

4-1-2010

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Recommended Citation

Carol C. Cleary, *From "Personal Autonomy" to "Death-on-Demand": Will Purdy v. DPP Legalize Assisted Suicide in the United Kingdom?*, 33 B.C. Int'l & Comp. L. Rev. 289 (2010), <http://lawdigitalcommons.bc.edu/iclr/vol33/iss2/4>

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FROM “PERSONAL AUTONOMY” TO “DEATH-ON-DEMAND”: WILL *PURDY V. DPP* LEGALIZE ASSISTED SUICIDE IN THE UNITED KINGDOM?

CAROL C. CLEARY*

Abstract: Debates over end-of-life issues and the “right to die” are becoming increasingly prevalent in many modern societies. In July 2009 the House of Lords addressed the question of whether the legal framework governing assisted suicide in the United Kingdom constitutes an unjustifiable infringement on privacy rights. The court decided that question in the affirmative, and this Note discusses the implications of *Purdy v. Director of Public Prosecutions* for the legality of assisted suicide in the United Kingdom. This Note uses evidence of legal developments in other jurisdictions that have grounded the right to assisted suicide in personal autonomy to argue that the *Purdy* court’s reasoning and the Director of Public Prosecution’s response to the decision paves the way for a gradual breakdown in restrictions on the practice.

INTRODUCTION

A recent movement to legalize assisted suicide and euthanasia has swept across some of the globe’s wealthier industrialized nations.¹ While a handful of jurisdictions in Europe and the United States have legalized assisted suicide with varying degrees of restriction, laws that allow the practice remain the exception rather than the rule in most of the developed world.² The United Kingdom is one region in which efforts to legalize assisted suicide have historically proven unsuccessful; under current U.K. law, suicide itself is not a crime, but aiding or abetting someone else’s suicide is a criminal offense, the prosecution of

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¹ Lara L. Manzione, Note, *Is There a Right to Die?: A Comparative Study of Three Societies (Australia, Netherlands, United States)*, 30 GA. J. INT’L & COMP. L. 443, 444 (2002).

² See generally Raphael Cohen-Almagor, *Euthanasia and Physician-Assisted Suicide in the Democratic World: A Legal Overview*, 16 N.Y. INT’L L. REV. 1 (2003) (discussing the legal approaches to assisted suicide and euthanasia around the world, and noting that the Netherlands and Belgium are the only countries in the liberal world that accept both practices).

which is left to the discretion of the Director of Public Prosecutions (DPP).³ The legality of the ban on assisted suicide and the scope of prosecutorial discretion have recently come under scrutiny, especially as British citizens have begun to take advantage of the more liberal suicide laws in neighboring European countries like Switzerland.⁴ Switzerland is unique among jurisdictions that have legalized assisted suicide because Swiss law does not require that the person giving assistance be a physician, and there are no restrictions on foreigners who travel to the country merely to take advantage of its liberal assisted suicide provision.⁵ As a consequence of these legal idiosyncrasies, Switzerland has become a hotbed for what some have termed “death tourism,”⁶ and since 1998 over 100 British citizens are known to have traveled to the country to take their lives with the help of “right-to-die” centers.⁷

To date, no one in the United Kingdom has been prosecuted under the Suicide Act for assisting in a suicide that takes place abroad.⁸ The fact that the ban remains in place, however, has led some to seek clarification from the British government regarding how the DPP chooses whether or not to prosecute perpetrators of the Act.⁹ In July 2009, the House of Lords ruled in *Purdy v. Director of Public Prosecutions* that the DPP must clarify which factors he would consider before deciding whether a prosecution under the Suicide Act would be in the public’s interest.¹⁰ The decision noted that, while it was not the place of the court to decriminalize assisted suicide, judges had a role to play in clarifying the law for cases in which “compassionate assistance” was required, i.e. where assistance was necessary to aid the terminally ill in ending their lives.¹¹ The DPP issued draft guidelines in late September 2009¹² and after a period of public comment issued final guidelines in

³ Suicide Act, 1961, 9 & 10 Eliz. 2, c. 60, §§ 1–2 (Eng.).

⁴ See *Purdy v. Dir. Pub. Prosecutions* [2009] UKHL 45, [2009] 3 W.L.R. 403, 414 (U.K.); see also Rohith Srinivas, Note, *Exploring the Potential for American Death Tourism*, 13 MICH. ST. U. J. MED. & L. 91, 111–12 (2009).

⁵ Srinivas, *supra* note 4, at 106–07.

⁶ See *id.* at 105, 107.

⁷ See John F. Burns, *With Help, Conductor and Wife Ended Lives*, N.Y. TIMES, July 15, 2009, at A4.

⁸ *Id.*

⁹ See *Purdy*, 3 W.L.R. at 414; see also *Pretty v. United Kingdom*, App. No. 2346/02, 35 Eur. H.R. Rep. 1, 1 (2002).

¹⁰ See *Purdy*, 3 W.L.R. at 414.

¹¹ See *id.* at 413, 423.

¹² Mark Hennessy & Gerry Moriarty, *New Guidelines on Assisted Suicide Published in UK*, IRISH TIMES, Sept. 24, 2009, at 13, available at <http://www.irishtimes.com/newspaper/world/2009/0924/1224255131933.html>.

late February 2010.¹³ The policy includes sixteen factors that weigh in favor of prosecution, and six factors that weigh against prosecution.¹⁴

Upon issuing the draft guidelines, the DPP stated that his policy guidelines are not intended to undermine the force of the Suicide Act, and that no person is immune from prosecution.¹⁵ Almost immediately, however, the list generated controversy; some accused the DPP of usurping the role of Parliament and granting de facto immunity to certain classes of persons, while others hailed the guidelines as a step towards “greater patient choice.”¹⁶ The DPP’s initial policy placed an emphasis on the physical status of the individual committing suicide; under that policy, evidence of terminal illness or physical disabilities weighed against prosecution.¹⁷ After a period of public comment, the DPP revised his guidelines to place greater emphasis on the motives of the assister rather than the health of the victim.¹⁸ The DPP reiterated that the policy was not intended to change the prohibition on assisted suicide,¹⁹ but the very existence of such a policy remains a source of debate among those with differing views about the practice of assisted suicide.²⁰ Regardless of the probable effect of the DPP’s guidelines, the factors themselves reveal the complexities and nuances attendant to the assisted suicide debate, one that has become increasingly relevant to societies around the world.²¹

Part I of this Note provides a detailed overview of the “right-to-die” movement and the most recent jurisprudence on the issue of assisted suicide in the United Kingdom. Part II of the Note discusses this juris-

¹³ See Press Release, Crown Prosecution Serv., DPP Issues Assisted Suicide Policy (Feb. 25, 2010), http://www.cps.gov.uk/news/press_releases/109_10/ [hereinafter CPS Press Release 2/25/10].

¹⁴ See *id.*

¹⁵ Frances Gibb, *Assisted Suicide: DPP Unlikely to Prosecute Relatives Who Help*, TIMES ONLINE (London), Sept. 24, 2009, <http://business.timesonline.co.uk/tol/business/law/article6845582.ece>.

¹⁶ See *id.*

¹⁷ Crown Prosecution Service, Interim Policy for Prosecutors in Respect of Cases of Assisted Suicide, http://cps.gov.uk/consultations/as_policy.html (last visited Apr. 26, 2010) [hereinafter Interim Policy for Prosecutors].

¹⁸ See CPS Press Release 2/25/10, *supra* note 13.

¹⁹ See *id.*

²⁰ See Haroon Sidiq, *DPP Releases Assisted Suicide Guidelines*, GUARDIAN (U.K.), Feb. 25, 2010, <http://www.guardian.co.uk/uk/2010/feb/25/dpp-releases-assisted-suicide-guidelines>.

²¹ See Gibb, *supra* note 15; David Maddox, *Half of Britons Want Assisted Suicide to Be Made Legal*, SCOTSMAN (Edinburgh), Sept. 15, 2009, at 6, available at <http://news.scotsman.com/euthanasia/half-of-britons-want-assisted.5646125.jpp>; Stephen McGinty, *Victory in Bid to Legalise Assisted Suicide*, SCOTSMAN (Edinburgh), July 31, 2009, at 1, available at <http://news.scotsman.com/euthanasia/victory-in-bid-to-legalise.5511527.jpp>.

prudence, as well as the DPP's guidelines, in more detail. Finally, Part III presents the argument that the *Purdy* court's desire to carve out a de facto exception to the Suicide Act for individuals with terminal illnesses and/or disabilities is at odds with its holding that the decision to commit suicide is a matter of personal autonomy. This Note further argues that by premising the right to kill oneself on notions of privacy and personal autonomy, the *Purdy* decision is likely to set the United Kingdom down a path towards relaxation of the assisted suicide ban and eventual legalization of the practice. Recent developments prove that the DPP cannot issue guidelines that draw a line between individuals with terminal illnesses or incurable disabilities and others who make rational decisions to end their own lives without articulating some kind of rationale that places relative worth on individual lives vis-à-vis the state.

I. BACKGROUND

A. *The "Right to Die"*

The concept of a "right to die" has its theoretical basis in the idea that an individual should be able to decide the time and manner of his or her own death, either by herself or with the aid of another if she so chooses.²² The right to die encompasses the right of an individual to commit suicide with or without assistance, as well as the right to request that another person commit acts that cause the death of the requesting party, or "voluntary euthanasia."²³ Voluntary euthanasia can be either "passive," when a doctor or other actor refrains from performing acts that prolong an individual's life, or "active," when a doctor or some other actor acts to cause the death of another, e.g. by injecting a lethal medication.²⁴ The distinction between assisted suicide and euthanasia thus rests on who actually carries out the act that ends the individual's life.²⁵

Euthanasia remains a crime in most countries of the world.²⁶ Assisted suicide is currently legal in the Netherlands, Belgium, and Switzerland,²⁷ and in the U.S. states of Oregon, and Washington.²⁸ Of these

²² Manzione, *supra* note 1, at 445.

²³ See Srinivas, *supra* note 4, at 94.

²⁴ See JOHN GRIFFITHS ET AL., EUTHANASIA & LAW IN THE NETHERLANDS 51 (1998); Cohen-Almagor, *supra* note 2, at 2-3.

²⁵ See Srinivas, *supra* note 4, at 94.

²⁶ Cohen-Almagor, *supra* note 2, at 5.

²⁷ *The Fight for the Right to Die*, CBC NEWS, Feb. 9, 2009, <http://www.cbc.ca/canada/story/2009/02/09/f-assisted-suicide.html>.

jurisdictions, the Netherlands is considered to have the most liberal “right-to-die” laws, which permit euthanasia as well as assisted suicide.²⁹ Though euthanasia is illegal in Switzerland, that nation also has a unique legal position on assisted suicide, a practice it has permitted since 1918.³⁰ Swiss law allows lay persons as well as doctors to assist in the suicide of others, so long as the person assisting does not act with selfish intent; the law also does not require that persons seeking assistance be terminally ill.³¹

A number of “right to die” organizations have sprung up in Switzerland to facilitate assisted suicide.³² One such organization, called “Dignitas,” does not discriminate against non-residents who travel to Switzerland to use its services.³³ As a result, individuals from other nations where assisted suicide is illegal have begun to travel to Switzerland to end their lives, a phenomenon known as “death tourism.”³⁴ In the past several years, over 100 British citizens have taken advantage of Dignitas’ services, igniting the right to die debate in the United Kingdom.³⁵ Individuals seeking assistance in suicide, and those who seek to help them, are calling for a reform of the nation’s assisted suicide law,³⁶ while supporters of the ban argue that the law is necessary to protect vulnerable individuals who might be pressured into taking their own lives if assisted suicide were legalized.³⁷

B. *The Suicide Act, Prosecutorial Discretion & the Right to Privacy— Controversy in the United Kingdom*

Suicide and attempted suicide ceased to be crimes in the United Kingdom when the Suicide Act was passed in 1961.³⁸ The statute also created a new offense in section 2(1), which stipulates that any person who “aids, abets, counsels or procures the suicide of another, or an at-

²⁸ William Yardley, *First Death for Washington Assisted-Suicide Law*, N.Y. TIMES, May 23, 2009, at A10.

²⁹ See Cohen-Almagor, *supra* note 2, at 5–6.

³⁰ See Srinivas, *supra* note 4, at 105–06.

³¹ See *id.*

³² See *id.* at 106.

³³ See *id.*

³⁴ See *id.* at 92–93.

³⁵ See *id.*

³⁶ See Srinivas, *supra* note 4, at 92.

³⁷ See A.N. Wilson, *I Still Wake Up at Night, Wishing I Had Killed My Mother. But Keir Starmer Is Wrong*, DAILY MAIL (London), Sept. 24, 2009, <http://www.dailymail.co.uk/debate/article-1215710/a-n-wilson-i-wake-night-wishing-i-killed-mother-but-keir-starmer-wrong.html>.

³⁸ Suicide Act, 1961, 9 & 10 Eliz. 2, c. 60, § 1 (Eng.).

tempt by another to commit suicide” is liable on conviction to serve up to fourteen years in prison.³⁹ Thus, under the Suicide Act, it is considered a crime to assist another person in a non-crime.⁴⁰ Pursuant to section 2(4), however, no prosecutions may be brought for an offense under section 2 except by or with the consent of the DPP.⁴¹

As the head of the Crown Prosecution Service, the DPP prosecutes criminal cases that the police of England and Wales have investigated.⁴² The basic reason for including a provision in a statute limiting the initiation of prosecutions is to prevent inappropriate prosecutions for actions that may fall under the scope of the statute.⁴³ In general, the DPP will only bring a prosecution under a criminal statute when he deems it to be in the public interest.⁴⁴ The DPP and his agents, in the form of Crown prosecutors, determine whether a prosecution is in the public interest by reference to a set of factors published in the Code for Crown Prosecutors (the Code).⁴⁵ The Code, which the DPP issues and makes available to the public, applies to all criminal offenses and does not distinguish among different crimes.⁴⁶

The DPP’s role in the prosecution of crimes is at the heart of recent challenges to the legality of the Suicide Act; however, these cases are also unique because the litigants have argued that the ban on assisted suicide

³⁹ *Id.* § 2(1).

⁴⁰ *See id.* §§ 1–2.

⁴¹ *Id.* § 2(4).

⁴² *See* Crown Prosecution Service, About the CPS: Director of Public Prosecutions, <http://www.cps.gov.uk/about/dpp.html> (last visited Apr. 26, 2010); Crown Prosecution Service, People at the CPS: The Crown Prosecution Service, <http://www.cps.gov.uk/about/people.html> (last visited Apr. 26, 2010).

⁴³ *See Purdy v. Dir. Pub. Prosecutions* [2009] UKHL 45, [2009] 3 W.L.R. 403, 419 (U.K.). Other reasons to include a provision for limiting prosecutions are:

[T]o secure consistency of practice, to prevent abuse of the kind that might otherwise result in vexatious private prosecution, to enable account to be taken of mitigating factors and to provide some central control of the use of the criminal law where it has to intrude into areas which are particularly sensitive or controversial.

See id. at 419–20.

⁴⁴ *See id.* at 420.

⁴⁵ *See id.*

⁴⁶ *See id.* The Code sets out two tests which prosecutors typically use to determine whether or not to proceed with a prosecution—the “Threshold Test” which is used at a very early stage in the investigation, and the “Full Code Test,” which entails consideration of the evidence followed by consideration of whether a prosecution is needed in the public interest. *See id.*

constitutes an intrusion into their right to privacy.⁴⁷ For example, in *Pretty v. United Kingdom*, plaintiff Diane Pretty sued the United Kingdom in the European Court of Human Rights (ECHR) after the DPP refused to grant her husband advance immunity for his anticipated assistance in her suicide.⁴⁸ Pretty, who suffered from a motor neuron disease, claimed that the blanket ban on assisted suicide prevented her from exercising her lawful right to end her life because her deteriorating physical condition rendered her incapable of performing the act without assistance.⁴⁹ Pretty sought a guarantee from the DPP that he would not prosecute her husband if he were to assist her in committing suicide.⁵⁰ The court concluded, for the first time ever, that the right to privacy guaranteed by Article 8(1) of the European Convention of Human Rights (Convention) encompasses the right to make the decision to end one's own life.⁵¹ The court held, however, that the DPP did not act inappropriately by refusing to grant advance immunity for Pretty's husband.⁵² The court reasoned that it could be construed as a threat to the rule of law if the government were to exempt individuals or classes of individuals from the operation of the law, and that the gravity of assisting in someone else's suicide was serious enough that the DPP's refusal to acquiesce in Pretty's request was not unreasonable.⁵³

In *Purdy v. DPP*, plaintiff Debbie Purdy sought judicial review of the DPP's actions after he refused to publish detailed guidelines regarding the factors he would consider before deciding whether or not to prosecute an individual under the Suicide Act.⁵⁴ Owing to her primary progressive multiple sclerosis, Purdy foresaw a time when she would regard her continuing existence as unbearable, and she would wish to commit suicide.⁵⁵ She anticipated, however, that by the time she reached that stage of her disease she would be unable to act without assistance and would need to travel to a country where assisted suicide was lawful.⁵⁶ Purdy argued it was an injustice that the law was so unclear that she could not be sure whether her husband would be prosecuted for assist-

⁴⁷ See *id.* at 415–16; *Pretty v. United Kingdom*, App. No. 2346/02, 35 Eur. H.R. Rep. 1, 14 (2002).

⁴⁸ See *Pretty*, 35 Eur. H.R. Rep. at 6–7.

⁴⁹ See *id.* at 6.

⁵⁰ See *id.*

⁵¹ See *id.* at 36–37.

⁵² See *id.* at 39.

⁵³ See *id.*

⁵⁴ See *Purdy*, 3 W.L.R. at 414.

⁵⁵ See *id.* at 409.

⁵⁶ *Id.*

ing her in traveling to another country to commit suicide.⁵⁷ As a consequence, Purdy argued, she would have to commit suicide sooner than she would like while she was still well enough to do so by herself, rather than subject her husband to possible prosecution.⁵⁸

First, the *Purdy* court followed *Pretty* in ruling that Article 8(1) encompasses the right to “self-determination,” which itself includes the right to make the decision to kill oneself.⁵⁹ The court then held that the public interest factors set out in the current version of the Code were not applicable to the complex issues presented by assisted suicide cases.⁶⁰ Finally, the court ordered the DPP to issue an offense-specific policy identifying the facts and the circumstances that would be considered when deciding whether to prosecute individuals under the Suicide Act.⁶¹ Pursuant to this ruling, the DPP issued interim guidelines on September 23, 2009.⁶² These guidelines were left open for public comment until December 16, 2009, and the DPP issued his final policy on February 25, 2010.⁶³

II. DISCUSSION

The *Purdy* court’s recognition that Article 8(1) guarantees the right to self-determination was foundational to the court’s ultimate holding requiring the DPP to issue an offense-specific policy directing prosecutorial discretion in cases of assisted suicide.⁶⁴ Article 8(1) of the Convention stipulates that all individuals have the right to respect for their private and family life.⁶⁵ Under Article 8(2), public authorities may not interfere with this right unless the interference is in accordance with the law, has an aim which is legitimate, and is necessary in a democratic society for that legitimate aim.⁶⁶

⁵⁷ See *id.* at 413–14.

⁵⁸ See *id.* at 414.

⁵⁹ See *id.* at 416–17, 431.

⁶⁰ See *Purdy*, 3 W.L.R. at 423.

⁶¹ *Id.*

⁶² See Gibb, *supra* note 15.

⁶³ CPS Press Release 2/25/10, *supra* note 13; Press Release, Crown Prosecution Serv., DPP Publishes Interim Policy on Prosecuting Assisted Suicide (Sept. 23, 2009), http://www.cps.gov.uk/news/press_releases/144_09/.

⁶⁴ See *Purdy v. Dir. Pub. Prosecutions* [2009] UKHL 45, [2009] 3 W.L.R. 403, 416–17, 431 (U.K.).

⁶⁵ See European Convention for the Protection of Human Rights and Fundamental Freedoms art. 8(1), Nov. 4, 1950, 213 U.N.T.S. 221, 230 [hereinafter ECHR].

⁶⁶ See *Pretty v. United Kingdom*, App. No. 2346/02, 35 Eur. H.R. Rep. 1, 37 (2002); see also ECHR, *supra* note 65, art. 8(2) (listing “national security, public safety or the economic well-being of the country, [for] the prevention of disorder or crime, [for] the protection

To meet the requirement of being “in accordance with the law,” any intrusion must be clearly authorized by law and precise enough for an individual to understand the law’s scope and foresee its consequences so that he or she may regulate his or her conduct accordingly.⁶⁷ Purdy claimed that the Suicide Act did not meet this requirement because she did not understand how to conform her actions to avoid subjecting her husband to prosecution.⁶⁸ This uncertainty resulted from the fact that the Suicide Act’s ban on assisted suicide did not allow for any exceptions, yet simultaneously provided for broad prosecutorial discretion in its enforcement.⁶⁹ Thus, Purdy’s husband’s fate was wholly dependent upon the DPP’s interpretation of factors in the Code inapplicable to unique situations like hers.⁷⁰ Purdy argued, and the court accepted, that because the Suicide Act as formulated, taken together with the Code, did not meet the requisite level of accessibility and foreseeability required by Article 8(2) of the Convention, it constituted an unjustifiable interference with her right to privacy in violation of the Convention.⁷¹

In determining that Purdy’s right to privacy includes the right to make the decision to kill herself, the House of Lords emphasized that Article 8(1) relates to the manner in which a person lives his or her life, and that how a person chooses to spend the closing moments of his or her life is part of the act of living and therefore should be respected.⁷² The *Purdy* court relied on reasoning in *Pretty v. U.K.*, in which the ECHR noted that when the law prevents an individual from exercising choices that affect her quality of life, as when she decides to avoid “what she considers will be an undignified and distressing end to her life,” this constitutes an interference with her right to privacy.⁷³

of health or morals, or [for] the protection of rights and freedoms of others” as legitimate aims).

⁶⁷ See *Purdy*, 3 W.L.R. at 417.

⁶⁸ See *id.* at 414.

⁶⁹ See *id.* at 418.

⁷⁰ See *id.* at 423. Some of the factors listed in the Code which weigh in favor of prosecution include the seriousness of the offense, the seriousness of the sentence upon conviction, whether or not a weapon was used, whether or not the offense was committed against a person serving the public, whether or not the offense was premeditated, and whether or not the defendant was in a position of authority or trust, among others. See CROWN PROSECUTION SERVICE, THE CODE FOR CROWN PROSECUTORS § 5.9(a),(c)–(e) (2004), available at <http://cps.gov.uk/publications/docs/code2004english.pdf>.

⁷¹ See *Purdy*, 3 W.L.R. at 422.

⁷² See *id.* at 416.

⁷³ See *id.* at 416–17; *Pretty*, 35 Eur. H.R. Rep. at 37.

After concluding that Purdy's Article 8(1) rights were implicated by the Suicide Act, the Law Lords examined the factors in the Code that the DPP customarily uses to determine whether a prosecution is in the public interest.⁷⁴ Lord Hope noted that while the Code normally provides sufficient guidance to Crown Prosecutors,⁷⁵ it fails to do so in cases involving the assisted suicide "of a person who is terminally ill or severely and incurably disabled," and who, "having the capacity to take such a decision, does so freely and with a full understanding of the consequences."⁷⁶ Lord Hope also noted the clear disconnect between the text of the Suicide Act and the manner of its application in "compassionate" cases like Purdy's.⁷⁷ Furthermore, although the relatively small number of these "controversial" cases would undoubtedly grow, Lord Hope concluded that the DPP could likely define the class that would require "special treatment" narrowly.⁷⁸ Similarly, Baroness Hale wrote that there could be individual cases in which "the deterrent effect of a prosecution would be a disproportionate interference with the autonomy of the person who wishes to end her life."⁷⁹ Accordingly, Hale concluded, any law that interferes with this decision must be formulated to protect an individual's right to make a "genuinely autonomous choice."⁸⁰ In sum, an offense-specific policy for prosecutorial discretion under the Suicide Act was deemed necessary because there would otherwise be an inappropriate infringement on the right of autonomous individuals to make the decision to end their lives.⁸¹

The final guidelines that the DPP issued on February 25, 2010 are an attempt to satisfy the Law Lords' directive, and upon their release, the current DPP, Keir Starmer, noted that "only Parliament can change the law," that he is unable to assure a person in advance of committing a crime that he will not bring a prosecution, and that no one should take his policy as any kind of assurance against charges.⁸² The policy applies when the acts that constitute assistance are committed in England and Wales, regardless of where the suicide or attempted suicide

⁷⁴ See *Purdy*, 3 W.L.R. at 420–23.

⁷⁵ See *id.* at 422.

⁷⁶ See *id.* at 423.

⁷⁷ See *id.*

⁷⁸ See *id.*

⁷⁹ See *id.* at 425.

⁸⁰ See *Purdy*, 3 W.L.R. at 426.

⁸¹ See *id.* at 423, 426.

⁸² Crown Prosecution Service, Policy for Prosecutors in Respect of Cases of Encouraging or Assisting Suicide, Feb. 2010, http://www.cps.gov.uk/publications/prosecution/assisted_suicide_policy.html (last visited Apr. 26, 2010) [hereinafter Policy for Prosecutors].

actually occurs.⁸³ Thus, the policy is clearly intended to cover instances of death tourism as well as suicides in England and Wales.⁸⁴

The DPP's policy lists sixteen factors that weigh in favor of prosecution and six that weigh against prosecution.⁸⁵ The factors that weigh in favor of prosecution include that: the victim did not have the capacity to reach an informed decision to commit suicide; the victim had not reached a "voluntary, clear, settled and informed decision to commit suicide;" the victim had not clearly communicated his or her decision to commit suicide; the victim did not seek the assistance of the suspect on his or her own initiative; the suspect "was not wholly motivated by compassion," was motivated by the prospect of financial gain, or was paid by the victim for his or her assistance; the suspect pressured the victim to commit suicide; and the victim was physically able to undertake the act that constituted the assistance him or herself, among others.⁸⁶

The six factors that weigh against a prosecution are that: the victim had reached a clear, settled, voluntary, and informed decision to commit suicide; the suspect was entirely motivated by compassion; the actions of the suspect were "of only minor encouragement or assistance;" the suspect had sought to dissuade the victim from committing suicide; the suspect's actions constituted "reluctant encouragement or assistance" in the face of the victim's determined wish to commit suicide; and the suspect reported the suicide to the police and fully cooperated in any investigation into the circumstances of the victim's death.⁸⁷

III. ANALYSIS

A. *An Exception to the Ban*

The DPP's final guidelines clearly emphasize the victim's autonomy in the prosecutorial analysis, and the policy disfavors prosecution in cases in which an individual has made a rational, autonomous, inde-

⁸³ *Id.*

⁸⁴ *See id.* In setting out the factors for/against prosecution the DPP noted that determining whether a prosecution is in the public interest "is not simply a matter of adding up the number of factors on each side and seeing which side has the greater number," and that each case must be decided on its own facts. *Id.* He also notes that "[i]t is quite possible that one factor alone may outweigh a number of other factors which tend in the opposite direction." *Id.*

⁸⁵ *See id.*

⁸⁶ *See id.*

⁸⁷ *See id.*

pendent decision to end his or her own life.⁸⁸ These guidelines are consistent with the *Purdy* court's stated intention to respect the autonomy of individuals in Purdy's situation.⁸⁹

The *Purdy* court's apparent desire, however, to carve out an exception to the Suicide Act for an individual suffering from a terminal illness or disability who wishes to make the decision to end his or her own life⁹⁰ is inconsistent with the premise of the court's directive to the DPP, a premise that is based on the principle of self-determination.⁹¹ If *Purdy v. DPP* stands in part for the proposition that the right to privacy protects an individual's ability to make autonomous choices regarding the quality of his or her life, including even the choice to end that life,⁹² then any prosecutorial guidelines which by their content purport to respect this autonomy must exclude any qualifying factors regarding an individual's physical condition; thus, there is a tension between protecting personal autonomy and stipulating when a person is suffering enough to end his or her own life.⁹³

At least one of the Law Lords recognized this tension; for example, Baroness Hale noted in her opinion that if the court "is serious about protecting autonomy" then it must "accept that autonomous individuals have different views about what makes their lives worth living."⁹⁴ Hale proceeded to note that though "[i]t is not for society to tell peo-

⁸⁸ See Policy for Prosecutors, *supra* note 82. For example, so long as a victim manifested a resolute, clear intention or "determined wish" to commit suicide, and the decision was made independently and without pressure from outside sources, then a majority of the factors disfavoring prosecution would be satisfied, and six of the factors favoring prosecution would be negated. See *id.*

⁸⁹ See *Purdy v. Dir. Pub. Prosecutions* [2009] UKHL 45, [2009] 3 W.L.R. 403, 426 (U.K.).

⁹⁰ See *id.* at 422–23. The court's desire to carve out an exception for individuals with terminal illnesses can be inferred ipso facto from the *Purdy* court's directive to the DPP, which is premised on the holding that the original Code was inapplicable to cases of competent individuals who suffered from terminal illnesses, and who, as such, deserved special consideration under the law. See *id.*

⁹¹ See *id.* at 426; see also NEIL M. GORSUCH, THE FUTURE OF ASSISTED SUICIDE AND EUTHANASIA 99 (2006). As Gorsuch points out, an assisted suicide regime wherein the individual is required not only to make a rational, autonomous choice, but also to meet some sort of benchmark requirement of terminal illness or suffering is inconsistent in its application because, while it "would advance the autonomy interests of some persons," it would not respect the autonomy interests of others. GORSUCH, *supra*, at 96. This requirement would suppress many of what Gorsuch calls "rational, autonomous . . . decisions to die." *Id.* Thus, in order to comport fully with principles of autonomy, a state arguably must "abstain from coercively interfering with any rational adult's private decision to die, whatever the motive or reason for the individual's considered decision." See *id.* at 98.

⁹² See *Purdy*, 3 W.L.R. at 416–17.

⁹³ See GORSUCH, *supra* note 91, at 96, 98–99.

⁹⁴ See *Purdy*, 3 W.L.R. at 426.

ple what to value about their own lives,” at times it “may be justifiable for society to insist that we value their lives even if they do not.”⁹⁵ The court has not provided any rationale for distinguishing between lives society must “insist” upon valuing versus those which society has less interest in protecting.⁹⁶ Consequently, as it stands, the court’s “self-determination” rationale for implicating privacy rights in the decision to commit suicide leaves a gaping hole wherein any autonomous individual should, under the court’s logic, be able to pass judgment on the subjective quality of his or her own life and act accordingly.⁹⁷

The reaction to the DPP’s first attempt at formulating a policy for assisted suicide cases illustrates the line-drawing problem presented by the *Purdy* decision.⁹⁸ The September guidelines, which took account of the physical situation of the victim and clearly disfavored prosecution in cases in which the individual was terminally ill or disabled and was helped to die by a family member or close friend,⁹⁹ were criticized on the grounds that the policy amounted to a statement that certain kinds of life were entitled to less protection from the state.¹⁰⁰ Therefore, by emphasizing autonomy and self-determination as the bases for the right to make a decision to end one’s own life, the *Purdy* court has in-

⁹⁵ *See id.* at 426–27.

⁹⁶ *See id.* at 427. Baroness Hale raised the question of how it should be determined when “the law is justified in interfering with a genuinely autonomous choice” but did not provide any answers, instead expressing her hope that the DPP’s policy would include qualifying factors pertaining to the “reasons why the person . . . wished to be helped to end his or her life.” *See id.*

⁹⁷ *See id.* at 426–27; *see also* GORSUCH, *supra* note 91, at 98–99; Daniel Callahan, *Reason, Self-determination, and Physician-Assisted Suicide*, in *THE CASE AGAINST ASSISTED SUICIDE* 52, 61–62 (Kathleen Foley & Herbert Hendin eds., 2002). During the Parliamentary debates in July 2009, when a proposal to create an exception to the Suicide Act for terminally ill individuals who traveled abroad to take their lives was defeated, some lawmakers expressed concern that “any proposal to alter the current position involves a judgment that a certain kind of life, or a certain span of life, has become unworthy of support.” *See* David Aaronovitch, *It’s My Life and I Demand to End It When I Want*, *TIMES* (London), Sept. 22, 2009, http://www.timesonline.co.uk/tol/comment/columnists/david_aaronovitch/article6843426.ece.

⁹⁸ *See* Editorial, *Assisted Suicide: Right-to-Die Laws Are a Matter for Parliament*, *TELEGRAPH* (U.K.), Feb. 25, 2010, at 23, *available at* <http://www.telegraph.co.uk/comment/telegraph-view/7319183/Assisted-suicide-Right-to-die-laws-are-a-matter-for-Parliament.html> (noting that representatives of terminally ill and disabled individuals had accused the DPP of sending a message through his interim policy that those lives were “second class”).

⁹⁹ *See* Interim Policy for Prosecutors, *supra* note 17. For example, in a case where an adult with a terminal illness indicated on her own initiative her clear wish to commit suicide and requested the aid of a spouse or loved one in doing so, under the interim policy at least five of the seven most important factors weighing against prosecution would be satisfied, and four of the factors weighing in favor of prosecution would be negated; thus, a prosecution would very likely not follow. *See id.*

¹⁰⁰ *See* Editorial, *supra* note 98.

vited a situation in which it is very difficult for the state to articulate limits on this right without appearing disingenuous.¹⁰¹

B. *The Slippery Slope*

The tension between individual autonomy and the state's role in the "quality of life" analysis is the conventional starting point of "slippery slope" arguments that have historically been invoked to justify laws prohibiting *all* forms of assisted suicide and/or euthanasia.¹⁰² Although such arguments are often over-stated, evidence from other jurisdictions that justify the practice of assisted suicide by appeals to personal autonomy or "quality of life" assessments reveals a legal trend wherein the category of individuals deemed acceptable candidates for the procedure is gradually being widened.¹⁰³

Recent developments in the Netherlands illustrate this gradual widening; in 1994, the Dutch Supreme Court squarely held in the *Chabot* case that assistance in the suicide of an individual whose suffering is not physical and who is not terminally ill can be justified on necessity grounds because "the wish to die of a person whose suffering is psychic can be based on an autonomous judgment."¹⁰⁴ Seven years later, the

¹⁰¹ See *Purdy*, 3 W.L.R. at 426; Policy for Prosecutors, *supra* note 82; Editorial, *supra* note 98.

¹⁰² See GRIFFITHS ET AL., *supra* note 24, at 177; CRAIG PATERSON, ASSISTED SUICIDE AND EUTHANASIA: A NATURAL LAW ETHICS APPROACH 173 (2008). For example, proponents of these arguments hold that euthanasia must be outlawed in all circumstances because when taken to its logical conclusion, a legal regime which allows the practice of euthanasia on the basis of personal autonomy has no argument against legalization in situations where a patient is not suffering, which the regime deems as unacceptable. See GRIFFITHS ET AL., *supra* note 24, at 177. Griffiths takes issue with the logical slippery slope argument because the argument "presupposes that the forms of termination of life allegedly implied by legalization of euthanasia are obviously unacceptable." See *id.*

¹⁰³ See, e.g., GORSUCH, *supra* note 91, at 105-06; GRIFFITHS ET AL., *supra* note 24, at 152-53; PATERSON, *supra* note 102, at 176-78. For example, euthanasia and assisted suicide first became subjects of public debate in the Netherlands in the early 1970s, when a Dutch court indicated in the *Postma* decision that dispensing of pain relief that hastens a patient's death can be acceptable when a patient is incurably ill, finds his suffering mentally or physically unbearable, has expressed the wish to die, and the person who accedes to the request is a doctor. See GRIFFITHS ET AL., *supra* note 24, at 51-53. By 1986, a series of court decisions had established that "when a patient who is suffering unbearably and hopelessly makes a voluntary and well-considered request" to be euthanized or to be assisted in his or her own suicide, a doctor who responds to the request and conforms to "requirements of careful practice" would not be guilty of a crime. *Id.* at 73. Eventually, assisted suicide and euthanasia were legalized in 2001 without any express requirement that a patient be "incurably ill." See GORSUCH, *supra* note 91, at 106.

¹⁰⁴ See GRIFFITHS ET AL., *supra* note 24, at 80-82. In the wake of *Chabot*, John Griffiths, a professor of sociology of law at the University of Groningen in the Netherlands specu-

Dutch Parliament actually legalized both practices; under the legislation doctors are primarily restricted by the requirements that the patient's request be "voluntary and well-considered," and that his or her suffering be "lasting and unbearable."¹⁰⁵ Terminal illness is not a requirement for euthanasia or assisted suicide, and neither is a physical ailment of any kind; the "suffering" referenced in the bill is completely subjective, and to meet this requirement, a doctor who assists in the death of the patient "need only show that he or she believed that the patient endured some sort of unspecified suffering."¹⁰⁶

Switzerland provides another striking example of the impact that autonomy-based arguments have in breaking down legal restrictions to assisted suicide: in 2006, the Swiss Federal Supreme Court ruled that assisted suicide should be available to individuals with mental illness and psychiatric disorders, so long as they were capable of making a "rational" and "well-considered" decision.¹⁰⁷ In that case, the plaintiff, a manic depressive, based his argument on his Article 8(1) right to self-determination.¹⁰⁸ In its decision, the court reasoned that serious mental disorders "could make life seem as unbearable to some patients as serious somatic ailments do to others" and that those individuals should have just as much of a right to end their lives.¹⁰⁹

Thus, in light of recent developments in other jurisdictions that accord deference to autonomy-based arguments, there is a high poten-

lated that, given the court's rationale that placed greater weight on the principle of autonomy, the requirement of *any* form of unbearable suffering was "on the way out." GORSUCH, *supra* note 91, at 105; GRIFFITHS ET AL., *supra* note 24, at 153. Writing in 1998, Griffiths predicted that *Chabot* might eventually come to be seen as paving the way to a legal development which accepts assistance in the suicides of persons who are simply "tired of life" or those who "are not suffering at the time the request is made but, in anticipation of future deterioration, want to be in a position to choose the time of their death." *See* GRIFFITHS ET AL., *supra* note 24, at 153. Griffiths noted that such situations were not inevitable, but the *Chabot* decision had granted sufficient weight to arguments stemming from notions of autonomy to make them plausible. *See id.*

¹⁰⁵ GORSUCH, *supra* note 91, at 106. Doctors must also inform patients about their situation and prospects for recovery, and consult with another physician who has seen the patient. *Id.* Finally, the doctor and the patient must hold "the conviction that there was no other reasonable solution for the situation [the patient] was in." *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *See* Jacob M. Appel, *A Suicide Right for the Mentally Ill? A Swiss Case Opens a New Debate*, 37 HASTINGS CTR. REP., 21, 21 (2007).

¹⁰⁸ *See id.*

¹⁰⁹ *See id.* In the wake of this decision, at least one scholar has concluded that the court's opinion, however jarring, is theoretically consistent with the idea of respect for personal autonomy upon which the assisted suicide movement is built. *See id.* at 22.

tial that in the post-*Purdy* age, the United Kingdom will begin its slide down the slope towards more permissive assisted suicide laws.¹¹⁰

CONCLUSION

The *Purdy* court's reasoning that grounds the decision to commit suicide under the umbrella of privacy rights is a significant step toward the gradual liberalization of assisted suicide laws in the United Kingdom, especially because restrictions on assisted suicide have proven difficult to uphold in other jurisdictions once autonomy-based arguments are invoked to challenge them. *Purdy v. DPP* has not by itself blown open the door for the legalization of assistance in suicide on-demand because the Suicide Act remains valid law in the United Kingdom and the DPP's guidelines technically do not grant anyone immunity from prosecution. Nevertheless, a legal regime that accepts the principle that self-determination grants one the right to avoid what he or she considers to be an undignified end to his or her life by its own logic invites challenges to any sort of restrictions that would appear to limit the right to assisted suicide to those who suffer from a small subset of serious physical ailments. If personal autonomy persists as the sole rationale for recognizing the right to make decisions regarding the manner of one's own death, it is only a matter of time before "death-on-demand" is available to all U.K. citizens, irrespective of their level of suffering.

¹¹⁰ See GORSUCH, *supra* note 91, at 97–98; PATERSON, *supra* note 102, at 176–77. See also Wesley J. Smith, *Death on Demand: The Assisted Suicide Movement Sheds Its Fig Leaf*, WEEKLY STANDARD, July 5, 2007, <http://www.weeklystandard.com/Content/Public/Articles/000/000/013/831mhugn.asp>. Smith uses the term "death-on-demand" in a 2007 piece in which he argues that the right-to-die movement is really about extending the right to assisted suicide to all rational persons, regardless of whether they are terminally ill. See *id.* Smith also uses evidence from several jurisdictions to demonstrate that "nearly every jurisdiction that has legalized assisted suicide for the seriously ill—as well as those that have refused to meaningfully enforce anti-assisted suicide laws—has either formally expanded the legal right to die to those suffering existentially, or shrugged in the face of illegal assisted suicides of the depressed." See *id.*