

3-1-2005

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Recommended Citation

Emily Wada, *A Pretty Picture: The Margin of Appreciation and the Right to Assisted Suicide*, 27 Loy. L.A. Int'l & Comp. L. Rev. 275 (2005).

Available at: <http://digitalcommons.lmu.edu/ilr/vol27/iss2/4>

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A Pretty Picture: the Margin of Appreciation and the Right to Assisted Suicide

I. INTRODUCTION

Article 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“Convention”) protects the right to life.¹ In April 2002, the European Court of Human Rights (ECHR) refused to interpret Article 2 of the Convention broadly to protect the “right to self-determination in relation to issues of life and death.”² Therefore, Member States³ are under no obligation to decriminalize assisted suicide,⁴ even in the most compelling circumstances such as those of Diane Pretty (“Ms. Pretty”), who suffers from an incurable and debilitating disease.⁵

The margin of appreciation is a core principle controlling the ECHR.⁶ The margin of appreciation is a “degree of discretion”⁷ afforded to Member States that is frequently invoked when there is “difficulty in identifying uniform European conceptions of the extent of rights or restrictions.”⁸ A lack of consensus among

1. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 2, 213 U.N.T.S. 222, 224. See *Pretty v. United Kingdom*, 2002-III Eur. Ct. H.R. 155, 185 (setting forth few instances where the denial of this right is validated but subject to heightened judicial review).

2. *Pretty*, 2002-III Eur. Ct. H.R. at 164, 186.

3. See Council of Europe, Dates of Ratification of the European Convention on Human Rights and Additional Protocols in General Information, at <http://www.echr.coe.int/Eng/EDocs/DatesOfRatifications.html>.

4. Assisted suicide is when “[s]omeone provides an individual with the information, guidance, and means to take his or her own life with the intention that they will be used for this purpose.” Euthanasia.com, *Euthanasia Definitions*, at <http://www.euthanasia.com/definitions.html> (last visited Jul. 25, 2005).

5. See *Pretty*, 2002-III Eur. Ct. H.R. at 187.

6. See HOWARD CHARLES YOUROW, *THE MARGIN OF APPRECIATION DOCTRINE IN THE DYNAMICS OF EUROPEAN HUMAN RIGHTS JURISPRUDENCE* 13 (1996).

7. IAIN CAMERON & MAJA KIRILOVA ERIKSSON, *AN INTRODUCTION TO THE EUROPEAN CONVENTION OF HUMAN RIGHTS* 45 (1993).

8. *Id.* at 72.

Member States suggests to the ECHR that the matter is best left to individual states.⁹ Many factors, such as differing local laws and cultures, lend support to application of the margin of appreciation, especially in the context of highly sensitive issues.¹⁰

One example of such an issue is assisted suicide, a well known political and moral debate throughout the world, which clearly falls within the margin of appreciation accorded to Member States. Although the ECHR did not expressly discuss the role of the margin of appreciation in its decision-making process, its application to the issue raised in *Pretty v. United Kingdom* (“*Pretty*”) is the quintessential illustration of its proper usage.

This Note agrees with the ECHR’s determination regarding Ms. *Pretty*’s claims under Article 2. In examining its decision, this Note will apply the underlying principles of the margin of appreciation to *Pretty*. Part II presents a brief background of Ms. *Pretty*’s case. Part III outlines the basic tenets of the margin of appreciation and applies them to the facts of *Pretty*, discussing the parties’ respective interests, as well as a past and contemporary world view on assisted suicide. Part IV concludes that, while not discussed by the ECHR, the margin of appreciation was a controlling factor behind the ECHR’s ruling. Furthermore, *Pretty* represents an illustrative example of when the ECHR should show a wide margin of appreciation to Member States.

II. PRETTY V. UNITED KINGDOM

In 2002, Ms. *Pretty*, a forty-three year old English citizen, was in the advanced stages of motor neuron disease (“MND”)¹¹ that caused her to become quadriplegic.¹² MND¹³ is an untreatable progressive neurodegenerative disease that affects voluntary

9. *See id.*

10. *See id.* (commenting on the lack of uniformity in approaches across nations).

11. *Pretty*, 2002-III Eur. Ct. H.R. at 162.

12. *See id.*; Clare Dyer, *Diane Pretty Makes Final ‘Death with Dignity’ Plea*, GUARDIAN, Mar. 20, 2002, at 1, available at LEXIS, News & Business Library, ALLNWS file.

13. *See* Motor Neuron Disease Association, *What Is MND?*, at <http://www.mndassociation.org/full-site/what/index.htm> (last visited Jul. 25, 2005); National Institute of Neurological Disorders and Strokes, *NINDS Motion Neuron Diseases Information Page*, at http://www.ninds.nih.gov/health_and_medical/disorders/motor_neuron_diseases.htm (Aug. 8, 2001) (discussing general information and providing links regarding MND).

muscles and usually results in death due to respiratory failure.¹⁴ Significantly, the ability of MND patients to make their own choices is unaffected.¹⁵

Ms. Pretty's severe physical condition made it impossible to end her suffering without the assistance of her husband.¹⁶ Her problem, however, was that while England's Suicide Act of 1961 did not make it a crime for her to commit suicide, it imposed criminal liability on anyone *assisting* her in suicide.¹⁷ Thus, Ms. Pretty's attorney wrote a letter to the Director of Public Prosecutions requesting that her husband not be prosecuted should he help her in fulfilling her wishes.¹⁸ The English judiciary nevertheless upheld the Director of Public Prosecutions' decision to prosecute Ms. Pretty's husband if he assisted her suicide.¹⁹

The ECHR held that Ms. Pretty did not meet the burden of showing that the U.K. breached the Convention by failing to permit her husband to assist her suicide absent criminal liability.²⁰ Ms. Pretty argued that the right to die flows directly from the right to life guaranteed in Article 2; therefore, the state had an affirmative duty to protect the right of self-determination with respect to life and death.²¹

Despite her efforts, the ECHR held that because Article 2 proscribes the intentional taking of life except in limited circumstances, it would be inconsistent to accept that it also

14. *Pretty*, 2002-III Eur. Ct. H.R. at 162.

15. *Id.*; see, e.g., Robert S. Olick et al., *Advance Care Planning and the ALS Patients: A Cross-Cultural Perspective on Advance Directives*, 4 ANN. REV. L. & ETHICS 529-52 (1996), available at http://www.bioethics.jp/licht_advvals.html.

16. *Pretty*, 2002-III Eur. Ct. H.R. at 163.

17. Suicide Act 1961, 50 Eliz., c. 60, § 2 (Eng.) ("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 for a term not exceeding fourteen years."). A limited defense is nevertheless available for those giving proper treatment to terminally ill persons for the purpose of lessening pain when that treatment has the effect of shortening life. Jonathan Montgomery, *Power Over Death: The Final Sting*, in DEATH RITES: LAW AND ETHICS AT THE END OF LIFE 52 n. 25 (Robert Lee & Derek Morgan eds., 1994).

18. *Pretty*, 2002-III Eur. Ct. H.R. at 163.

19. *Id.* Ms. Pretty's denial was upheld by three separate courts. See *The Queen v. Dir. of Pub. Prosecutions*, EWHC Admin. 788 (Q.B. Div'1 Ct. 2001); *Regina (Pretty) v. Dir. of Pub. Prosecutions*, [2002] 1 A.C. 800 (H.L. 2001).

20. *Pretty*, 2002-III Eur. Ct. H.R. at 167-68.

21. *Id.* at 164-65.

ensures the right to procure another's help in committing suicide.²² The ECHR also explained the ostensible inconsistency in the Suicide Act of 1961: "[T]he sanctity of life entails its inviolability by an outsider. Subject to exceptions like self-defense, human life is inviolate even if the person in question has consented to its violation. That is why although suicide is not a crime, assisting someone to commit suicide is."²³

III. *PRETTY V. UNITED KINGDOM*: THE QUINTESSENTIAL ILLUSTRATION OF THE APPLICATION OF THE MARGIN OF APPRECIATION

Pretty is a unique case concerning the right to assisted suicide of a mentally competent, yet terminally ill and physically incompetent person.²⁴ In fact, *Pretty* is the first time the ECHR confronted the issue of whether Article 2 of the Convention guaranteed a right to die. While the ECHR justified its holding through statutory interpretation of Article 2,²⁵ distinguishing case law,²⁶ and basic principles of English law,²⁷ the sheer novelty and complexity of the issue alone may have been enough to predict the case's outcome.

The ECHR did not explicitly discuss or apply the margin of appreciation in *Pretty* with respect to Ms. *Pretty*'s claims under Article 2.²⁸ Yet *Pretty* is an excellent illustration of when and why the ECHR should make the most of the doctrine.

A. *The Margin of Appreciation: A Theory of Deference*

The margin of appreciation is a self-imposed²⁹ mechanism of judicial restraint.³⁰ Conceptually, it is the "elbow room" given to

22. *Id.* at 165-67 (recalling "that Article 2 of the Convention may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual"). *Osman v. United Kingdom*, 1998-VIII Eur. Ct. H.R. 3124, 3159.

23. *Airedale N.H.S. Trust v. Bland*, 1993 A.C. 789, 831 (H.L. 1992).

24. *See generally Pretty*, 2002-III Eur. Ct. H.R. at 162.

25. *Id.* at 165.

26. *Id.* at 167.

27. *Id.*

28. *See generally id.*

29. *YOUROW*, *supra* note 6, at 196.

30. *See CAMERON*, *supra* note 7, at 72.

contracting states³¹ as the “formal standard for the determination of deference to state discretion”³² in the enactment or enforcement of local laws.³³ Accordingly, the margin may be “wide” or “narrow”—a wide margin results in more discretion given to a state,³⁴ and a narrow margin results in less discretion.³⁵ This distinction is important because the “width” of the margin may greatly affect the level of protection required by Member States.³⁶

The determination of the width of the margin of appreciation depends on the totality of the circumstances.³⁷ That is, it depends on the “fundamental nature” of the asserted right in comparison to the “objectivity and importance” of the state practice in question, and the degree of convergence among Member States.³⁸

While “the presence of a consensus does not of itself mean that there is a [narrow] margin of appreciation, . . . the absence of a consensus is probably a *decisive factor* in finding that there is a [wide] margin of appreciation.”³⁹ In fact, the ECHR often takes

31. YOUROW, *supra* note 6, at 13.

32. *Id.* at 195-96.

33. The margin of appreciation is historically rooted in cases relating to public emergencies where the Court was reluctant to rule against a state for their policy decisions. IAIN CAMERON, NATIONAL SECURITY AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS 28 (2000). In those cases, the ECHR frequently found itself unversed in the particular situation. See MARK W. JANIS ET AL., EUROPEAN HUMAN RIGHTS LAW: TEXT AND MATERIALS 146 (2d ed. 2000). There were also several analytical approaches available to the Court. KAREN REID, A PRACTITIONER’S GUIDE TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS 32 (1998). Accordingly, the ECHR would apply the margin of appreciation so that the Convention could compensate for the different traditions, ethics, and observances in each of the Contracting States. *Id.*

34. For example, the ECHR gives highly contentious issues of national security a wide margin of appreciation. REID, *supra* note 33, at 33.

35. *See id.*

36. *See* Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 317 (1997).

37. *See* CAMERON, *supra* note 33, at 29.

38. YOUROW, *supra* note 6, at 13. The issue itself may also factor into the degree of deference accorded to Member States. REID, *supra* note 33, at 33. For example, there is a well-defined history of deference towards controversial issues such as transsexualism. *See, e.g.*, Rees Judgment, 106 Eur. Ct. H.R. (ser. A) 6, 17 (1987); Cossey Judgment, 184 Eur. Ct. H.R. (ser. A) 5, 16 (1990); B. v. France, 232 Eur. Ct. H.R. 33, 49 (1993); Sheffield v. United Kingdom, 1998-V Eur. Ct. H.R. 2014, 2028.

39. CAMERON, *supra* note 7, at 72-73 (emphasis added). In fact, the ECHR commonly cites a lack of convergence in a highly contentious issue as a ground for applying a wide margin of appreciation. REID, *supra* note 33, at 33. *See* Helfer, *supra* note 36, at 317; YOUROW, *supra* note 6, at 193.

special note of the degree of convergence among contracting states.⁴⁰

Thus, the margin of appreciation is clearly an important doctrine controlling the ECHR and the obligations of Member States. The difficulty, however, is the doctrine's indeterminate applicability.⁴¹ "This is because neither the [ECHR] [n]or the [European Commission of Human Rights] proved or attempted to provide a definition and, more pertinently, because the Convention organs have treated the doctrine functionally, developing it on an ad hoc basis."⁴²

B. Applying the Margin to Pretty

1. Balancing the Interests at Stake

a. Ms. Pretty's interest: the right to live a dignified life

The interest of Ms. Pretty is obvious—the right of life—but how does one define living? Is life merely survival or does it incorporate some degree of dignity? Ms. Pretty's proponents argue that if a person's entire life consists of physical, mental, and psychological suffering, then that is living death itself.⁴³

The question then becomes whether the state should be allowed to deny a person the ability to live his or her life with dignity. Article 2 should recognize the "right to self-determination in relation to issues of life and death" and thereby impose an affirmative obligation upon Member States to protect both the

40. See CAMERON, *supra* note 33, at 26; JANIS, *supra* note 33, at 147; REID, *supra* note 33, at 33; see, e.g., L & V v. Aus., 2003-I Eur. Ct. H.R. 31, 43 (noting the existence of "an ever growing European consensus to apply equal ages of consent for [sexual] relations"); Goodwin v. U.K., 2002-VI Eur. Ct. H.R. 3, 20 (recognizing "an unmistakable trend in the [M]ember States" with respect to transsexual legal rights); Coster v. U.K., 33 Eur. H.R. Rep. 479, 506 (2001) (observing the "emerging international consensus" within the Council of Europe regarding the minority needs); Tyrer v. U.K., 26 Eur. Ct. H.R. (ser. A) 4, 15-16 (1978) (noting that there were influential developing "commonly accepted standards in the penal policy of the [M]ember States").

41. See YOUROW, *supra* note 6, at 14.

42. *Id.* at 14 n. 23 (citing ARANGIO-RUIZ, ET AL., INTERNATIONAL LAW AT THE TIME OF ITS CODIFICATION 192 (1987)).

43. See Peter Alldridge, 'Who Wants to Live Forever?', in DEATH RITES: LAW AND ETHICS AT THE END OF LIFE 11 (Robert Lee & Derek Morgan eds., 1994) (discussing the fear of becoming the "undead").

right to life and the right to die.⁴⁴ Refusing individuals this right is to devalue life⁴⁵ and to render them completely powerless, denying them of their “fundamental human right.”⁴⁶

b. State’s interest: workability

On the other hand, the interests of the state are equally clear. As Kathryn Willington, a health and social care policy officer for Help the Aged,⁴⁷ said, “The prohibition on assisted suicide is designed to protect some of the most vulnerable members of society Any change in the law would run the risk of abuse and would fundamentally change the doctor/patient relationship.”⁴⁸

Focusing on the patient’s concerns, several problems immediately come to mind. A terminally ill patient may feel pressured to participate in such a program to save his or her family substantial emotional and financial expenses.⁴⁹ Also, the mere existence of a legal assisted suicide program could feasibly foster hasty decision making. For example, one study revealed that approximately sixty-three percent of the patients using Oregon’s assisted suicide law were prompted “by a concern that they were a burden on family, friends and caregivers.”⁵⁰

Another large issue lies in the administration of the program. Undoubtedly, the U.K. would impose restrictions similar to those of other countries that currently allow some form of legalized

44. *Pretty*, 2002-III Eur. Ct. H.R. at 164.

45. See, e.g., Bruce Schimmel, *A Dignified Death*, PHILA. CITY PAPER, Jan. 10-17, 2002, available at <http://www.citypaper.net/articles/011002/sl.loose.shtml>.

46. See Jo Revill, *Swiss to Stop Entry of ‘Mercy Death’ Britons*, OBSERVER, Jan. 26, 2003, available at <http://society.guardian.co.uk/health/story/0,7890,883108,00.html> (quoting Chris Davies, Liberal Democratic Member in the European Parliament for the New West Region of the U.K.).

47. David Batty, *Government Urged to Drop Notion of ‘Undeserving’ Poor* (Oct. 15, 2003), at <http://society.guardian.co.uk>. Help the Aged is an organization committed to campaigning and researching geriatric issues. Help the Aged, *Viewpoint*, at <http://www.helptheaged.org.uk> (last visited Jul. 25, 2005).

48. Help the Aged, *Lords Debate ‘Right to Die’ Bill*, UK NEWS (June 6, 2003), available at http://www.helptheaged.org.uk/CampaignsNews/_default.htm.

49. See, e.g., *How Physician Assisted Suicide Could Affect People with Disabilities*, at <http://www.euthanasia.com/disabledman.html> (last visited Jul. 25, 2005) (detailing the personal reflections of a quadriplegic man who characterizes the assisted suicide as a “nightmare” for terminal patients, and “hope[s] the entire [physician assisted suicide] concept dies a swift death . . .”).

50. Society for the Protection of Unborn Children, *Euthanasia and Women* (June 2003), at <http://www.spuc.org.uk/documents/papers/euthanasiaandwomen.pdf>.

assisted suicide.⁵¹ What will always remain, however, is the problem of ensuring that the patient is the person choosing to utilize the program rather than the doctor. This problem, better known as the “futile-care theory,”⁵² is one that the Dutch, who have legalized some form of assisted suicide, know all too well.⁵³

In addition, the U.K. would reasonably worry about people who are not terminally ill taking advantage of such laws.⁵⁴ Unwilling physicians also factor into the mix of concerns. In a survey conducted just before Lord Joffe’s introduction of the Patient (Assisted Dying) Bill to the House of Lords, approximately seventy-five percent of physicians polled said they would not use the law if it passed.⁵⁵

Altogether, it is difficult to reach a conclusive position while attempting to balance state interests with the interests of Ms. Pretty and those similarly situated to her. If the ECHR held in favor of Ms. Pretty, over forty of the forty-five Member States

51. E.g., Euthanasia Law, *Termination of Life on Request and Assisted Suicide (Review Procedures) Act*, at <http://www.nvve.nl> (last visited Jul. 25, 2005), for current assisted suicide law in the Netherlands.

52. See Wesley J. Smith, International Task Force on Euthanasia and Assisted Suicide, *Doctor Knows Best. . . But It'll Be Too Late for You, If He's Wrong*, 17 UPDATE (2003), <http://www.internationaltaskforce.org/iaa28.htm> (last visited Jul. 25, 2005) (stating the real problem is that most people do not become aware of such policies until it is too late); see also *How Physician Assisted Suicide Could Affect People with Disabilities*, at <http://www.euthanasia.com/disabledman.html> (last visited Jul. 25, 2005) (“With health care professionals being forced by insurance companies/bureaucracies to balance cutting costs against what’s in the best interest of their patient, add in legalized [physician assisted suicide] and the possibility of being offered a cheap end to your life as opposed to an astronomically expensive long term plan of treat is all to [sic] real.”).

53. See International Task Force on Euthanasia and Assisted Suicide, *Reports Indicate Dutch Doctors Breaking New Euthanasia/Assisted-Suicide Law*, 17 UPDATE (2003), <http://www.internationaltaskforce.org/iaa28.htm> (last visited Jul. 25, 2005) (giving one example of a Dutch doctor who said his “patient was too sick to request euthanasia herself, so he increased her morphine” and “knowingly broke the law” without even consulting another doctor).

54. See, e.g., International Task Force on Euthanasia and Assisted Suicide, *Swiss Group Responsible for Deaths of Non-Terminally Ill Couple and Others*, 17 UPDATE (2003), <http://www.internationaltaskforce.org> (last visited Jul. 25, 2005) (“Dr. Philip Sutorius, a general practitioner who, in 1998, assisted the suicide of 86-year-old ex-senator Edward Brongersma. Brongersma was not physically ill or in pain. He claimed he was simply ‘tired of life’ and his aging . . .”).

55. International Task Force on Euthanasia and Assisted Suicide, *Most U.K. Doctors Oppose Assisted Suicide*, 17 UPDATE (2003), <http://www.internationaltaskforce.org/iaa28.htm> (last visited Jul. 25, 2005).

would be forced to immediately address the valid concerns discussed above in order to come up with a workable program.

As important as it is to respect the right asserted by Ms. Pretty, the risk of needless deaths of those who would misuse such programs is too great a responsibility for society. The “objectivity and importance” of the state’s interest is too pronounced—one individual’s “fundamental right” to a dignified life and a dignified death should not outweigh the risk of many lives. The balance of interests weighs in favor of the U.K., and thus, the margin of appreciation at this stage of the analysis must be wide.

2. The Issue Itself: What Is the Degree of Consensus?

a. The historical disregard for the right to die

The Hippocratic Oath, one of the oldest codes of ethics governing physicians, dates back to approximately 400 B.C. It states, “I will neither give a deadly drug to anybody if asked for it, nor will I make a suggestion to this effect.”⁵⁶ Catholicism later formally condemned suicide and Christendom codified this view in the fifth century.⁵⁷ Those who committed suicide were even refused Christian burials.⁵⁸ Further, while the debate over suicide became less rigid during the seventeenth and eighteenth centuries,⁵⁹ there nevertheless remains a long Western tradition expressing disapproval of assisted suicide.⁶⁰

Actually, legally condoned assisted suicide is a recent innovation in Western society. Germany implemented a regime of assisted suicide around 1939⁶¹ which bore some resemblance to what modern advocates preach.⁶² However, even though German

56. N.D.A. KEMP, ‘MERCIFUL RELEASE’: THE HISTORY OF THE BRITISH EUTHANASIA MOVEMENT 4 (2002).

57. *Id.* at 6.

58. *Id.*

59. *See id.* at 6-8.

60. *Washington v. Glucksberg*, 521 U.S. 702, 710-12 (1997).

61. *See History of Euthanasia*, Euthanasia.com, at <http://www.euthanasia.com> (last visited Jul. 25, 2005).

62. Molly Hammett Kronberg, *The Nazi Precedent: Hitler’s Euthanasia Program More Like Today’s Than You Might Imagine*, in EXECUTIVE INTELLIGENCE REVIEW, SPECIAL REPORT: HOW TO STOP THE RESURGENCE OF NAZI EUTHANASIA TODAY 129, 130 (Nancy B. Spannaus et al. eds., 1988). At that time in Germany, assisted suicide, or more specifically, physician-assisted suicide, was seen as a “merciful” privilege for those without a minimal “quality of life.” *Id.* at 132-33.

leaders made sure that the doctors who performed euthanasia did so in the most humane and least painful manner,⁶³ those doctors were still tried and hung for “crime[s] against humanity” by an international tribunal.⁶⁴ Australia’s Northern Territory also legalized euthanasia in 1996, but then quickly overturned the law in 1997.⁶⁵ Within that one year, only four people made use of the short lived Australian law, some with great difficulty because of reluctant physicians deterred by the possibility of homicide convictions.⁶⁶

b. The current international status

There is an argument that the U.K. distorted the current situation in other European countries by arguing that The Netherlands was the only country to legalize assisted suicide.⁶⁷ In rebuttal, a member of the Voluntary Euthanasia Society asserted that while the U.K. has the most stringent laws, most European countries do not criminalize assisted suicide,⁶⁸ and some even have special laws for terminally ill patients.⁶⁹

While few places in the world allow assisted suicide,⁷⁰ Oregon, Switzerland, Belgium, and The Netherlands are the only places in

63. *Id.* at 140. This “privilege” was unavailable to those of Jewish descent. *Id.* at 132.

64. *Id.* at 129, 134.

65. Euthanasia Laws Act, 1997, sched. 1 (Austl.) (“For the avoidance of doubt, the enactment of the Legislative Assembly called the Rights of the Terminally Ill Act 1995 has no force or effect as a law of the Territory, except as regards the lawfulness or validity of anything done in accordance therewith prior to the commencement of this Act.”); *History of Euthanasia*, Euthanasia.com, at <http://www.euthanasia.com/historyeuthanasia.html> (last visited Jul. 25, 2005).

66. See *Euthanasia and Assisted Suicide in Australia*, The World Federation of Right to Die Societies, at <http://www.worldrtd.net/faqs/factsheets/?id=164> (last visited Jul. 25, 2005).

67. Mike Wendling, *Assisted Suicide Case Goes to Highest European Court* (Mar. 19, 2002), available at European Ctr for L. & Justice, http://www.eclj.org/news/euro_news_020319_assisted_suicide.asp.

68. For example, assisted suicide is not legal in Switzerland, but the practice is regarded as humane. *Widow Defends Assisted Suicide Trip*, BBC NEWS (Feb. 10, 2003), available at <http://news.bbc.co.uk/1/hi/health/2736473.stm>.

69. Wendling, *supra* note 67, at http://www.eclj.org/news/euro_news_020319_assisted_suicide.asp.

70. For example, Columbia’s judiciary upheld voluntary medical euthanasia while the legislature remains silent on the issue. Derek Humphrey, *Assisted Suicide Laws Around the World* (last updated Sept. 18, 2003), available at Euthanasia Research & Guidance Org., http://www.assistedsuicide.org/suicide_laws.html.

the world that have given the official nod of approval as of today.⁷¹ Advocates of assisted suicide in countries or states without similar statutes, such as the U.K., are unsuccessfully fighting for their own laws.⁷² In the meantime, many terminally ill proponents of assisted suicide leave their own country and travel to where they can end their lives on their own terms.⁷³

c. The Council of Europe at a glance

The Council of Europe, comprised of forty-five Member States,⁷⁴ conducted an international survey in 2002⁷⁵ to survey the laws and practices regarding human rights and their relation to the terminally ill.⁷⁶ Thirty-four Central Asian and European states, the United States, and Russia responded.⁷⁷

71. *E.g.*, Termination of Life on Request and Assisted Suicide (Review Procedures) Act, available at Right to Die-NL, <http://www.nvve.nl/english/info/euthlawenglish.htm> (last visited Jul. 25, 2005). Oregon only permits physician assisted suicide; Switzerland permits physician and non-physician assisted suicide; Belgium permits euthanasia but does not define it; and, the Netherlands permit voluntary euthanasia and physician assisted suicide. Humphrey, *supra* note 70.

72. From 1936 through 2003, there have been eight attempts to legalize some form of assisted suicide in the U.K. *Id. E.g.*, Patient (Assisted Dying) Bill [HL] (Eng.), available at <http://www.publications.parliament.uk/> (last visited Jul. 25, 2005) (debating the second reading of Lord Joffe's Patient (Assisted Dying) Bill within the House of Lords); see also VES Auckland, *New Zealand: Death with Dignity Bill Lost in Narrow Vote* (July 31, 2003), available at <http://www.nvve.nl/english/info/news.htm>. Attempts to legalize euthanasia in Luxembourg failed by a single vote. Humphrey, *supra* note 70.

73. Jeevan Vasagar, *Suicide Reform Plea to Stop Britons Going Abroad to Die*, GUARDIAN, Apr. 16, 2003, available at <http://www.guardian.co.uk/guardianpolitics/story/0,3605,937594,00.html>. See, e.g., *Widow Defends Assisted Suicide Trip*, *supra* note 68, at <http://news.bbc.co.uk/1/hi/health/2736473.stm>; Jo Revill, *Swiss to Stop Entry of 'Mercy Death' Britons*, GUARDIAN, Jan. 26, 2003, available at <http://society.guardian.co.uk/health/story/0,7890,883108,00.html> (discussing the rapid growth of "suicide tourism" in Switzerland and the possibility of making it illegal).

74. See Council of Europe, *The Council of Europe's Member States*, at http://www.coe.int/T/e/com/about_coe/member_states/default.asp (last visited Jul. 25, 2005).

75. Short Report, *Law and Practice Short Report: Law and Practices Relating to Euthanasia and Assisted Suicide in 34 Countries of the Council of Europe and the USA*, 22 MED. & L. 197 (2003) [hereinafter *Law and Practices Relating to Euthanasia*].

76. *Id.*

77. Humphrey, *supra* note 70.

When asked whether the country legally allowed euthanasia,⁷⁸ Belgium was the only country to answer in the affirmative.⁷⁹ Moreover, the survey revealed that assisted suicide was legally permitted only in Estonia and Switzerland.⁸⁰ In overwhelming contrast, twenty-five countries stated that euthanasia was impermissible at law⁸¹ and twenty-three countries shared the same view regarding assisted suicide.⁸²

While some advocates of assisted suicide point out that only six countries admitted to enforcing laws that specifically prohibit assisted suicide,⁸³ it is important to note that many countries punish assisters using the regular penal laws concerning homicide.⁸⁴ For example, under Scottish law, consented killings are considered to be murder and otherwise assisting another in suicide is also criminally punishable conduct.⁸⁵ Similarly, Norway and Sweden charge assisters as accessories to murder.⁸⁶ In Luxembourg and France, assisting suicide is sometimes treated as a criminal failure to aid a person in danger.⁸⁷

On the other hand, England, Wales, Canada, Hungary, Ireland, Italy, and Russia directly prohibit assisted suicide by law.⁸⁸ In Finland, one who notifies the authorities of one's act of assistance may go unpunished.⁸⁹ Uruguay provides a rather extreme illustration where, if a court finds that a person killed another out of compassion, it may decide not to punish that person at all.⁹⁰

78. Euthanasia is defined as "the intentional killing by act or omission of a dependent human being for his or her alleged benefit." See Humphrey, *supra* note 70 for related vocabulary.

79. *Law and Practices Relating to Euthanasia*, *supra* note 75, at 198.

80. *Id.*

81. Nine countries did not give a specific answer. *Id.*

82. *Id.*

83. *See id.*

84. *Law and Practices Relating to Euthanasia*, *supra* note 75, at 198.

85. Humphrey, *supra* note 70.

86. *Id.*

87. *Law and Practices Relating to Euthanasia*, *supra* note 75, at 198. *But see id.* ("[I]nciters or accessories to a *freely responsible* suicide are . . . not criminally liable.") (emphasis added).

88. Humphrey, *supra* note 70.

89. *Id.*

90. Article 27 of the Penal Code states that "judges are authorized to forego punishment of a person whose previous life has been honorable where he commits a homicide motivated by compassion, induced by repeated requests of the victim." *Id.*

Considering the facts above, it would be difficult to say that a majority of Member States view assisted suicide favorably. Although there is a strong and deeply rooted western consensus against the legality of assisted suicide,⁹¹ each country obviously deals with the issue differently, or chooses not to address it at all.⁹² There are three notable exceptions, however, within the Council of Europe: Switzerland, Belgium, and The Netherlands, all of which have laws allowing some form of assisted suicide.⁹³ In addition, Germany experimented with such a program in the past,⁹⁴ and there are significant efforts in a number of states to legalize assisted suicide.⁹⁵

The resulting picture is, quite honestly, a mess. There is no clear agreement among the Member States. Taking this with the balance of interests in favor of the U.K. should signal a wide margin of appreciation on the issue of assisted suicide.⁹⁶ Thus, although the ECHR did not discuss the width of the margin in *Pretty*, its application to this case is illustrative, and this Note provides further support for the ECHR's determination in *Pretty*.

IV. CONCLUSION

The ECHR is a unique tribunal that faces many issues that are not traditionally handled in an international forum.⁹⁷ It functions to interpret and apply the Convention in the "most intimate aspects of the relations between the citizen and the State."⁹⁸ Additionally, because the subject matter before the court pertains to human rights, the ECHR must tread carefully so as to avoid stepping on the toes of its numerous and diverse members.⁹⁹ The margin of appreciation allows for, and sometimes *requires*, the ECHR, as in Ms. *Pretty's* case, to fulfill its duty in both respects.

91. *Glucksberg*, 521 U.S. at 710.

92. *See infra* III.B(2)(b).

93. Humphrey, *supra* note 70.

94. Kronberg, *supra* note 62, at 129.

95. Humphrey, *supra* note 70.

96. *See* CAMERON, *supra* note 7, at 72-73.

97. *See* J. G. MERRILLS, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE EUROPEAN COURT OF HUMAN RIGHTS* 9 (2d ed. 1993).

98. *Id.*

99. After all, "[i]t is not reasonable to expect any court, least of all an international court, to blaze the trail in promoting human rights." CAMERON, *supra* note 33, at 26.

In viewing the totality of the circumstances, *Pretty* is a good example of when the ECHR should show Member States a wide margin of appreciation.¹⁰⁰ Attempting to balance the interest of Ms. *Pretty* against the interest of the U.K. proved to be a difficult task. From a collectivist point of view, serious concerns over the administration and use of assisted suicide laws are far too real and marked.¹⁰¹ As such, to interpret Article 2 as requiring Member States to safeguard the lives of those within its jurisdiction,¹⁰² and simultaneously imposing a positive obligation to legalize assisted suicide in compliance with such a duty, would be a seemingly impossible task.

Furthermore, the right to die has been and continues to be the subject of flourishing social, moral, and political debate and literature.¹⁰³ There is no consensus on the issue.¹⁰⁴ Some countries expressly forbid assisted suicide through special legislation, other countries punish assisters using regular penal laws, and yet other countries may cushion sentences under special circumstances or do not convict at all.¹⁰⁵ And, on the furthest end of the spectrum, there are even some states that legally condone assisted suicide.¹⁰⁶ Collectively, these facts point towards a wide margin of

100. See Mark Tushnet, *New Forms of Judicial Review and the Persistence of Rights and Democracy-Based Worries*, 38 WAKE FOREST L. REV. 813, 837 n. 87 (2003).

101. See, e.g., Stephen R. Katz, *Doctor Assisted Suicide – a Bad Oxymoron and a Bad Idea*, CONN. POST, Apr. 27, 1998, available at <http://pages.prodigy.com/DOCTORINFORM/suicide.htm>.

102. *Pretty*, 2002-III Eur. Ct. H.R. at 165.

103. See, e.g., KUMAR AMARASEKARA & MIRKO BAGARIC, EUTHANASIA, MORALITY AND THE LAW 19 (David A. Schultz ed., 2002); see also DANIEL HILLYARD & JOHN DOMBRINK, DYING RIGHT: THE DEATH WITH DIGNITY MOVEMENT (2001); *The Right to Die?*, NI Global Issues for Learners of English, available at http://www2.gol.com/users/bobkeim/right_to_die/r2diecont.html (last visited Jul. 25, 2005); *Right to Die*, Public Agenda, available at http://www.publicagenda.org/issues/frontdoor.cfm?issue_type=right2die (last visited Jul. 25, 2005).

104. Just recently, however, the Council of Europe approved of a report on euthanasia, and in a draft resolution adopted on September 5, 2003, Member States were asked to consider whether legislation to legalize euthanasia should be enacted. Council of Europe, *Assembly Committee Calls on European States to Consider Decriminalizing Euthanasia*, at <http://www.coe.int/NewsSearch/InternetNewsByMonth.asp?lmLangue=1>. (last visited Jul. 25, 2005).

105. For example, in some Norwegian cases “where consent was given and the reasons compassionate, . . . courts [have] pass[ed] lighter sentences.” Humphrey, *supra* note 70.

106. Euthanasia Law, *Termination of Life on Request and Assisted Suicide (Review Procedures) Act*, at <http://www.nvve.nl/english/info/euthlawenglish.htm> (last visited Jul. 25, 2005).

appreciation towards Member States, and thus provide additional support for the ruling against Ms. Pretty.

Notwithstanding the court's grounds for dismissing Ms. Pretty's argument on the right to die, *Pretty* is the quintessential example of the proper application of the margin of appreciation. It is in cases such as *Pretty* that the ECHR should defer to the individual judgments of its Member States.

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