analysis, I opted to use discourse analysis as a means of gathering and interpreting my data.

The discourse analysis revealed that there were two narratives pertaining to physician-assisted dying that were woven throughout *Carter* and the intervener facta: one religious (i.e., traditional, conservative Christianity), the other nonreligious. The three key concepts (life, death, and morality) that I chose as objects of analysis were important to both those opposed to and in favour of physician-assisted dying. By examining the intervener facta and the decision I was able to: (1) trace the ways that the arguments around these concepts appeared in the Supreme Court's decision; and (2) track evidence that the Court adopted the conceptualizations of the concepts

presented by those who favoured physician-assisted dying. This analysis revealed that although both narratives exist simultaneously in *Carter,* the Court took authority away from the religious narrative to define life, death, and morality, and ultimately physician-assisted dying, for all Canadians. Instead, the Court bestowed this authority upon the nonreligious narrative.

In Chapter Three of this thesis I examined the narratives pertaining to life as understood in the context of physician-assisted dying in *Carter*. The facta of the interveners demonstrated the existent of two narratives existing simultaneously, though necessarily competing with one another. My analysis also revealed that there was a shift away from a religious understanding of life (which was very much the authoritative narrative in *Rodriguez*) to an understanding of life that is nonreligious in nature.

Traditionally understood as a sacred gift from God, life became conceptualized as something else—something outside of the realm of the transcendent and therefore no longer thought of as a gift from a divine figure. What my discourse analysis revealed was that life, as understood in a narrative established by nonreligion, became understood as something situated within the immanent. In *Carter* life is understood as: (1) encapsulating the idea that, within a specific set of circumstances, a person is able to freely and justifiably end his or her own life if he or she so wishes; (2) the value of life is determined according to how a person lives his or her life; and (3) life is understood subjectively with an emphasis on the quality of one's life. These three ways of understanding life are interwoven with one another and form the overall new understanding of life when it comes to matters of physician-assisted dying in Canadian law. In these three ways that life is understood, it is also apparent that there exists a prominent underlying theme of autonomy. In a narrative established by nonreligion, individuals have a choice as to how to live their life, how to value their life, and how to fundamentally understand

their life. Thus, there is an emphasis on autonomy that underlies the nonreligious conceptualization of life rather than some transcendent being narrating how life is to be both lived, valued, and ultimately understood.

In Chapter Four I examined the concept of death. Much like the concept of life, there were also two competing, but simultaneously existing narratives of how death was understood in reference to physician-assisted dying. In addition, how this concept was understood, transitioned from a narrative established by religion to one established by nonreligion. My analysis demonstrates that in the religious framework, suffering was a spiritual experience and was to be endured to uphold human value and dignity (Beaman and Steele 2018). The second narrative, however, the one established in nonreligion, dictates that death is to be understood independently from the transcendent. Death then, much like life, has undergone a reconceptualization in *Carter*.

Traditional religious notions of what constitutes death and how it is to be understood in law, have given way to a nonreligious notion of what death entails. The nonreligious narrative understands death and physician-assisted death as: (1) a way to free an individual from suffering; (2) death as rational and natural; (3) physician-assisted death not as an act of suicide and killing but rather as part of process of dying; and (4) death as a valid form of medical treatment. Again, much like life, there exists an undercurrent that emphasizes autonomy within this reconceptualization of death. Rather than God determining the place and timing of one's death, the individual is now able to determine how his or her life is valued and if such value is maintained through his or her *choice* to die if he or she is experiencing "intolerable" suffering. Consequently, an individual's choice to die at a time of his or her own choosing is now to be "respected" in Canadian society (*Carter,* at para. 63).

Finally, in Chapter Five, I examined the concept of morality. My analysis of this concept in *Carter*, paralleled the concepts of life and death and revealed that two competing narratives also existed as to how morality was to be understood—a religious narrative and a nonreligious narrative. Morality, as framed by those who were opposed to physician-assisted dying, was very much understood in the context of a framework established by religion. To these interveners (like the Court in *Rodriguez*) morality and sources of morality were understood to originate with the transcendent. The source behind moral behaviour and morality were generally to be found in God or religion more broadly. In contrast, in a framework established by nonreligion (as articulated by the Court and the interveners who favoured physician-assisted dying in *Carter)* whether or not something is considered right is to be determined by the individual, for the individual. As a result, there was also a move away from the transcendent and toward the immanent when it came to understandings of morality. [123]

This general shift away from the transcendent and toward the immanent in understanding morality is nuanced in my analysis. My analysis revealed that in a nonreligious narrative of physician-assisted dying: (1) an individual decides what is moral and immoral for him or her; (2) the focus of morality is the individual and what is best for this individual, so he or she can participate fully in Canadian society when it comes to matters related to physician-assisted dying; and (3), when the moral nature of physician-assisted dying is discussed, it is done so using supplemental language. This shift in language is not to say that the nonreligious are steering away from making moral judgements, because *Carter* and the positions articulated by those who favoured physician-assisted dying are moral judgments in and of themselves. Instead, the shift in language enhances the moral position of the nonreligious concerning physician-assisted dying by

[123] See *Carter,* at para. 126.

emphasizing the importance of autonomy in a narrative of physician-assisted dying established by nonreligion.

These analysis chapters have outlined how certain concepts that are central to physician-assisted dying, are now understood in the context of Canadian law in light of the Supreme Court's 2015 *Carter* decision. This analysis reveals that concepts that were traditionally understood in the context of a narrative established by traditional, conservative Christian religion are now understood in a narrative outside of religion—in nonreligion. Further, my analysis of *Carter* reveals that nonreligion, given the social context of Canada, has the power to constitute the framework within which physician-assisted dying is framed. Religious understandings of concepts that frame physician-assisted dying in *Carter* have lost ground to a nonreligious framework. In *Carter*, the Court recognized the legitimacy of both narratives, but took the authority away from religion to define physician-assisted dying for all Canadians. Such a shift in power between these two prominent narratives is monumental considering it was only 23 years prior to *Carter* that the Court upheld a narrative of physician-assisted dying that was very much indebted to Christianity (Chambers 2011a, 2011b). In *Carter,* the narrative of physician-assisted dying is instead indebted to *nonreligion.*

Defining Nonreligion in the Context of Physician-Assisted Dying

My analysis of life, death, and morality reveals the existence of two competing narratives that dictate distinct understandings of these concepts. This analysis reveals how understandings of these concepts have transitioned away from being rooted in a religious framework toward being grounded in a framework established by nonreligion. This analysis does not, however, answer *how* nonreligion is rendered in *Carter* in the context of physician-assisted dying. Instead, this

analysis highlights similarities between the nonreligious *understandings* of these key concepts. I then wish to tie these similarities together and return to the primary focus and purpose of this thesis, that is, to answer how nonreligion has been rendered by Canadian law in the context of physician-assisted dying.

This analysis was purposely intended to capture similarities between nonreligious understandings of key concepts used to frame physician-assisted dying. It is through the unearthing of key similarities among nonreligious understandings of these concepts that one is able to deduce how *nonreligion* is conceptualized in *Carter.* In other words, the analysis of the concepts I have described above provides insight into how specific concepts that are intertwined with physician-assisted dying are more generally conceptualized within a narrative established by nonreligion. These definitional similarities provide conceptual generalizations that can be applied more broadly to understand how nonreligion is rendered in *Carter*.

The nonreligious understandings of life, death, and morality reveal two primary generalizations that can be used to describe how nonreligion has been rendered in *Carter.* The first is the removal of the divine, or transcendent from the narrative of physician-assisted dying in *Carter*.[124] Perhaps expected in any rendering of nonreligion is the shift from the transcendent toward the immanent (Beaman and Steele 2018). The reconceptualization of the concepts of life, death, and morality all portray that these concepts are not to be understood in reference to some divine figure. The nonreligious narrative stipulates no divine authority, nor religious doctrine, is to denote how phenomena are to exist or be understood. The focus becomes about the here and now and about what is going on with the individual. Consequently, when we look at nonreligion more broadly, and based on nonreligious understandings of these concepts, nonreligion concerns

[124] The removal of religion from the narrative of physician-assisted dying is also something echoed in other medical related settings. Thompson et al. note that several individuals "suggested outright opposition to any incorporation of religion and/or spirituality into genetic counseling" (2016, 954).

the removal of the transcendent as it is understood according to traditional forms of Christianity as demonstrated by the religious interveners in *Carter*.

However, simply removing the transcendent or divine from religious phenomena does not render these as nonreligion. To categorize something as nonreligion, phenomena need to be given positive content. Too often, nonreligion is understood as a deficit term and positioned as something negative (Brown 2017). As Brown argues, "a narrative of diminishing religiosity may be an unappealing attribute of a life story; it is negative, perhaps feared as diminishing of morality, and conceived as hollowing the self" (2017, 20). Unbelief is "bereft of much narrative substance" (Brown 2017, 71). But, as Brown points out, atheism, unbelief, and nonreligion are described by those who identify as belonging to these groups as having a "***positive*** moral outlook distinct from a traditional religious one**"** (2017, 2; emphasis added). Nonreligion is not negative in outlook, but rather positive—it is a "positive story of freedom from religion fostering a new comprehensive moral outlook and a blossoming of the ***autonomous self***" (Brown 2017, 5; emphasis added). Nonreligion is thus a story of "***positive*** human development" (Brown 2017, 5; emphasis added) and the "human discovery of a new moral cosmos" (Brown 2017, 184).

Recalling from Chapter One that nonreligion is often considered a placeholder term (Woodhead 2016), it is then used to capture things that are not necessarily religion, but at the same time, not "*not"* religion. Instead, something falls under this catchall category and becomes nonreligion when such a phenomenon is given positive content—or in the words of Lee (2015) *meaningfully* differs from religion. Although some might argue that the shift from the transcendent toward the immanent may be enough to categorize something as nonreligion, the results of my analysis reveal that the concepts I have discussed share another, positive content giving, similarity.

In the preceding analysis of nonreligious understandings of life, death, and morality, though all transition toward the immanent, they also all focus on the importance of individual autonomy and choice. This focus on autonomy and choice is the second generalization. No longer are these concepts to be understood as being grounded in the transcendent, but central to the understanding and values of these concepts is an emphasis on autonomy. In the context of physician-assisted dying, it is up to the individual to determine what his or her life means to them; how to die; and whether or not something is "good and just". Underlying the shift from religion to nonreligion in all the understandings of the concepts I assessed in *Carter* was the notion that the transcendent is removed and replaced by the individual.

This focus on autonomy provides for *meaningful* difference thereby moving something that is not deemed as religion into the realm of nonreligion. When we consider that for religion (as it is understood in *Carter*) the emphasis is on the transcendent and divine authority, nonreligion as rendered in *Carter* meaningfully differs from religion, as the focus for such a phenomenon is on the immanent and personal choice which as concepts are also constructed in a particular way in *Carter*. When it comes to legal discussions about physician-assisted dying, nonreligion is thus framed as the negation of the transcendent as it is understood and constructed by traditional, conservative renderings of Christianity as portrayed by the religious interveners in *Carter,* and is supplemented by the immanent, autonomous self. This move toward autonomy is imperative to understanding nonreligion in the context of physician-assisted dying as it is an undercurrent in the concepts I have analyzed in this thesis (see also Brown 2017). This understanding of nonreligion, focusing on positive content, adds to the growing body of

literature that seeks to nuance the study of "that which is not religious" and broaden the limited, deficit centric approach often used to study nonreligion.[125]

Conceptual Limitations

My rendering of nonreligion, of course, has limitations. First, this conceptualization of nonreligion is based on a constructionist approach to nonreligion. Nonreligion as rendered above is specific to physician-assisted dying. When matters are discussed that do not emphasize autonomy as much as physician-assisted dying, there is the need for another positive content giving aspect to be present in order to establish what nonreligion is (e.g., culture). Nonreligion as a phenomenon is then fluid and will change depending on the context in which it is being rendered. Nonreligion in the context of physician-assisted dying is the rejection of the divine and the emphasis on autonomy. Nonreligion in the context of something else of social importance may be entirely different. Left open-ended to account for this fluidity, nonreligion can be conceived of as the conceptual gap between what is religion and what is not religion but in order to be situated within this gap, phenomena must meaningfully differ from religion.

Another conceptual limitation of this understanding of nonreligion, particularly the move away from the transcendent, is how, for example, might nonreligion be rendered in matters related to indigenous spiritualities (e.g., in the *Ktunaxa Nation* decision).[126] When some phenomenon still has a connection with the transcendent, how might one categorize this phenomenon? Spirituality, for example, is a phenomenon that might not be accurately categorized as nonreligion because in many cases there remains a connection with the

[125] See Quack (2014), Lee (2015), Woodhead (2016); Brown (2017).
[126] *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54, [2017] 2 S.C.R. 386. Hereinafter "*Ktunaxa Nation*".

transcendent. Depending on how one delimits religion, is nonreligion then inclusive of spirituality or not?

Finally, I would like to point out that although the conceptualization of nonreligion as presented throughout this thesis may suggest that nonreligion is equated with favouring physician-assisted dying and religion is opposed to physician-assisted dying this is certainly not the case. The boundaries between those that support and oppose physician-assisted dying are not clear cut. This thesis is concerned with the general construction of nonreligion, in the context of physician-assisted dying, by Canadian law. This thesis was not concerned with whether or not the nonreligious or religious support or oppose physician-assisted dying. What I have argued in this thesis is that physician-assisted dying has been reconceptualized within a framework that is not established by religion, but instead is conceptualized within a framework established by nonreligion. Nonreligion simply provides another way of thinking about physician-assisted dying. I have not argued that all nonreligious people are supportive of physician-assisted dying and that all religious people reject physician-assisted dying. The data used in this thesis suggests that such a boundary does not exist. Gloria Taylor, for example, was a member of the United Church of Canada[127] and the Canadian Unitarian Council is a religious organization, but both supported physician-assisted dying in *Carter*. In contrast, the Council of Canadians with Disabilities, a nonreligious organization, was opposed to physician-assisted dying. There are religious people who favour physician-assisted dying just as there are nonreligious people who opposed physician-assisted dying. Therefore, the results of this thesis do not intend to imply that religion or everyone who identifies as religious are opposed to physician-assisted dying, nor is nonreligion or all those who identify as nonreligious supportive of physician-assisted dying. It just so happens that *most* of the nonreligious interveners in *Carter* favoured physician-assisted

[127] See Todd (2012).

dying and *most* of the religious interveners opposed physician-assisted dying. Just as Quack (2014) suggests there are degrees to which religion-related things (nonreligion) may be understood, the preceding analysis suggests that the space which various religious and nonreligious interveners occupy on the religious/nonreligious spectrum varies. Therefore, the boundaries between what is religion and what is nonreligion are not clear cut and are often quite blurred.

Moving Forward with Nonreligion

Based on my findings, nonreligion remains very much a catchall category for things that we might use to describe 'that which is not religion' (Cragun 2016). My findings do not offer a conclusive definition of nonreligion, nor do they restrict nonreligion to a set of boundaries. Rather, like constructionist views of religion and nonreligion, my findings provide a snapshot of how nonreligion is rendered in the context of physician-assisted dying in Canadian law at a specific moment in time. This study has contributed, though, to the notion that there is a need for some form of positive content present within some phenomenon for it to be considered nonreligion (Brown 2017). This will avoid overrepresenting things as nonreligion when in fact certain phenomena may simply be without religion (or simply not religion) and also help rid the category of its negative connotations (Brown 2017). The requirement of positive content allows for things to be completely independent of religion thereby nuancing the study of what is commonly referred to as the 'secular'. The inclusion of nonreligion allows for a more typological approach to studying "that which is not religious" (Lee 2015).

This study also provides some insight into how the changing religious and nonreligious landscape in Canada has resulted in narratives that are established in nonreligion to gain more

traction when it comes to social issues of importance to Canadians. *Carter* shows us that as the religious attitudes of Canadians continue to change, so do the attitudes of Canadians towards other deep-seated beliefs. Just as a relationship between religious beliefs and physician-assisted dying exists, so too might this relationship exist with other concerns such as pornography, sex, and sexuality (Angus Reid Institute 2015). As the intervener The Evangelical Fellowship of Canada argued, "laws do not only reflect a society; they also form it" (at para. 41). How then will the laws that are based on nonreligion begin to form the Canadian society in which we live? Will laws that are understood within a narrative established by nonreligion be more inclusive than the laws currently in place? Thiessen provides some insight into this issue by arguing that "diminished religiosity can [in some instances] be seen as a welcome change" (2015, 184). Ultimately though, this is something only time and continued research into the realm of nonreligion can tell.

Returning to the assumption that opened this thesis regarding what was meant by Dr. Beaman when she asked if I would be interested in studying nonreligion, I could not have been further from the truth. Certainly, nonreligion implies that phenomena are not religious, but such a term does not mean that these phenomena are completely devoid of religion. The study of nonreligion is not straightforwardly the study of things that lack religion. Instead, the study of nonreligion is the study of phenomena that are not religious but are not "not" religion—these phenomena remain meaningfully engaged with religion and do not lack positive meaning (Brown 2017). Nonreligion recognizes the positive content of phenomena, rather than simply denoting phenomena that are conceived of inherently lacking something. Such an approach leaves open the possibility that phenomena do indeed exist independently from religion (Lee 2015), but also

most importantly, recognizes that there are ideologies that are meaningful and valid that exist outside of a religious framework (Brown 2017).

Only time will tell how the transition towards nonreligion as seen in *Carter* will play out in future decisions of the Supreme Court of Canada and how those decisions will affect Canadian society. The study of nonreligion confuses what we once thought was clear and so the future study of this phenomenon will certainly be interesting. Nonreligion is like a shadow in contemporary society—dark and unexplored. But, "in the dark, there is discovery, there is possibility, there is freedom in the dark once someone has illuminated it" (Flint, Black Sails, Season 4, Episode 10, April 2, 2017).

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