Suicide Killing Of Human Life as Human Right - The Continuing Devolution of Assisted Suicide Law in the United Kingdom

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The Continuing Devolution of Assisted Suicide Law in the United Kingdom

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INTRODUCTION

Throughout its remarkable history, Great Britain’s culture and law safeguarded the dignity of human life by refusing to recognise a “right” to suicide. Indeed, contemporary British statutes make it a serious crime even to assist in the commission of a suicide killing.¹ Recent parliamentary proposals² and a court decision³, however, deliberately abandon these deeply-rooted cultural, historical, and legal traditions. Most recently, in an assertive exercise of judicial power, five Law Lords made British history by declaring into existence a human right to kill

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¹ Suicide Act 1961.
human life via suicide. Prosecutorial guidelines promulgated by the Department of Public Prosecutor (DPP), pursuant to this court decision, likewise abandon the deeply rooted inalienable standard, providing factors upon which prosecutors may now rely when refusing to prosecute someone assisting in the killing of another human being. The trend continues with the formation of a Commission on Death and Dying, studying how the United Kingdom should employ assisted suicide policy.

In this article we analyze the devolution of Britain’s assisted suicide policy. We begin by reviewing current U.K. statutory law prohibiting assisted suicide. We then review recent pro-suicide parliamentary proposals and subsequent court action recognising suicide as a human right. Finally we analyze the DPP guidelines and other relevant contemporary government actions concerning assisted suicide in the United Kingdom. This critical review reveals a disquieting jurisprudential shift, accompanied by a deteriorating respect for the value of human life. Finally, we review, therefore, the implications for a nation that accompany such a shift in worldviews. In the end, we conclude that viewing the value of human life through the lens of human-centred morally-relative legal positivism presents grave implications for the citizens of Great Britain.


PART I.

U.K. LAW ON ASSISTED SUICIDE

Current statutory law prohibiting assisted killing reflects an objective moral standard present in Great Britain’s divine, natural, and common-law traditions. Pro-suicide proposals and court decisions, on the other hand, divorce and discard any moral reference point in the law, replacing it with a human-centred, morally relative approach to lawmaking.6

When formulating law concerning suicide killing, these two jurisprudential worldviews collide. Like other nations, the Parliament and the judiciary in the United Kingdom face a choice. On the one hand, they may look to the objective moral standard revealed in divine or natural law as the benchmark and promulgate provisions reflecting that standard. Alternatively, they may, using subjective morally-relative legal positivism, create law apart from any objective moral standard of right or wrong.

A. The History and Tradition in Britain of Protecting the Sanctity of Human Life

For most of British history the idea that God endows all human beings with sacred, inalienable rights, was self-evident – including the right to life.7 Thus, historically, British citizens in their law acknowledged and respected the God-given (and, hence, inviolable) dignity

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6 Fundamentally, two jurisprudential views of the world exist. The first view sees God as the source of law and rights, while the latter makes man the measure of all things. Thus, one can embrace either that law is something God reveals for us to discover or that it is something we create solely by our own reasoning apart from any divine revelation. Dan Crone, ‘Assisted Suicide and the U.S. Court of Appeals for the Ninth Circuit: A Philosophical Examination of the Majority Opinion in Compassion in Dying v. Washington’ (1996-1997) 31 USF L Rev 399, 422. See also Michael W McConnell, ‘The Right to Die and the Jurisprudence of Tradition’ [1997] Utah L Rev 665, 667-69. S Charles E Rice, ‘Rights and the Need for Objective Moral Limits’ (2005) 3 Ave Maria L Rev 259, 260. For further jurisprudential worldview discussion see William Wagner, ‘The Jurisprudential Battle over the Character of a Nation’ in Suri Ratnapala and Gabriel Moens (eds), Jurisprudence of Liberty (2nd ed, LexisNexis Butterworths 2011).

7 See Crone, ‘Assisted Suicide’ (n 6) 422, quoting THE DECLARATION OF INDEPENDENCE para 2 (US 1776).
of every human being. Here, one of the fundamental roles of a moral government is to protect human life. Thus, traditionally we find in Britain divine or natural-law prohibitions on suicide, and later see such traditions embodied in British common and statutory law. As we’ve noted elsewhere:

[I]t is no coincidence that Western cultures uniformly discourage—if not condemn—the act of suicide and those who assist in it. These cultures base their ethical and legal systems on the Judeo-Christian tradition, which teaches

8 ibid 426.
9 See eg Dwight G Duncan and Peter Lubin, ‘The Use and Abuse of History in Compassion in Dying’ (1996-1997) 20 Harv J L & Pub Pol’y 175, 177. Indeed, it has been said that ‘[t]he care of human life and happiness, and not their destruction, is the first and only legitimate object of good government.’ Thomas Jefferson, Address to Republican Citizens of Washington County, Maryland, Assembled at Hagerstown on the 6th Instant, Monticello (Mar. 31, 1809), in 16 The Writings of Thomas Jefferson 359 (Andrew A. Lipscomb & Albert Ellery Bergh (eds), 1905). Although government must also protect liberty, the interest in life is plainly superior. See eg Washington v Glucksberg, 521 US 702, 741 (1997) (Stevens, J, concurring). Life without liberty at least holds the potential for renewed liberty and other goods, but liberty without life is a nullity. No one has the ‘liberty right’ to unnaturally terminate one’s life simply because doing so is wrong. What is wrong cannot be a right. Although this proposition is self-validating, Hadley Arkes provides a typically illuminating discussion of the matter in First Things: An Inquiry into the First Principles of Morals and Justice (Princeton University Press 1986) 24.
13 Duncan and Lubin (n 9) 185. Because of the respect for life imbued by the Jewish religion, suicide was rare in ancient Judaic culture. Daniel M Crone, ‘Historical Attitudes Toward Suicide’ (1996-1997) 35 Duq L Rev 7, 10, citing Norman St John-Stevas, The Right to Life (1st ed, Holt, Rinehart and Winston 1964) 59 and M Pabst Battin, Ethical Issues in Suicide (Prentice-Hall 1982) 31. Although one historian opines that suicide was generally considered the result of derangement and thus not punishable in Hebraic culture, it is also reported that suicide victims and their families were punished by denial of the customary burial rites (though this would hardly seem exculpatory toward an assist). ibid, citing Norman L Farberow, ‘Cultural History of Suicide’ in Norman L Farberow (ed), Suicide in Different Cultures (University Park Press 1975) 4 and Jacques Choron, Suicide (Scribner 1972) 13-14. Although Hellenistic culture may have influenced some later Jewish writers to relax their approbation of the act (eg, in special circumstances, such as avoiding capture in battle) Rabbinic and Talmudic writings after the Jewish exile included prohibitions on suicide and maintained funeral sanctions. ibid 11, citing Battin (n 13) 32. See also Duncan and Lubin (n 9) 187. Roman law forbade suicide and, at least under limited circumstances, forfeited the violator’s personal and real property to the state, so they could not pass to the offender’s heirs. ibid 16, citing Farberow (n13) 6. See also Duncan and Lubin (n 9) 192-94, 199-200 (highlighting that Roman law criminalised assisting in suicide, ‘mercy killing’ was deemed murder, and forfeiture occurred only in limited circumstances). Early Christian culture eventually came to influence Roman law with the conversion of the Emperor Constantine. Crone, ‘Historical Attitudes’ (n 13) 17. Christian doctrine, as later most famously expounded by Augustine and Aquinas, clearly forbade suicide, which, at the very least, implicitly prohibited assistance in suicide. ibid 17-22. See also Duncan and Lubin (n 9) 194-95, 197. Because of the dominant influence Christianity had on Western legal systems, the Judaic and Roman legal penalties for suicide persisted in Western cultures for many centuries after the
that taking human life is fundamentally wrong.\textsuperscript{14} Because God creates human life with moral purpose, only He can authorise the taking of it—and nowhere in His Word does He authorise suicide or assisting someone to commit suicide.\textsuperscript{15} God’s inviolable standard is expressed in His command: “Thou shalt not kill.”\textsuperscript{16}

Historically, the United Kingdom never recognised a “right” to suicide (or assistance in committing suicide by physicians or others).\textsuperscript{17} On the contrary, the common law generally viewed suicide as self-murder.\textsuperscript{18} As is the case with murder, assisting or attempting suicide were

\begin{footnotes}
14 See eg Exodus 20:13 (King James); Deuteronomy 5:17 (King James). In this regard, God reveals in His Word that the life He creates has worth, value, and significance. He declares His creation of human life good: ‘So God created man in his own image, in the image of God he created him; male and female he created them.’ Genesis 1:26, 27NIV. Scripture quotations marked NIV are from the Holy Bible: New International Version c 1973, 1978, 1984; ‘God saw all that he had made, and it was very good.’ Genesis 1:31 NIV. Moreover, God intimately communicates that He has a plan and purpose for each life He creates: ‘For I know the plans I have for you,’ declares the Lord…’ Jeremiah 29:11 NIV; ‘For we are God’s workmanship, created in Christ Jesus to do good works, which God prepared in advance for us to do.’ Ephesians 2:10 NIV; ‘For you created my inmost being; you knit me together in my mother’s womb.’ ‘your eyes saw my unformed body. All the days ordained for me were written in your book before one of them came to be.’ Psalm 139:13, 16 NIV; ‘For in him all things were created: things in heaven and on earth, visible and invisible, whether thrones or powers or rulers or authorities; all things were created by him and for him.’ Colossians 1:16 NIV; ‘[E]very one who is called by my name, whom I created for my glory, whom I formed and made.’ Isaiah 43:7 NIV; ‘The God who made the world and everything in it is the Lord of heaven and earth . . . .’ ‘From one man he made every nation of men, that they should inhabit the whole earth; and he determined the times set for them’ Acts 17:24, 26 NIV; ‘…if only I may finish the race and complete the task the Lord Jesus has given me—the task of testifying to the gospel of God’s grace’—(Paul’s statement, just prior to facing humanly unbearable adversity) Acts 20:24 NIV.

15 See Genesis 1:275:1-2, 6:7 (King James); Job 27:8 (King James); Isaiah 42:5(King James); John 3:36(King James); Revelation 22:19 (King James).

16 Exodus 20:13 (King James); Deuteronomy 5:17 (King James); See also Genesis 9:6 NIV (indicating that humans are not to be killed because ‘in the image of God has God made man’); Although the duty of those created to reverently respect the commands of the Creator is self-evident, it becomes especially compelling when one reads the commandment not to kill in pari materia with the first, ‘I am the LORD your God . . . You shall have no other gods before me.’ Exodus 20:2-3 NIV, ‘Deuteronomy 5:6-7 NIV and the greatest [L]ove the Lord your God with all your heart, and with all your soul, and with all your mind.’ Matthew 22:37 NIV.

17 See eg Suicide Act 1961; Purdy (n 3) [35].

18 Purdy (n 3) [5], citing R v Dyson (1823) Russ & Ry 523, 168 ER 930; R v Croft [1944] KB 295 (CCA). See also Glucksberg, 521 US at 711 (“[F]or over 700 years, the Anglo common-law tradition has punished or otherwise disapproved of both suicide and assisting suicide.”).
\end{footnotes}
also criminal acts at common law. British common law also continued the Judaic and Roman traditions of ignominious burial and adopted a more expanded version of the Roman penalty of forfeiting the personalty of one who committed suicide, although it discontinued the escheat of realty.

Whether by common law, statute, or both, the American colonies also generally condemned suicide and largely continued England’s legal sanctions.

When natural-law theory dominated Western legal philosophy, judges, lawyers, and scholars recognised God’s existence, and referred to His natural law as a source of our rights. These judges, lawyers, and legal scholars widely agreed that the common law was an expression of natural or divine law. The highest courts of Western nations cited the writings of Grotius,
Puffendorf, and Vattel, three of Europe’s greatest natural-law scholars. And Blackstone, whose *Commentaries on the Laws of England* was once the “bible” for lawyers and judges, characterised suicide as “self-murder” and “among the highest crimes.” Thus, the divine law, natural law, English common law, and Britain’s statutory law traditions all historically embody an inviolable objective standard that killing a human being by suicide is wrong.

**B. Contemporary British Statutory Law: The 1961 Suicide Act**

Reflecting the inviolable, objective standard, the United Kingdom enacted statutory law prohibiting assisted suicide.

As originally promulgated, the United Kingdom’s Suicide Act 1961, provided that

“A person who aids, abets, counsels or procures the suicide of another, or an attempt by another to commit suicide, shall be liable on conviction on indictment to imprisonment…”

On its face, the 1961 Act broadly covered all aspects of assisted suicide. To be sure, like many other governments, the U.K. Government dropped criminal sanctions for the person

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26 Helmholz (n 23) 407. David Hume prominently opposed the notion that suicide should be prohibited as a violation of natural law, arguing that we regularly ‘violate’ natural law and that is not necessarily negative. See Marzen I (n 20) 35-36. His argument was cast, however, largely in terms of the physical laws of nature, and was based on his assertion that human life had no special sanctity or importance. See ibid 36. (‘The life of a man is of no greater importance than that of an oyster.’). He cannot, therefore, be said to represent the views of the majority of Western people or legal history, although more than a few prominent legal scholars have also fallen into that black hole and called it light. See eg Crone, ‘Assisted Suicide’ (n 7) 412-15.

27 Marzen I (n 20) 62, 71, 72; Kirk (n 25) 1038 (noting that Edmund Burke reported that by 1775, nearly as many copies of the Commentary had been sold in America as in England); Jones (n 25) 1055-57; Kmiec (n 23) 391-92; Miller (n 10) 219.

28 4 Bl Comm 2387. Indeed, courts sometimes referred to ‘self-preservation’ as ‘the first law of nature.’ Helmholz (n 23) 409 (quoting cases).

29 Suicide Act 1961; *R (Pretty) v DPP* [2001] UKHL 61, [2002] 1 AC 800 [35] (hereinafter, *Pretty v DPP*). See also *Glucksberg*, 521 US at 710 (noting that in almost every Western democracy it is a crime to assist a suicide).

30 Suicide Act 1961 (n 1) s 2(1). By enacting the Suicide Act 1961, Parliament displaced the common law offence. See eg *Purdy* (n 3) [25]. The Coroners and Justice Act amended the language of the Suicide Act so that a person commits an offence if he or she does an act capable or encouraging or assisting the suicide or attempted suicide of another person. See Coroners and Justice Act 2009, ss 59-61.
attempting suicide in the 1961 Act.\textsuperscript{31} It is important to note, however, that neither the U.K. nor these other governments did so because they believed the conduct acceptable.\textsuperscript{32} Thus, after the United Kingdom statutorily decriminalised suicide in the 1961 Act, judicial opinions in the House of Lords described the change as a way to promote life.\textsuperscript{33}

The provisions of the 1961 Act inherently acknowledged that legitimising assisted suicide threatens the most vulnerable. Judicial opinions in the House of Lords likewise historically recognised such risks.\textsuperscript{34} Undeniably, many people in the final stages of life cannot communicate effectively. Whilst they may have once indicated a preference to avoid suffering at their end of lives, no-one knows whether, at the point they cannot communicate, they still desire to extinguish their lives unnaturally.

Britain’s statutory proscriptions against assisted suicide additionally appreciate that government-authorised suicide creates a frightening duty to die. Judicial opinions in the House of

\textsuperscript{31} Suicide Act 1961. In the late-eighteenth and early-nineteenth centuries, many governments abolished the penalties for suicide by statutory or constitutional provisions. Marzen I (n 20) 67-68. How governments treated those who assisted in suicides is unclear because of the lack of reporting and codification of cases and legislation. ibid 70-76 (concluding that in the nineteenth century, many governments apparently prohibited assisted suicide). From a drafting perspective, the wording of the statute creates an interesting point of criminal law. This is because ‘the offence of aiding and abetting the suicide of another in section 2(1) Suicide Act 1961 is unique in that the critical act—suicide—is not itself unlawful, unlike any other aiding and abetting offence.’ Purdy (n 3) [49], quoting Keir Starmer, ‘Decision on Prosecution – The Death By Suicide of Daniel James’ The Crown Prosecution Service (London, 9 December 2008) <http://www.cps.gov.uk/news/articles/death_by_suicide_of_daniel_james/> accessed 15 June 2011.

\textsuperscript{32} Rather, governments came to view the penalties themselves as inappropriate either because they imposed unjustifiable hardship on the victims’ families or because the act was deemed a manifestation of mental illness, and thus not culpable. Marzen I (n 20) 67-100; Marzen II (n 21) 264-65. See also Glucksberg (n 9) 774.

\textsuperscript{33} See Pretty v DPP (n 29) [106]: ‘There were good reasons for wishing to decriminalise the act [suicide] itself. The removal of the fear of prosecution and of the stigma was likely to make it easier to deter those who were planning of attempting suicide. Broadly speaking, it was a measure in favour of saving life.’ Ironically, in Purdy, Lord Brown turns this underlying policy designed to protect life on its head by using it to legitimise assisting suicide. In paragraph 82 he contends: ‘...the assistance criminalised by section 2(1) is assistance which those lawfully intent on suicide may require so as to enable them to fulfil their chosen end.’ Purdy (n 3) [82].

\textsuperscript{34} See Pretty v DPP (n 29) [28]: ‘The Government can see no basis for permitting assisted suicide. Such a change would be open to abuse and put the lives of the weak and vulnerable at risk.’ (quoting the Government Response accepting the recommendation of the House of Lords Select Committee on Medical Ethics).
Lords also historically recognised the elderly might choose suicide “not from a desire to die or a willingness to stop living, but from a desire to stop being a burden to others.”  

_C. Pro-Suicide Statutory Proposals: Advocates Unsuccessfully Attempt to Legalise Assisted Suicide Killings in the U.K._

Consistent with Britain’s cultural heritage and legal traditions, Parliament repeatedly defeated endeavours to undercut the protections provided in the Suicide Act 1961. To be sure, several serving in Parliament relentlessly sought to shift the political paradigm. Lord Joffe, whose self-proclaimed life mission is to promote dying, led the attack. In 2002 and 2003, Lord Joffe tried unsuccessfully to legalise assisted suicide by proposing the Patient (Assisted Dying) Bill, (later known as the Assisted Dying for the Terminally Ill Bill). Parliament again rejected the pro-suicide proposal in 2005 and in 2006.

The situation involving British pro-suicide advocate Debbie Purdy, activated another attempt to pass pro-suicide legislation. Diagnosed with a terminal disease, Ms. Purdy wanted to kill herself after the illness progressed to a certain stage. She stated she could not accomplish the act without assistance. When the time came, she wanted her husband to assist in her

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35 _Pretty v DPP_ (n 29) [29]: ‘We are also concerned that vulnerable people—the elderly, lonely, sick or distressed—would feel pressure, whether real or imagined, to request early death.’ (quoting a report by the House of Lords Select Committee on Medical Ethics).
37 ibid.
39 Proposed Amendment 173 (n 2).
40 _Purdy_ (n 3) [17].
41 ibid.
suicide killing by helping her to travel to another country where suicide was legal. While Purdy’s situation sought limelight, Parliament debated the Coroners and Justice Bill.

Consistent with the cultural heritage and legal traditions of the United Kingdom, members of Parliament originally introduced the Coroners and Justice Bill to strengthen British anti-assisted suicide law. The provisions, included in the Coroners and Justice Act 2009, clarified that Britain’s proscription against assisting suicide: 1) extended to those who do not know the person who wants to die; and 2) applied to assisters of attempted suicides whether or not an attempted suicide or suicide occurs.

Pro-suicide proponents in Parliament, however, attempted to use the Coroners and Justice Bill as a vehicle to legalise assisted suicide. Using Ms. Purdy’s situation as justification, pro-suicide proponents proposed various amendments. One amendment sought to authorise assisted killing of British citizens in Mrs. Purdy’s situation. The proposed amendment counter-intuitively indicated that “an individual ... is not to be treated as capable of ... assisting the suicide ... of another adult ... if ...the act is done ... principally for the purpose of ... assisting [an individual to travel to a country to commit suicide as permitted there].” This proposed amendment would have codified the government-sanctioned killing of human life under proscribed conditions.

Thus, an individual in the U.K. could, for example, put another human being on a train, sending that person to another country to be killed. The proposed amendment cloaked the

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42 ibid.
44 ibid.
45 See eg, Proposed Amendment 173 (n 2).
46 ibid.
47 Proposed Amendment 173 (n 2) reads in part:
(1) An act by an individual (“D”) is not to be treated as capable of encouraging or assisting the suicide or attempted suicide of another adult (“T”) if:
(a) the act is done solely or principally for the purpose of enabling or assisting T to travel to a country or territory in which assisted dying is lawful;
individual assisting in the killing with complete immunity. Again counter-intuitively, the proposed law continued to protect human life if the train did not leave the U.K.

Another amendment proposed to put doctors, serving as coroners, in the position of authorising the killing of a human being. Upon “certification from a coroner”, the amendment sought to allow an individual to assist another in committing suicide if the person wishing to die was “suffering from a confirmed, incurable and disabling illness which prevents him from caring through his own wish to bring his life to a close.”

The pro-suicide proposal aggressively challenged long-established ethical elements of medical practice in the United Kingdom. The British Medical Association, and other respected health care organisations, nonetheless continued to affirm the moral proscription against assisted suicide as the very foundation of medical ethics. The Hippocratic Oath, written during the fifth to fourth centuries B.C. declares, “I will neither give a deadly drug to anybody if asked for it, nor will I make a suggestion to this effect.” Such a standard is consistent with God’s revealed inviolable standard reflected in the common law and other historical and legal traditions of the United Kingdom. Indeed, assisted suicide is entirely irreconcilable with a doctor’s calling to heal. Astonishingly, the pro-suicide proposals before Parliament failed to provide any ethical standards of implementation or enforcement mechanisms for compliance by physicians. Not surprisingly, therefore, no data-collection requirements that might provide some accountability

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48 Proposed Amendment 174 (n 2).
51 The creation of the Hippocratic Oath in ancient Greek culture has been foundational in Western medical ethics, and it remains centrally relevant in contemporary medical practice. See eg C Everett Koop, ‘Introduction’ (1996-1997) 35 Duq L Rev 1.
52 ibid.
even existed. Furthermore, despite vague, subjective requirements concerning the physical and mental state of the patient, no definitional safeguards existed to protect vulnerable or elderly patients. Moreover, no duty to discuss other treatment options or palliative care alternatives for pain management existed anywhere in the proposed statutory scheme.

Thus, with virtually no protection for the most vulnerable of British citizens, the proposed pro-suicide amendments to the Coroners and Justice Bill expressly authorised individuals to assist, in prescribed circumstances, in the suicide killing of a live human being.\(^\text{53}\) Consistent with (and informed by) the deeply-rooted first principles reflected in Britain’s legal history and tradition, a majority of those voting on the pro-suicide provisions voted against them.\(^\text{54}\)

### D. The Purdy Decision: Surrendering Sovereignty and Conscience?

Not long after Parliament rejected pro-suicide amendments to the Coroner’s and Justice Bill, a court case initiated by Ms. Purdy came before five Law Lords. Although the 1961 Act broadly covered all aspects of assisted suicide, Purdy raised the issue as to whether an individual could assist someone to travel to another country where assisted suicide is “legal” and expect to escape prosecution.\(^\text{55}\) Among other things, Ms. Purdy contended the assisted suicide prohibition in the 1961 Act constituted an interference with her privacy rights under article 8(1) of the

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\(^\text{53}\) Proposed Amendment 174 to the Coroners and Justice Bill, 29 Jun 2009 (n2) read: *Notwithstanding sections 49 to 51, no offence shall have been committed if assistance is given to a person to commit suicide who is suffering from a confirmed, incurable an disabling illness which prevents him from carrying through his own wish to bring his life to a close, if the person has received certification from a coroner who has investigated the circumstances, and satisfied himself that it is indeed the free and settled wish of the person that he brings his life to a close.*

\(^\text{54}\) See ‘Coroners and Justice Bill – Committee (5th Day) – Assisted Suicide’ (*The Public Whip*, 7 July 2009) <http://www.publicwhip.org.uk/division.php?date=2009-07-07&number=1&house=lords> accessed 15 June 2011. See also Purdy (n 3) [58].

\(^\text{55}\) See eg Purdy (n 3) [18] - [25], [90]-[93].
European Convention on Human Rights.\textsuperscript{56} Thus, Purdy asserted she possessed a human right grounded in privacy to decide to kill herself—and that the statutory proscription against assisting suicide infringed this right.\textsuperscript{57}

To understand fully the context of the Purdy case before the five Law Lords, one must review what happened beforehand. Prior to Purdy came Pretty v. DPP.\textsuperscript{58} Pretty involved another woman who also desired to kill herself with the assistance of her husband.\textsuperscript{59} When Pretty v. DPP reached the House of Lords, the Court clearly confirmed that no right to commit suicide existed in the United Kingdom:

> While the 1961 Act abrogated the rule of law whereby it was a crime for a person to commit suicide, it conferred no right on anyone to do so... The policy of the law remained firmly adverse to suicide.\textsuperscript{60}

Moreover, on the issue raised by Ms. Pretty, the Law Lords held Article 8 pertained to protecting personal autonomy while the individual was alive, but did not confer a right to decide to commit suicide.\textsuperscript{61}

The Pretty case then travelled to European Court of Human Rights, now styled as Pretty v The United Kingdom.\textsuperscript{62} Turning a blind eye to the cultural and legal traditions of Great Britain, the European judges reached a very different conclusion from the British

\textsuperscript{56} Purdy (n 3) [28]. The European Convention on Human Rights (hereinafter ‘European Convention’) in paragraph 1 of Article 8 provides: ‘Everyone has the right to respect for his private and family life, his home and his correspondence.’

\textsuperscript{57} Ibid [28]-[31] She also contended that because the Government failed to provide an offence-specific prosecution policy for assisted suicide, such interference violated Article 8 paragraph 2 of the European Convention (which requires interference with a right to be ‘in accordance with the law’). In this regard, Purdy contended that without such guidance she lacked enough information with which to make a decision—so as to be able to challenge a government authority if it arbitrarily interferes with rights safeguarded by the Convention. The European Convention in paragraph 2 of Article 8 provides: ‘There shall be no interference by a public authority with the existence of this right except such as is in accordance with the law....’

\textsuperscript{58} Pretty v DPP (n 29).

\textsuperscript{59} ibid. See also Purdy (n 3) [71].

\textsuperscript{60} Pretty v DPP (n 29) [35]. See also, eg, Glucksberg, 521 US at 711 (commenting on the common-law tradition of disapproval toward suicide and assisting suicide).

\textsuperscript{61} Pretty v DPP (n 29). See also Purdy (n 3) [32].

\textsuperscript{62} Pretty v UK (2002) 35 EHRR 1 (hereinafter, Pretty v UK).
Court. The European Court of Human Rights ("ECtHR") concluded that exercising a choice to kill human life via suicide constituted a human right under article 8(1). The Court also held that Britain’s 1961 assisted suicide law interfered with this right.\(^{63}\)

With the dichotomy of the\(^{64}\) Pretty decisions serving as prologue, Purdy began its journey through the British courts. The Court of Appeal faced the issue of whether Purdy possessed a human right to decide to kill herself under Article 8(1).\(^{64}\) Before deciding the issues, the Court of Appeal had to first determine which prior court authority to follow. Should it follow the Pretty precedent established in the British Court? Or should it follow the Pretty decision reached by the European judges? The Court of Appeal applied the former confirming that Article 8(1) of the Convention conferred no right to commit suicide.\(^{65}\) Ms. Purdy appealed the decision to the House of Lords.

The five Law Lords began by relying upon the European Court’s analysis in Pretty to resolve the issues raised by Ms. Purdy, rather than standing by their previous precedent in Pretty v. DPP.\(^{66}\) In so doing, the Law Lords’ discarded the deeply-rooted British cultural and legal traditions protecting human life against suicide killings. In its place, the Law Lords adopted the European Court’s construction of Article 8(1) of the European Convention\(^{67}\) to hold that deciding to kill human life via suicide was a human right. Thus, each Law Lord concluded that Ms. Purdy possessed a human right under the Convention to decide to kill herself. After the Law Lords held that Purdy had a human right, it further concluded the assisted suicide prohibition in

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\(^{63}\) Ibid [67]. The European Court of Human Rights plainly disagreed with the British Court, asserting: ‘The Court is not prepared to exclude that this constitutes an interference with her right to respect for private life as guaranteed under Article 8 paragraph 1 of the Convention.’ Given that a right existed, the Court then proceeded to evaluate whether this interference conformed with the requirements of Article 8, para 2. The court concluded the interference in this instance was justified. See paras [74] and [78] of the decision.

\(^{64}\) Purdy (n 3) [32]. (Note: The Court of Appeal decision is reported at [2009] EWCA Civ 92.)

\(^{65}\) Ibid.

\(^{66}\) Ibid.

\(^{67}\) The European Convention on Human Rights Article 8 para 1 provides: ‘Everyone has the right to respect for his private and family life, his home and his correspondence.’ Purdy (n 3) [29].
the 1961 Act constituted an interference with that right. Because the Government failed to provide an offence-specific prosecution policy for assisted suicide, the Law Lords further found, therefore, that such interference violated Article 8, paragraph 2 of the Convention—since the Government’s interference with the right was not “in accordance with the law”.  

How could the five Law Lords in Purdy interpret existing pro-life law so inconsistently with the deeply rooted first principles reflected in its nation’s legal history and tradition? The answer lies in understanding the lens through which they view the world. The Law Lords and other assisted suicide proponents reject the moral absolute of an inviolable standard. In its place, they employ a human-centred, subjective, morally relative worldview of legal positivism. When the five Law Lords deemed the killing of human life via suicide a human right, they did more than defer to the European Court. They shifted a nation’s jurisprudential worldview. Before Purdy, British jurisprudence saw a moral absolute in the innate positive value of vulnerable human life. Judges and lawmakers therefore viewed such life as worthy of governmental protection, proscribing conduct associated with assisted suicide killing. The five Law Lords in Purdy instead chose to view the matter through the subjective lens of morally relative legal positivism, enabling them to create law without looking to any moral standard of right or wrong. Viewed through the subjective lens of moral relativism, deciding to kill human life via suicide devolves into a matter of personal autonomy or convenience. Thus, the value of a particular human life in the United Kingdom now varies with the circumstances. To completely comprehend the significance of the jurisprudential shift, it is helpful to analyze the mechanics of

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68 In this regard, the Court held that without such guidance, individuals like Ms. Purdy lacked enough information with which to make a decision—so as to be able to challenge a Government authority if it arbitrarily interfered with rights safeguarded by the Convention. See, eg, Purdy (n 3) [30]-[31], [40]-[56]. The European Convention in para 2 of Article 8 provides: ‘There shall be no interference by a public authority with the existence of this right except such as is in accordance with the law . . . .’

the court’s analytical process. Under traditional notions of the rule of law, government can prohibit conduct. Thus, consistent with an inviolable standard that human life has value at all stages, the U.K. government enacted laws prohibiting a person from assisting in the commission of a suicide. Using the evolving human-centered, morally-relative approach of legal positivism, though, the law lords here took this prohibited conduct and judicially re-characterised it as an essential liberty interest cloaked with the status of a “human right” (e.g., here, a privacy right of personal autonomy to make end of life choices). It was no accident that the newly created human right completely contradicted the unalienable inviolable standard.

E. Purdy’s Progeny - Public Prosecution Guidelines

In response to the Lords’ discussion in Purdy criticising the lack of an offence-specific prosecution policy, Britain’s Director of Public Prosecution (DPP) drafted policy guidelines in conformance with the Lords’ decision declaring assisted suicide a human right. Unfortunately, the new guidelines create more than a little uncertainty in the law. The guidelines begin by ostensibly suggesting that Purdy did nothing to change assisted suicide law in the U.K.:

The case of Purdy did not change the law: only Parliament can change the law on encouraging or assisting suicide. This policy does not in any way "decriminalise" the offence of encouraging or assisting suicide. Nothing in this policy can be taken to amount

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70 Titus’ descriptive analysis of this principle is a good example of the unalienable worldview. ‘Let us now look at the thirteenth chapter of the Epistle to the Romans. We can all certainly agree that verse four addresses the role of the civil ruler as a minister of God. In the Greek, he is a deacon of God, he is a servant of God. Notice carefully that verse four authorizes the civil ruler to wield the sword against wrong doing. Now, that is a very important first principle: The civil ruler has authority over conduct. Blackstone reflects this view in his definition of “municipal law,” i.e., the law of civil society, describing it as “a rule of civil conduct.”’ Herb Titus, ‘The Bible and American Law’ (2008) 2 Liberty U L Rev 305, 311.


to an assurance that a person will be immune from prosecution if he or she does an act that encourages or assists the suicide or the attempted suicide of another person.\(^{73}\)

The guidelines provide, however, that whether or not someone who assisted in suicide is prosecuted is up to the discretion of the prosecutor:

…This was recognised by the House of Lords in the *Purdy* case where Lord Hope stated that: "[i]t has long been recognised that a prosecution does not follow automatically whenever an offence is believed to have been committed." He went on to endorse the approach adopted by Sir Hartley Shawcross, the Attorney General in 1951, when he stated in the House of Commons that: "[i]t has never been the rule... that criminal offences must automatically be the subject of prosecution".

Accordingly, where there is sufficient evidence to justify a prosecution, prosecutors must go on to consider whether a prosecution is required in the public interest.\(^{74}\)

Thus, the once inviolable standard deeply rooted in the nation’s legal traditions, and reflected its statutory law, is no more. The value of any particular British human life instead rests in the hands of individual government prosecutors. In deciding to not protect human life against an assisted suicide killing, prosecutors now may arbitrarily rely upon ambiguous provisions in the guidelines to refuse to prosecute. Under these factors,

[a] prosecution is less likely to be required if:

1. the victim had reached a voluntary, clear, settled and informed decision to commit suicide;
2. the suspect was wholly motivated by compassion;
3. the actions of the suspect, although sufficient to come within the definition of the offence, were of only minor encouragement or assistance;
4. the suspect had sought to dissuade the victim from taking the course of action which resulted in his or her suicide;
5. the actions of the suspect may be characterised as reluctant encouragement or assistance in the face of a determined wish on the part of the victim to commit suicide;
6. the suspect reported the victim's suicide to the police and fully assisted them in their enquiries into the circumstances of the suicide or the attempt and his or her part in providing encouragement or assistance.\(^{75}\)

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\(^{73}\) See Director of Public Prosecutions, ‘Policy for Prosecutors’ (n 72) paras 5-6.

\(^{74}\) See Director of Public Prosecutions, ‘Policy for Prosecutors’ (n 72) paras 36-37.

\(^{75}\) See Director of Public Prosecutions, ‘Policy for Prosecutors’ (n 72) para 45.
These factors create colossal excuses allowing for assisted suicide without fear of prosecution. Attempts to disprove these factors become problematic because, in the words of Dr. Peter Saunders, of Care Not Killing, “Anyone who takes part in an assisted suicide is going to claim they were acting out of compassion. The only witness who really knows will be dead.”\textsuperscript{76}

The DPP’s assisted suicide guidelines became effective in February of 2010. During 2010, prosecutors thereafter filed no charges in 20 assisted suicides committed.\textsuperscript{77} According to the DPP, many of the cases involved family members assisting in the suicide. The disturbing irony is that this increase in assisted suicides took place while assisted suicide was still illegal in Britain.

As the public debate on assisted suicide continues, it makes sense to review the implications for a nation that accompanies such a jurisprudential shift.\textsuperscript{78} In the next section, therefore, we address the implications of turning down the road of morally relative legal positivism.

\textbf{PART II.}

\textbf{TURNING DOWN A DANGEROUS ROAD WITH DARK CONSEQUENCES}

Suicide-killing proponents insist the United Kingdom turn off the path of self-evident inalienable truth, (embodied in its deeply rooted natural, common, and positive law traditions), onto a path of legal positivism. Humankind has travelled down this immorally relative road before with tragic consequences. Before the U.K. proceeds past a point of no return on suicide killing policy, we might consider whether the consequences are worth the supposed convenience.

\textsuperscript{78} See Crone, ‘Assisted Suicide’ (n 7) 422. See also McConnell, (n 6).
Policy positions permitting assistance in suicide killings proceed from a mistaken premise that human life in certain conditions no longer has positive value or purpose. That presupposition has incalculably grave implications for every citizen in the United Kingdom. When government policy relegates the value of life to an immorally relative individual choice, no benchmark exists against which to measure right from wrong or good from evil. If no moral reference point exists for those governing in the U.K., nothing prevents taking human life in other ways, for other people, in other situations. History reveals terrible costs associated with such an approach. Once “liberated” from objective moral standards by subjective relativism, the individual is completely subject to the will of any stronger individual or group; for no moral standard exists to prevent the imposition of that stronger subject’s “morality.” Thus, instead of leading to the freedom it promises (from the alleged “oppression of tradition”), the morally relative legal positivist path leads to totalitarian tyranny.

Many scholars document that although present proposals protecting suicide proceed down this dangerous road, they surely were not the first steps taken down the perilous path. During the late-nineteenth and early-twentieth century, eugenics movements advocated for the elimination, by various means, of “less valuable” human beings. Germany subsequently legalized voluntary euthanasia. Thereafter, the Nazis killed hundreds of thousands of the mentally ill—all prior to the unspeakable tragedy of the Holocaust. The push to make assisted suicide or “mercy killing” a normal and “compassionate” procedure was happening as early as

80 See Rice (n 6) 270-71, 274. That it may be a tyranny of the majority is no comfort, for today's majority may become tomorrow's minority. See Arkes (n 79) 31.
82 ibid. Thirty American states passed sterilization laws embraced by both Presidents Theodore Roosevelt and Woodrow Wilson. ibid 6.
83 ibid 7.
the 1920s in Germany.\textsuperscript{84} This approach transformed the role of a physician from purely a healer to both healer and killer.\textsuperscript{85} The end result was Auschwitz and places like it. Dr. Jay Lifton conducted extensive research and interviews of the Nazi doctors who committed these mass killings. Lifton established that the first step enabling the Nazi’s mass killings was the removal of the barrier between healing and killing.\textsuperscript{86}

“Medicalization of killing—the imagery of killing in the name of healing—was crucial to that terrible step. At the heart of the Nazi enterprise, then, is the destruction of the boundary between healing and killing.”\textsuperscript{87}

The question must be asked, how could doctors reconcile the killing of people with their vow to uphold the Hippocratic Oath? One of them, Fritz Klein, when asked this question, answered,

“Of course I am a doctor and I want to preserve life. And out of respect for human life, I would remove a gangrenous appendix from a diseased body. The Jew is a gangrenous appendix in the body of mankind.”\textsuperscript{88}

That doctor had, because of his morally relative worldview, reached a deluded conclusion that he was upholding the Hippocratic Oath and serving mankind by slaughtering thousands of Jews.

The perverted idea that killing a patient is compassionate and therapeutic first gained traction from the work of two German professors, Karl Binding and Alfred Hoche.\textsuperscript{89} They published their work entitled “The Permission to Destroy Life Unworthy of Life” in 1920.\textsuperscript{90} This work postulated that some people are unworthy of life. Those unworthy included not only the

\textsuperscript{85} ibid 4-5.
\textsuperscript{86} ibid 14.
\textsuperscript{87} ibid.
\textsuperscript{88} ibid 15-16.
\textsuperscript{89} ibid 46-47.
\textsuperscript{90} ibid.
incurably ill, but also large segments of mentally ill and deformed children.\textsuperscript{91} They stressed the therapeutic goal of destroying an unworthy life and described it as a “purely healing treatment” and a “healing work.”\textsuperscript{92} Hoche insisted the policy was compassionate and consistent with medical ethics. He wrote that putting people to death “is not to be equated with other types of killing…but [is] an allowable, useful act.”\textsuperscript{93}

Hoche further justified the killing policy by deeming the mentally and physically ill a tremendous burden for society to bear. He concluded: “single less valuable members have to be abandoned and pushed out.”\textsuperscript{94} Dr. Lifton exposed Hoche’s “striking note of medical hubris in insisting that ‘the physician has no doubt about the hundred-percent certainty of correct selection’ and ‘proven scientific criteria’ to establish the ‘impossibility of improvement of a mentally dead person.’”\textsuperscript{95} In other words, these doctors thought so highly of their knowledge and skill that they could be certain a “mentally dead” person will never recover. According to their morally relative standard, therefore, no problem existed with destroying that life.

The supposed compassionate killing of mentally or physically “unworthy lives” eventually evolved into a justification for the slaughter of thousands of Jews, likewise deemed “unworthy.”\textsuperscript{96} And so we learn from history where the path of killing as an accepted medical treatment leads. Hoche and Binding’s justifications validating “compassionate” killing of a patient are eerily similar to contemporary justifications for assisted suicide.

In the 1940s, euthanasia proponents like Dr. Foster Kennedy advocated, on eugenics grounds, compulsory euthanasia for retarded children.\textsuperscript{97} By the 1970s, euthanasia proponents

\textsuperscript{91} ibid.
\textsuperscript{92} ibid.
\textsuperscript{93} ibid.
\textsuperscript{94} ibid 47.
\textsuperscript{95} ibid 47.
\textsuperscript{96} See generally Crone, ‘Assisted Suicide’ (n 7).
\textsuperscript{97} ibid 6-7.
evolved their position to easing the “burden” of caring for the elderly, and then to easing suffering—and now to “liberty” of “choice.”

A more recent example of the consequences of legalising assisted suicide is in the Netherlands. There, “safeguards” in the pro-suicide Dutch law failed to protect Dutch citizens. Evidence revealed thousands killed, including many unreported assisted suicides, many failures to follow established guidelines for voluntariness or consultation, and many lives extinguished without consent. Where did travelling down the path of euthanasia take the Netherlands? A Dutch healthcare facility concedes it euthanized newborn infants, and a physician who killed the disabled babies unapologetically asserts his conduct is proper. So society continues to slouch

98 ibid 8. Remarkably, no suffering requirement exists in the pro-suicide proponents’ proposals that were before Parliament. See Coroners and Justice Bill 2009, Proposed Amendment 174 (n 2). Nor do these proposals require anyone to advise the patient of palliative care and hospice options. ibid.
99 Doctors consistently violated unenforceable legal restraints on ‘abuses’ of the new ‘right.’ Foley and Hendin (n 81) 10. At one point in time sixty percent of Dutch assisted-suicide cases went unreported. ibid. Most non-reporting involved cases in which physicians failed to follow established guidelines for voluntariness or consultation. See ibid 11. Worse, in several thousand cases, physicians ended patients’ lives without the patients’ consent. ibid 104. Twenty-five percent of physicians terminated one or more lives without a request. ibid 104-105. In a 1995 study, forty percent of the more than 6,000 cases in which physicians actively intervened to cause death involved no explicit request from the patient. Herbert Hendin, ‘The Dutch Experience’ in Kathleen Foley and Herbert Hendin (eds), The Case Against Assisted Suicide: For the Right to End-of-Life Care (Johns Hopkins University Press 2002) 105. See also Zbigniew Zylicz, ‘Palliative Care and Euthanasia in the Netherlands: Observations of a Dutch Physician’ in Kathleen Foley and Herbert Hendin (eds), The Case Against Assisted Suicide: For the Right to End-of-Life Care (Johns Hopkins University Press 2002). Each major Dutch measure enacted to control and regulate physician-assisted suicide (including ‘informed consent’, consultation, and reporting) largely failed, was modified, or was violated. Hendin (n 99) 103 (citing Carlos F Gomez, Regulating Death: Euthanasia and the Case of the Netherlands (Free Press 1991). A more recent report indicated an increased number of ‘terminal sedation deaths.’ Agnes van der Heide and others, ‘End-of-Life Practices in the Netherlands under the Euthanasia Act’ (2007) 356 New Eng J Med 1957, 1960. The report further documented that ‘[i]n 2005, the ending of life was not discussed with patients for a variety of reasons….’ ibid. More recently, Dr. Francois Primeau stated, ‘In 2009, in the Netherlands, there were 2,636 deaths by euthanasia …[and] they don’t count in this total the 550 cases of euthanasia without consent, nor the 400 cases of assisted suicide, nor the 20% of euthanasia cases that were not reported, nor the infants that died.’, Matthew Cullian Hoffman Abuse of Assisted Suicide Laws Inevitable, expert warns Quebec government, 22 Feb 2011 available at http://www.lifesitenews.com/news/abuse-of-assisted-suicide-laws-inevitable-expert-warns-quebec-government (accessed 8 June 2011).
toward Gomorrah—and at an increasingly faster pace as it replaces God’s inviolable moral standard with a morally relative individual convenience.\textsuperscript{101}

What can policymakers in the U.K. learn from the experience of its Western neighbours? One thing for sure is that which U.K. pro-suicide proponents present as a limited right to assisted suicide will “likely, in effect, [lead to] a much broader licence….”\textsuperscript{102} The most recent proponent and activist for legalising assisted suicide in the U.K. is Lord Falconer. Leading a supposedly unbiased Commission on Death and Dying, Falconer’s commission is studying if and how assisted suicide policy should be implemented in the UK.\textsuperscript{103} The commission is made up of 12 members, most of who favour legalised assisted suicide.\textsuperscript{104} Nine of the twelve members already work in the field and support assisted suicide. The remaining three on the commission are not known to oppose assisted suicide.\textsuperscript{105} The chair of the commission, Lord Falconer, is a long-time proponent of assisted suicide, campaigning to legalise assisted suicide in the UK.\textsuperscript{106} Far from balanced, Lord Falconer is using this commission as a vehicle to drive the pro-assisted suicide policy in the UK.\textsuperscript{107} How far down the terrible path we have trod.

\textbf{Conclusion}

Since the beginning of time, divine and natural law traditions of the United Kingdom embodied God’s sacred standard that we should not assist in the killing of human life He created.

Discerning the truth of this ancient inviolable benchmark, the common and statutory law of

\textsuperscript{102} \textit{Glucksberg}, 521 US at 733.
\textsuperscript{105} ibid.
\textsuperscript{106} ibid.
\textsuperscript{107} ibid.
Britain reflected its moral reference point and prohibits assisted suicide. In the name of progress, *Purdy* and its pro-suicide progeny reject the inviolable standard underlying current statutory proscriptions against assisted killing. Instead, *Purdy* and its progeny take the U.K. down a morally-relative road of legal positivism. The grave implications for a nation that accompany such a choice are historically clear and profoundly frightening. CS Lewis noted,

> “We all want progress. But progress means getting nearer to the place where you want to be. And if we have taken a wrong turning, then to go forward does not get us any nearer. If we are on the wrong road, progress means doing an about-turn and walking back to the right road; and in that case the person who turns back soonest is the most progressive person.”

Only by turning around and walking back to the right road, will the U.K. ever again find the inherent value of human life worthy of government protection.

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