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Carl E. Schneider

University of Michigan Law School, carlschn@umich.edu

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All My Rights

by Carl E. Schneider

Diane Pretty was an Englishwoman in her early 40s who had been married nearly a quarter of a century. In November 1999, she learned she had amyotrophic lateral sclerosis—in Britain, motor neuron disease. Her condition deteriorated rapidly, and soon she was “essentially paralysed from the neck downwards.”¹ She had “virtually no decipherable speech” and was fed by a tube. She was expected to live only a few months or even weeks. As a court later explained, however, “her intellect and capacity to make decisions are unimpaired. The final stages of the disease are exceedingly distressing and undignified. As she is frightened and distressed at the suffering and indignity that she will endure if the disease runs its course, she very strongly wishes to be able to control how and when she dies and thereby be spared that suffering and indignity.”

Suicide is not a crime in Britain, but assisting suicide is. On 27 July 2001, Mrs. Pretty’s solicitor wrote the Director of Public Prosecutions asking for an assurance that her husband would not be prosecuted if he helped his wife commit suicide. The DPP refused because it would not “grant immunities that condone, require, or purport to authorise or permit the future commission of any criminal offence, no matter how exceptional the circumstances.”

On 20 August, Pretty sought judicial review of the DPP’s decision. She conceded she had no claim under “the common law of England,” but she argued that a 1961 assisted suicide statute violated the European Convention on

Human Rights. On 29 November 2001, the House of Lords affirmed a lower court’s refusal to countermand the DPP’s decision. The leading judgment in the House of Lords analyzed the Convention’s provisions at length and commented that its decision was “in accordance with a very broad international consensus. Assisted suicide and consensual killing are unlawful in all Convention countries except the Netherlands, but even if [Dutch law] were operative in this country it would not relieve Mr Pretty of liability . . . if he were to assist Mrs Pretty to take her own life.” Mrs. Pretty had argued that she was not challenging the statute generally, but saying only it should not apply in “the particular facts of her case: that of a mentally competent adult who knows her own mind, is free from any pressure and has made a fully-informed and voluntary decision.” The judgment invoked Dr. Johnson: “First, ‘Laws are not made for particular cases but for men in general.’ Second, ‘To permit a law to be modified at discretion is to leave the community without law. It is to withdraw the direction of that public wisdom by which the deficiencies of private understanding are to be supplied.’”

On 21 December 2001, Pretty took her case to the European Court of Human Rights. On 29 April, it rejected her claim. Four of her arguments the court readily dismissed. First was her argument that the 1961 act violated Article 2 of the Convention: “Everyone’s right to life shall be protected by law.” Mrs. Pretty thought that article “pro-

TECTED the right to life and not life itself.” The court concluded, however, that Article 2 could not “without a distortion of language, be interpreted as conferring the diametrically opposite right, namely a right to die.” On the contrary, Article 2 was “first and foremost a prohibition on the use of lethal force or other conduct which might lead to the death of a human being.”

The court made similarly short shrift of Mrs. Pretty’s argument that the 1961 act violated Article 3: “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.” Mrs. Pretty alleged that the statute “discloses inhuman and degrading treatment for which the State is responsible as it will thereby be failing to protect her from the suffering which awaits her as her illness reaches its ultimate stages.” But the court said that Article 3 was most commonly applied to “intentionally inflicted” acts of a state and that Mrs. Pretty’s interpretation “places a new and extended construction on the concept of treatment.”

Nor did the court labor over Mrs. Pretty’s claim that the 1961 act violated Article 9’s protection of “freedom of thought, conscience and religion.” The court honored Mrs. Pretty’s convictions, but held that they did not “involve a form of manifestation of a religion or belief, through worship, teaching, practice or observance.”

Perhaps less easily, the court also dismissed Mrs. Pretty’s claim that the 1961 act violated Article 14’s assurance that the Convention’s rights “shall be secured without discrimination on any ground such as sex, race, [and] colour.” The court said there was “objective and reasonable justification for not distinguishing in law between those who are and those who are not physically capable of committing suicide.” The essence of the court’s reason is that Mrs. Pretty’s argument would open an exception to the prohibition on assisted suicide that would too greatly increase the risk that the vulnerable would be hustled toward unwanted deaths.

More substantially, Mrs. Pretty invoked Article 8: “Everyone has the right to respect for his private and family

life.” The court acknowledged that “the concept of private life is a broad term” that “covers the physical and psychological integrity of a person.” It also acknowledged that although “no previous case has established as such any right to self-determination as being contained in Article 8 . . . , . . . the notion of personal autonomy is an important principle underlying the interpretation of its guarantees.” And it acknowledged that the article protected the right to refuse medical treatments even if refusal meant death. Indeed, the court proclaimed that the “very essence of the Convention is respect for human dignity and

intimate area of an individual’s sexual life.” But “States are entitled to regulate through the operation of the general criminal law activities which are detrimental to the life and safety of other individuals.” The 1961 act “was designed to safeguard life by protecting the weak and vulnerable,” especially “those who are not in a condition to take informed decisions.” Perhaps Mrs. Pretty was not vulnerable, but “it is the vulnerability of the class which provides the rationale for the law in question.” Furthermore, the court proposed to defer to member states: “It is primarily for States to assess the risk and the likely incidence of

bringing a prosecution, as well as to the fair and proper requirements of retribution and deterrence.”

Comparisons between legal systems are notoriously perilous. Yet the American lawyer cannot help observing that despite abundant differences in attitude and approach between American and European courts,² there are notable similarities between the European Court of Human Rights’ *Pretty v. The United Kingdom* and the U.S. Supreme Court’s assisted suicide decision in *Washington v. Glucksberg*. Both courts interpreted “constitutional” provisions drafted in grand and spacious terms. Both courts announced with cautious imprecision a right to freedom in making medical decisions. But both courts intimated that assisted suicide statutes serve legitimate ends, and both courts feared that abrogating those statutes would start the law down a lethally slippery slope. Finally, both courts apparently recoiled from the daunting labor of judicially devising and imposing a regime of assisted suicide that would be legally convincing, administratively workable, and politically acceptable.

When Mrs. Pretty learned of the court’s decision, she said, “The law has taken all my rights away.” On 3 May 2002, she had breathing problems and was taken to a hospice. On 11 May, with her husband by her side, she died. Her death, the hospice director said, was “perfectly normal, natural and peaceful.”

1. All quotations are from the opinion of the European Court of Human Justice.

2. C.E. Schneider, “America as Pattern and Problem,” *Hastings Center Report* 30 (2000): 20.

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human freedom.” Thus the court was “not prepared to exclude that” the 1961 act “constitutes an interference” with Pretty’s “right to respect for private life as guaranteed under Article 8 § 1.”

Section 1? Aye, there’s the rub. Article 8 has a second section which forbids “interference by a public authority” with a Section 1 right *unless* that interference “is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

Was the state’s interference with Mrs. Pretty’s asserted Section 1 right “necessary”? Yes. The “notion of necessity implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued; in determining whether an interference is ‘necessary in a democratic society’, the Court will take into account that a margin of appreciation is left to the national authorities.” That “margin of appreciation” is “narrow as regards interferences in the

abuse if the general prohibition on assisted suicides were relaxed or if exceptions were to be created. Clear risks of abuse do exist, notwithstanding arguments as to the possibility of safeguards and protective procedures. . . .”

But was not the 1961 act’s flat ban on all assisted suicide overbroad? No, because the ban was not so absolute as the statute’s text implied. Assisted suicide could not be prosecuted without the DPP’s approval, and courts could impose light sentences. In fact, “between 1981 and 1992 in 22 cases in which ‘mercy killing’ was an issue, there was only one conviction for murder, with a sentence for life imprisonment, while lesser offences were substituted in the others and most resulted in probation or suspended sentences.”

In short, Mrs. Pretty perhaps had a section 1 right, but the United Kingdom surely had a section 2 interest that justified its infringing that right. A state’s laws may “reflect the importance of the right to life, by prohibiting assisted suicide while providing for a system of enforcement and adjudication which allows due regard to be given in each particular case to the public interest in