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Constitutional Law—FLORIDA’S RIGHT TO DIE—A QUESTION OF
LITIGATION OR LEGISLATION?—Satz v. Perlmutter, 379 So. 2d 359
(Fla. 1980).

I. THE TRIAL COURT’S HOLDING

Seventy-three year old Abe Perlmutter suffered from amyotrophic lateral sclerosis (Lou Gerhig’s disease). There is no known cure for the disease, and normal life expectancy from time of diagnosis is two years. Perlmutter had reached the point of virtual incapacity, sustained only by a mechanical respirator attached to a breathing hole in his trachea. He petitioned the Seventeenth Judicial Circuit Court to allow him, with the full consent of his adult family, to have the respirator attachment disconnected. According to the attending physician, death would probably result within an hour.

The circuit court found Perlmutter to be competent and fully aware of the nature and consequences of his request. He had repeatedly asked his family to remove the respirator attachment and told the trial court judge at a bedside hearing that whatever the consequences of removal, “it can’t be worse than what I’m going through now.”

The trial court adopted the reasoning of the Supreme Court of New Jersey in In re Quinlan, in which the constitutional right of privacy was extended to include the right to decline medical treatment under certain circumstances. The Quinlan court was faced

3. 362 So. 2d at 161.
5. Id. at 193.
6. 362 So. 2d at 161. Perlmutter had attempted on several occasions to remove the respirator himself but was prevented from doing so by hospital personnel. Compare Perlmutter with In re Quinlan, 355 A.2d 647, 653 (N.J. 1976), cert. denied, 429 U.S. 922 (1976), in which the prior statements made by the comatose patient as to her wish not to have her life prolonged by extraordinary treatment were considered too remote and impersonal to yield significant probative insight into her present desires.
9. 355 A.2d at 663. The Quinlan court stated:

The Court in Griswold found the unwritten constitutional right of privacy to exist in the penumbra of specific guarantees of the Bill of Rights “formed by emanations from those guarantees that help give them life and substance.” Presumably this right is broad enough to encompass a patient’s decision to decline medical treatment under certain circumstances, in much the same way as it is broad enough to encompass a woman’s decision to terminate pregnancy under cer-
with a petition from the father of a twenty-one year old woman in a chronic vegetative state. The petitioner requested that he be appointed guardian with the express power to authorize the discontinuance of the respirator that sustained her cardiopulmonary functions.\textsuperscript{10} Competent medical testimony had established the absence of any reasonable hope of the patient's recovery from the comatose state. Medical practices and standards, however, did not permit removal from the respirator.\textsuperscript{11} The New Jersey court found that no compelling state interest could force the patient to endure the unendurable. Quinlan's condition was distinguished from that of a patient whose chances of recovery are realistic. Her rights were compared instead to those of a competent terminally ill patient, cancer-ridden and suffering great pain. Such a patient would not be kept against his will on a respirator.\textsuperscript{12} The court found that the state's interests weaken and that "the individual's right to privacy grows as the degree of bodily invasion increases and the prognosis dims."\textsuperscript{13}

Perlmutter's right of privacy was even more compelling than Quinlan's. Perlmutter, unlike Quinlan, was not comatose and could make his own independent decision with full knowledge of the results.\textsuperscript{14} Consequently, no state or medical interest was sufficiently urgent to override his decision to terminate the extraordinary measures which merely prolonged a hopeless situation.\textsuperscript{15}

The circuit court rejected the state's assertion that termination of extraordinary medical treatment would constitute self-murder, and that anyone assisting such termination would be guilty of manslaughter, a felony of the second degree.\textsuperscript{16} The court instead found termination of extraordinary treatment to be the exercise of

\textit{Id.} (quoting Griswold v. Connecticut, 381 U.S. 479, 484 (1965)) (citation omitted). The \textit{Quinlan} court did not, however, elaborate on any comparison between a woman's right to make abortion decisions and the right of a terminally ill patient to reject life-prolonging treatment. The court found, rather, that the right of privacy generally encompasses certain intimate personal decisions which may only be limited by compelling state interests. 355 A.2d at 663.

10. \textit{Id.} at 647.
11. \textit{Id.} at 655.
12. \textit{Id.} at 663.
13. \textit{Id.} at 664.
14. 47 Fla. Supp. at 193. In \textit{Quinlan} the father was granted standing to advance his daughter's constitutional right of privacy because his interests in the controversy were real and the proceeding served the public interest. 355 A.2d at 660-61.
16. \textit{Id.} at 194.
a constitutional right. Since death would ensue from natural causes no civil or criminal liability could attach to anyone assisting Perlmutter in implementing his decision to terminate treatment.\textsuperscript{17}

II. The State Interests

The Fourth District Court of Appeal affirmed the circuit court's order to allow termination, and elaborated on the lower court's finding that no valid state interest outweighed Perlmutter's constitutional right of privacy.\textsuperscript{18} Four valid state interests which ordinarily temper the right of an individual to refuse medical treatment were recognized: (1) the preservation of life; (2) the need to protect innocent third parties; (3) the duty to prevent suicide; and (4) the maintenance of the ethical integrity of the medical profession.\textsuperscript{19} The district court found that none of these interests were sufficiently compelling under the facts of this case to override Perlmutter's freedom of choice. In so holding, the district court relied heavily on the reasoning of the Supreme Judicial Court of Massachusetts in \textit{Superintendent of Belchertown v. Saikewicz},\textsuperscript{20} in which the constitutional right of privacy was held to encompass the sanctity of individual free choice and self-determination.\textsuperscript{21} According to the \textit{Saikewicz} court, the common law has long recognized the individual's right to be free from nonconsensual invasion of bodily integrity. One legal manifestation of this right is the doctrine of informed consent which protects the patient's dignity as a human being.\textsuperscript{22}

A. Preservation of Life

Addressing the state interest in preservation of life, the district

\footnotesize{
17. \textit{Id.}
18. 362 So. 2d at 162.
19. \textit{Id.}
20. 370 N.E.2d 417 (Mass. 1977). The Massachusetts Supreme Court allowed the non-treatment of a 67-year-old profoundly retarded ward of the state who suffered from incurable leukemia. Treatment had a 30-40\% chance of causing remission which would prolong life for 2 to 13 months. The court determined that the best interests of the patient indicated nontreatment. \textit{Id.} at 431-32. The adverse side effects of chemotherapy and the fear and discomfort the patient would experience due to his inability to understand or cooperate with the treatment was emphasized. \textit{Id.} The Court rejected any equation between quality of life and value of life. \textit{Id.} Compare \textit{Saikewicz with Roe v. Wade}, 410 U.S. 113 (1973), discussed infra.
21. 370 N.E.2d at 426.
}

court agreed with the Saikewicz court that an important difference exists between the state’s insistence that human life be saved if the person is curable, and the situation “‘where, as here, the issue is not whether, but when, for how long and at what cost to the individual [his] life may be briefly extended.’”23 The state interest in preserving life must be balanced against the traumatic cost of prolonging life.24 Advances in medical technology have raised serious questions concerning the best interests of patients. Life-prolonging measures often merely prolong suffering, isolate family members from the patient, and result in economic ruin.25 Even assuming that the state has an interest in protecting society from individual decisions which may tend to lessen the value of life, that value is not lessened by refusal of extraordinary medical treatment, according to the Saikewicz court, but rather by a denial of the individual right of choice under such circumstances.26 Perlmutter’s condition was terminal and wretched—sustained only temporarily by artificial means. The state had no interest in prolonging his suffering.27

B. Innocent Third Parties

The state’s interest in protecting innocent third parties usually arises when the patient has minor, dependent children28 or when the patient is pregnant.29 As interpreted by the Saikewicz court,

23. 362 So. 2d at 162 (quoting Saikewicz, 370 N.E.2d at 425-26; accord, Quinlan, 355 A.2d at 664, in which the New Jersey court expressed a similar view. See text at note 13 supra. Apparently, the degree of bodily invasion is equated with the extent to which the patient is sustained by life-support treatment. A blood transfusion was characterized by the Quinlan court as a minimal bodily invasion when chances of recovery are good. On the other hand, Quinlan’s need for 24-hour intensive care, antibiotics, respirator assistance, a catheter, and a feeding tube were described as a very great bodily invasion. 355 A.2d at 664. The state’s interest in life preservation is also weaker when balanced against the patient’s freedom to exercise religious beliefs by refusing treatment. See In re Osborne, 294 A.2d 372 (D.C. 1972).
24. 370 N.E.2d at 425.
25. Id. at 423.
26. Id. at 426. The Catholic Church expressed its view on the issue of death with dignity in an allocutio issued to anesthesiologists by Pope Pius XII in 1957 in which he stated that there is no obligation to use extraordinary means of preserving life or to give a doctor permission to use them. Quinlan, 355 A.2d at 658. See Note, supra note 22, at 604-07.
27. 362 So. 2d at 162.
28. In re Osborne, 294 A.2d 372, 374 (D.C. 1972) (the state’s interest was weakened since the minor children were adequately provided for in the event of the patient’s death).
29. In re Melideo, 390 N.Y.S.2d 523 (App. Div. 1976). In Melideo, the refusal of a patient to submit to a blood transfusion was upheld in part because she had no children and was not pregnant. The Melideo court cited a 1964 case, Raleigh Fitkin-Paul Morgan Memorial Hosp. v. Anderson, 201 A.2d 537 (N.J. 1964), cert. denied, 377 U.S. 985 (1964), as authority for its pregnancy rationale, 390 N.Y.S.2d at 524, without addressing the impact of
the state, as parens patriae, has an interest in protecting minor children and other innocent parties from the emotional and financial damage which may result from the patient's refusal of life-saving or life-prolonging treatment.\textsuperscript{30} Abe Perlmutter had no minor dependents, so the state had no third party interest, as defined by \textit{Saikewicz}, to protect.\textsuperscript{31}

C. Prevention of Suicide

Florida's interest in preventing suicide is not statutorily expressed. Florida law, however, imposes criminal liability for manslaughter on anyone deliberately assisting another in self-murder.\textsuperscript{32} The state argued that Perlmutter's discontinuance of life-prolonging treatment would constitute self-murder and that anyone aiding him in disconnecting the respirator would be subject to civil and criminal liability.\textsuperscript{33}

The district court rejected this conclusion, and found that disconnecting the respirator was not an unnatural "death-producing agent" but was merely death by natural means, especially since Perlmutter's affliction was not self-induced.\textsuperscript{34} Furthermore, Perlmutter had no \textit{intent} to die. Rather, he wished to live, but under his own power.\textsuperscript{35} Consequently, his discontinuance of treatment could not be characterized as suicide or self-murder.\textsuperscript{36} Perlmutter's right to discontinue treatment was found to be more analogous to

\begin{flushleft}
Roe v. Wade, 410 U.S. 113 (1973). In \textit{Anderson}, authority was granted the hospital to administer a blood transfusion to a pregnant patient who had refused the transfusion on religious grounds. The court found that the unborn third trimester child was entitled to legal protection. Arguably, under Roe, the state's authority to treat a pregnant woman against her will in order to preserve the fetus is less compelling in the early stages of pregnancy. See Roe, 410 U.S. at 163.
30. 370 N.E.2d at 426.
31. 362 So. 2d at 162.
33. 47 Fla. Supp. at 193-94. For a discussion of common law suicide concepts in this context, see \textit{Byrn}, \textit{Compulsory Lifesaving Treatment for the Competent Adult}, 44 FORDHAM L. REV. 1, 16-24 (1975). The common law elements of suicide are the specific intent to die and the self-infliction of a death producing agent. Id. at 16.
34. 362 So. 2d at 162-63. The Sackewicz court had also noted a distinction between situations where withholding extraordinary treatment may be viewed as letting the disease take its natural course and situations where the same action may be deemed the cause of death. Examples of such situations were not provided. 370 N.E.2d at 423. Similarly, the Quinlan court saw a distinction between self-infliction of deadly harm and refusal of artificial life support in the face of irreversible, painful, and certain imminent death. 355 A.2d at 665.
35. 362 So. 2d at 162-63. The implication is that the patient must expressly indicate the will to live to alleviate concern that the patient might be attempting suicide.
36. 362 So. 2d at 163.
\end{flushleft}
his right to refuse treatment initially. There is no legal require-
ment that a competent, mortally ill patient undergo treatment for
temporary prolongation of life. Since Abe Perlmutter had the right
to initially refuse treatment, the court reasoned, he also had the
right to discontinue it.\textsuperscript{37}

\textbf{D. Medical Ethics}

The district court relied again on the reasoning of \textit{Saikewicz} for
its analysis of the state's interest in protecting medical ethics.\textsuperscript{38}
The Supreme Judicial Court of Massachusetts found that the state
interest in maintaining the integrity of the medical community by
allowing medical personnel to exercise their professional judgment
in caring for people under their control is lessened where prevail-
ing medical standards protect that integrity. Current medical stan-
dards do not require that all possible efforts to prolong life be
made in all circumstances.\textsuperscript{39} Physicians, exercising their profes-
sional judgment, make a distinction between curing the ill and
comforting the dying, and may refuse to treat the dying as if they
were curable.\textsuperscript{40} The use of extraordinary life-prolonging treatment
is not required when there is no hope of recovery, and according to
the \textit{Saikewicz} court, recovery should be defined as the ability to
live without intolerable suffering, rather than the mere ability to
remain alive.\textsuperscript{41} Acknowledging a right to refuse treatment under
appropriate circumstances does not threaten the proper role of
medical personnel in caring for such patients. Protection of the
role of the medical profession does not require a sacrifice of the
right of individual self-determination.\textsuperscript{42}

In concluding that none of these valid state interests prevailed
over Perlmutter's rights of privacy and free choice, the district

\textsuperscript{37} \textit{Id.} For a discussion of ethical and legal problems of doctors resulting from patient's
dright to refuse treatment, see Byrn, \textit{supra} note 33, at 29. \textit{See also} Note, \textit{supra} note 22, at
585-89.
\textsuperscript{38} 362 So. 2d at 163.
\textsuperscript{39} 370 N.E.2d at 426-27. \textit{See} Collester, \textit{Death, Dying and the Law: A Prosecutorial
\textsuperscript{40} 370 N.E.2d at 423. The \textit{Quinlan} court also recognized this concept as a part of pre-
vailing medical ethics. Although medical science is not authorized to cause death, it also is
not expected to prevent death when it is imminently inevitable and when a return to the
exercise of human life is not possible. 355 A.2d at 659.
\textsuperscript{41} 370 N.E.2d at 424. Who defines "suffering"? Does this standard apply to those who
suffer but remain alive independent of extraordinary means?
\textsuperscript{42} \textit{Id.} at 426-27. \textit{See} Collester, \textit{supra} note 39, at 304-13. Historically, courts have been
reluctant to impose criminal liability on anyone for euthanasia. \textit{Id.}
court stated that it would be “all very convenient” to insist on Perlmutter’s continued existence in order to prevent foul play and to protect medical ethics: “However, it is quite another matter to do so at the patient’s sole expense and against his competent will, thus inflicting never ending physical torture on his body until the inevitable, but artificially suspended, moment of death.” Continuing in the same vein, the court concluded that, although this was a matter of great public interest, the “exigencies of this situation” required resolution without certification to the Florida Supreme Court.

III. SUPREME COURT REVIEW

Nevertheless, the Florida Supreme Court reviewed Satz v. Perlmutter and adopted the opinion of the district court. On review, counsel for the state asserted that Perlmutter had no constitutional right of privacy as recognized by the district court, and that the complexity of this issue rendered it unsuitable for judicial resolution. On the other hand, counsel for the decedent and for the attending physician urged comprehensive judicial resolution as a guide to the future conduct of hospitals, physicians, public officials, and citizens.

The court recognized the validity of each of these contentions but considered the complexity of the legal, medical, and social issues involved better suited to the legislative forum where all viewpoints could be presented and accommodated. Contradicting its own conclusion, though, the court indicated that legislative inaction would not prevent judicial enforcement of constitutional rights. In the absence of legislative resolution, the court would continue to deal with the death-with-dignity issue on a case-by-case basis.

43. 362 So. 2d at 164.
44. Id. Perlmutter disconnected his respirator on October 4, 1978. He died on October 6, 1978. Brief for Petitioner at 4, 379 So. 2d 359 (Fla. 1980).
45. 379 So. 2d 359 (Fla. 1980). Fla. Const. art. V, § 3(b)(3) grants authority to review by certiorari any district court decision that affects constitutional officers, such as state attorneys in the exercise of their duties.
46. 379 So. 2d at 360.
47. Perlmutter’s attending physician filed a brief on behalf of the medical profession of the State of Florida. Brief for Respondent at 4, 379 So. 2d 359 (Fla. 1980).
48. 379 So. 2d at 360.
49. Id.
50. Id.
A. Right of Privacy

In admitting its duty to enforce constitutional rights the court impliedly recognized the right asserted—a right of privacy in terminating medical treatment. Yet Florida’s Constitution has no express reference to a right of privacy.\(^5\) Furthermore, in *Laird v. State*\(^6\) the court refused to broaden the right of privacy in Florida beyond those aspects of personal decisionmaking such as marriage and contraception which are recognized by the United States Supreme Court.

Nonetheless, by adopting the district court’s opinion which was based on the reasoning of *Quinlan* and *Saikewicz*, the court apparently conceded a right of personal privacy broader than that expressly recognized by the United States Supreme Court. The *Quinlan* and *Saikewicz* courts both relied on *Roe v. Wade*\(^8\) as authority for extending the right of privacy from unwanted bodily invasion to terminally ill patients.\(^4\) The Supreme Court itself had laid a predicate for broadening personal rights. It found that personal rights cognizable as “fundamental” or “implicit in the concept of ordered liberty” are included within the right of privacy.\(^6\) The Court in *Roe* extended that right of privacy to a woman’s decision to terminate pregnancy in the absence of compelling state interests.\(^6\) The *Roe* Court and the *Perlmutter* court both engaged in a

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51. Neither does art. I, ¶ 1 of the New Jersey Constitution expressly include a right of privacy. The *Quinlan* decision, on which the Florida court relied, states, however, “nor is such a right of privacy forgotten in the New Jersey Constitution.” 355 A.2d at 663.

As this article goes to press, the Florida Legislature has passed Fla. CS for HJR 387 (1980), a joint resolution proposing the creation of FLA. CONST. art. I, § 23 relating to the right of privacy. The language of the provision is virtually the same as that proposed in 1978 and rejected by Florida’s electors. The 1978 proposal, however, was part of a package of fifty amendments subject to a single yes or no vote by electors, and may not be indicative of the response of the electors to the current proposal. See *Shevin v. Byron, Harless, Schaffer, Reid & Assoc., Inc.*, 379 So. 2d 633, 641 (1980) (England, C.J., dissenting). For an analysis of the scope and effect of the 1978 proposal see *Cope, To Be Let Alone: Florida’s Proposed Right of Privacy*, 6 FLA. ST. U.L. REV. 671 (1978). The current proposal will be placed on the November 1980 ballot for approval or rejection by the voters.

52. 342 So. 2d 962, 965 (Fla. 1977). The Florida Supreme Court recognized the right of privacy in matters relating to marriage, procreation, contraception, family relationships, child rearing, and education. Id. Claims of a state constitutional right to disclosural privacy were refused in *Shevin v. Byron, Harless, Shaffer, Reid & Assoc., Inc.*, 379 So. 2d 633 (Fla. 1980). The *Shevin* court demonstrated the continuing applicability of *Laird* by citing *Laird* for the proposition that Florida recognizes no general constitutional right of privacy. 379 So. 2d at 639.


54. 355 A.2d at 663; 370 N.E.2d at 424.

55. 410 U.S. at 152.

56. *Id.* at 163.
balancing of interests, but unlike the *Perlmutter* court, the *Roe* Court had no hesitancy in setting forth explicit guidelines.

In the first trimester of pregnancy the woman’s decision to terminate a pregnancy is absolute and free of state interference. In the second trimester the state has a compelling interest in the mother’s health and safety due to higher mortality rates in abortions after the first trimester. Thus the state may regulate the place and manner of abortion procedures. In the third trimester of pregnancy the state’s interest in “potential” life of the fetus becomes compelling. Consequently, at that point, the state may even prohibit abortion unless the mother’s life or health is in danger.

The *Roe* Court acknowledged the woman’s interest in avoiding a possibly distressful life and future stemming from an unwanted child. The Court thereby apparently placed greater weight on the quality of maternal life than on the mere fact or potentiality of fetal life. The concepts of quality of life and personal decisionmaking underlying the right of privacy are central to the extension of this right to the terminally ill patient. What could be a more fundamental personal decision than the choice to die, especially when faced with prolonged suffering and certain, imminent death? The terminally ill patient sustained by life-support systems may be compared to the fetus during the first trimester of pregnancy; both are incapable of independent, meaningful existence. Not until the fetus reaches viability, defined by the *Roe* Court as occurring at the third trimester, and is capable of meaningful autonomy outside the mother’s womb, does the state’s compelling interest in life preservation attach. Although the Court’s focus in *Roe* was the preservation of “potential” life, the preservation of imminently terminal life is not dissimilar. In the face of imminent, inevitable death with no reasonable hope of recovery, the state theoretically loses its interest in preserving the potential for a return to meaningful, autonomous life and, instead, assumes the same stance with regard to the terminal patient that it holds toward the first trimester fetus.

57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.* at 153. Other elements of health recognized by the Court, and presumably authorizing abortion, are the mental and physical health burden of child care and the stigma of unwed motherhood. *Id.*
61. *Id.* at 163. But if there is no state interest in preserving life which is not autonomous and meaningful, is patient consent in cases of terminal illness unnecessary?
62. See generally Cantor, Quinlan, Privacy and the Handling of Incompetent Dying
The Perlmutter court, though, merely implied a recognition of this aspect of the constitutional right of privacy and its corresponding right to die. As a result, lurking in Florida's legal forest are two enigmatic creatures whose genus and species remain unclassified. The court declined either to define these enigmatic rights or to provide standards for their implementation by doctors, hospitals, or patients, preferring to leave these tasks to the legislature.63

B. Limitations on the Right of Privacy

1. Ethics Committees

While the Perlmutter court deferred to the legislature, the Quinlan court took a different approach. It noted that courts generally must accept the responsibility of fashioning remedies for those in need of protection, regardless of the novelty of the questions presented.64 Requiring constant recourse to the courts for resolution of similar situations would be both cumbersome and an unwarranted intrusion into the medical profession's field of competency.65 The New Jersey court then proposed that these difficult decisions affecting incompetent patients could be made by families, patients, and doctors through resort to a hospital ethics committee composed of physicians, social workers, attorneys, and theologians. Use of an ethics committee would diffuse professional responsibility, provide for diverse knowledge and views, protect against abuse, and be in accordance with accepted medical practice. Such an arrangement, according to the Quinlan court, would be acceptable to society and the courts.66

Under the Quinlan court's proposal, the decision to terminate medical care is a two-step process. First, the attending physician determines that there is no reasonable possibility of the patient's recovery and that there is no positive value to continued treatment.67 Second, upon concurrence of the family, the hospital ethics

63. 379 So. 2d at 360.
64. 355 A.2d at 665.
65. Id. at 669.
67. 355 A.2d at 671-72.
committee is consulted, and if the committee agrees with the physician, life support systems may be withdrawn without civil or criminal liability. If indeed the right to terminate life-prolonging treatment is comparable to the right to terminate pregnancy in the first trimester without state regulation, the New Jersey court's ethics committee proposal is at least constitutionally suspect according to the Supreme Court's decision in Doe v. Bolton.

In Doe a Georgia abortion statute which, in pertinent part, required advance approval from an abortion committee composed of at least three members of the hospital staff was held unconstitutional. The Court found such a requirement redundant since the patient and her physician had already determined the best course of action for the patient. Review by a committee once removed from the diagnosis was recognized as an unwarranted interference with the patient's right to receive and the doctor's right to administer medical care in accordance with the doctor's own best judgment. Review and consent by a hospital ethics committee as proposed by the Quinlan court is not consistent with the concept of individual free choice recognized by the Saikewicz and Perlmutter courts.

2. Consent

The Perlmutter court inadvertently may have created an equally suspect solution. In limiting its opinion to the particular facts of the case presented—where a competent adult patient, with no minor dependents and with the consent of all adult family members, suffers from a terminal illness and seeks to exercise his right to refuse or discontinue extraordinary medical treatment—the court unwittingly provided standards, without thought of their applicability or viability.

The court effectively extended the right of privacy, including the right to discontinue extraordinary life-prolonging treatment, to a very narrow class of individuals. Claiming to clarify its holding, the Florida Supreme Court raised more questions than it answered. What relatives are contemplated by the term "adult family"? How

68. Id. Compare Quinlan with the holding in Saikewicz requiring judicial resolution of this issue, at least where the patient is incompetent. 370 N.E.2d at 435.
70. Id. at 184.
72. 379 So. 2d at 360.
and by whom are the terms “terminal illness” and “extraordinary medical treatment” to be defined? If the right of privacy is a personal right, may its exercise by a competent adult patient be constitutionally prevented if members of his adult family refuse to consent?

If the earlier analogy to abortion decisions is operable, a requirement of family consent may be as constitutionally suspect as the Quinlan court’s proposed ethics committee. In Planned Parenthood v. Danforth the Supreme Court refused to uphold two comparable provisions in a Missouri abortion statute. One provision required written spousal consent for a first trimester abortion unless the abortion was necessary to preserve the mother’s life. The Court invalidated this requirement, reasoning that the state may not do indirectly what it cannot do directly. Since the state may not regulate a first trimester abortion, it may not delegate to the spouse unilateral authority to prohibit this personal decision.

The second invalid provision in the Missouri statute required written parental consent for a first trimester abortion performed on an unmarried minor unless the abortion was necessary to preserve the minor’s life. Again the court held that the state could not constitutionally give a third party absolute and arbitrary veto power over the decision of a physician and a patient to terminate her pregnancy.

The court did, however, uphold a requirement that prior to a first trimester abortion, the woman must consent in writing and certify that such consent is informed and freely given. Since the decision to abort is such a major and stressful one, evidence of full

73. The Quinlan court recognized that these decisions have traditionally been the responsibility of the medical profession exercising its best judgment in the patient’s interests. 355 A.2d at 667-68.
75. Id. at 67-68.
76. Id. at 69.
77. Id. at 70. In so holding, the Supreme Court rejected the state’s asserted compelling interest in protecting the mutuality of decisionmaking vital to preservation of the marital relationship and the institution of marriage. Id. at 71.
78. Id. at 72.
79. Id. at 74. The Supreme Court acknowledged the state’s authority to regulate the activities of children more broadly than the activities of adults. Id. Nevertheless, the Court rejected the state’s assertion that the parental consent provision protected the family unit and parental authority. The parent’s interest in the abortion decision is outweighed by the privacy interest of a competent minor. Id. at 75. The Court stressed, though, that its holding did not mean that every minor, regardless of age or maturity, could effectively consent to an abortion. Id.
knowledge of its nature and consequences may constitutionally be required by the state.\textsuperscript{80}

In \textit{Scheinberg v. Smith}\textsuperscript{81} the United States District Court for the Southern District of Florida invalidated a Florida provision which required that the woman's spouse, unless separated or estranged, be given notice of a first trimester abortion and an opportunity to consult with his wife concerning the abortion decision. The court observed that, according to \textit{Roe} and the cases following \textit{Roe}, the state may not unduly burden first trimester abortion decisions without a compelling reason.\textsuperscript{82} Regulation that does not unduly burden the decision, however, need only reasonably further a proper state purpose.\textsuperscript{83} The court rejected the state's asserted purpose of preserving the marital relationship and the husband's procreative interest,\textsuperscript{84} and recounted a number of circumstances where a woman might not want to notify her husband of the abortion decision.\textsuperscript{85} The court concluded that the spousal notice requirement was not per se unconstitutional. As drafted, though, it was overinclusive and hence failed to meet constitutional requirements.\textsuperscript{86}

If the right of a competent terminally ill patient to reject life-prolonging treatment is as personal and absolute as the right to terminate pregnancy in the first trimester, it appears that, absent a compelling state interest, this right would not be subject to third party intervention in the form of required familial consent.

\textsuperscript{80} Id. at 67. Likewise, in Bellotti v. Baird, 443 U.S. 622 (1979), the Court invalidated a Massachusetts parental consent statute. The Massachusetts statute provided the alternative of judicial consent if the parents withheld consent or were unavailable, and if the judge determined that abortion was in the minor's best interests. Id. at 625. The Massachusetts statute was found lacking in two respects. It allowed judicial denial of an abortion even if the minor was found to be competent to make an independent decision, and it required parental consultation or notification in all instances, without affording the minor an opportunity to receive a judicial determination of maturity. Id. at 647-51.

\textsuperscript{81} 482 F. Supp. 529 (S.D. Fla. 1979).

\textsuperscript{82} Id. at 537.

\textsuperscript{83} Id.

\textsuperscript{84} The court held the statute was not sufficiently narrow to protect the procreative interest since it was "predicated upon husbandry rather than fatherhood." Id. at 540.

\textsuperscript{85} For example, where the fetus is the product of an extramarital affair, or where the husband is seriously ill or emotionally unstable. Id. at 538.

\textsuperscript{86} Id. at 540.
IV. LEGISLATION

A. Express Constitutional Rights

If the intention of the Perlmutter court in refusing to provide broader guidelines was to prod the legislature into action on the death-with-dignity issue, a brief review of the history of Dade County Classroom Teachers’ Association v. Legislature,87 on which the Perlmutter court relied for authority to enforce constitutional rights,88 is instructive. In 1968, the right to collectively bargain was granted as part of a constitutional revision.89 In 1969, the Florida Supreme Court urged the legislature to enact standards and guidelines for implementing this right.90 The legislature failed to act, and in 1972, the Dade County Classroom Teachers’ Association court faced a request to appoint a commission to recommend bargaining guidelines for the court. It declined to do so unless the legislature refused to act within a reasonable time.91 The 1973 legislature again failed to act, and the court appointed its commission which presented proposed guidelines in 1974.92 In response to this court action, six years after the right to collectively bargain was expressly granted, the legislature finally acted to implement this right.93 It is difficult to believe that the gentle nudge of Perlmutter will cause the legislature to act on an issue as complex and emotional as the right to die, when they had to be driven to implement an express constitutional right.

Senate President Phil Lewis’ reaction to Perlmutter may reflect the legislature’s attitude. Although he agreed that the legislature should look at the issue, he predicted that it would be engulfed in controversy. Lewis suggested that the question should be handled

87. 269 So. 2d 684 (Fla. 1972). The Dade County Classroom Teachers’ Association petitioned the court for a writ of mandamus to compel the legislature to enact collective bargaining legislation. Id. at 685.
88. In Dade County Classroom Teachers’ Ass’n, the court stated that it was primarily the duty of the legislature to provide the ways and means of enforcing such express rights. When the legislature fails to do so, the courts must; otherwise a constitution would be a meaningless document. 269 So. 2d at 686.
90. Dade County Classroom Teachers’ Ass’n v. Ryan, 225 So. 2d 903, 906 (Fla. 1969). In Ryan, the Florida Supreme Court held that the right to collectively bargain applied to both public and private employees. Id. at 906.
91. Dade County Classroom Teachers’ Ass’n, 269 So. 2d at 688.
92. McHugh, supra note 89, at 268.
93. Id.
by the courts on a case-by-case basis.\textsuperscript{94}

\textbf{B. Death-with-Dignity Legislation}

The Florida Legislature's failure to take action on any of the death-with-dignity bills introduced each year since 1969 indicates either a lack of ability or a lack of desire to resolve the issue.\textsuperscript{95} Ten states currently have death-with-dignity legislation, commonly referred to as Natural Death Acts.\textsuperscript{96} These acts generally provide guidelines by which patients can execute directives for the withholding or withdrawal of life-sustaining procedures under certain circumstances. These statutes also exempt physicians and other health professionals from liability for complying with the directives.\textsuperscript{97}

Some acts make the directives legally binding on the doctor only if executed or re-executed after the patient is diagnosed as terminal; otherwise the directive is merely advisory.\textsuperscript{98} California's act requires execution fourteen days after diagnosis of a terminal condition for the directive to be legally binding.\textsuperscript{99} Other acts simply require execution at a time when the patient is capable of rational decisionmaking.\textsuperscript{100} Executing a directive under all acts requires ob-

\textsuperscript{94} Tampa Tribune, Jan. 18, 1980, at 5A, col. 5.

\textsuperscript{95} Fla. SB 446 (1980); Fla. HB 463 (1980); Fla. HB 740 (1979); Fla. HB 8 (1978); Fla. HB 374 (1977); Fla. SB 513 (1976); Fla. HB 3703 (1976); Fla. HB 239 (1975); Fla. HJR 3007 (1974); Fla. HB 407 (1973-74); Fla. HB 2614 (1972); Fla. HB 68 (1971); Fla. HB 3184 (1970); Fla. HJR 91 (1969).


\textsuperscript{97} Comment, supra note 96, at 772-81.


\textsuperscript{99} Cal. Health & Safety Code § 7191 (West Supp. 1980). See generally Note, supra note 22, at 593-96 (physical, emotional, and psychological effects of the illness on a patient may seriously affect the capacity for rational judgment, especially as the illness progresses); Note, The California Natural Death Act: An Empirical Study of Physicians' Practices, 31 Stan. L. Rev. 913, 928 (1979) (physicians surveyed indicated that only about one-half of the dying patients remain conscious for fourteen days after diagnosis).

servance of formalities very similar to those of executing a will.\(^\text{101}\) Under the majority of acts, the directive is in force unless revoked;\(^\text{102}\) however, California, Idaho, and Oregon require re-execution after five years.\(^\text{103}\) The time at which the document becomes controlling is most often based on a certification of terminal condition by two physicians.\(^\text{104}\) Three acts, however, require a diagnosis that death is imminent.\(^\text{105}\) Several statutes require the doctor to either follow the directive or transfer the patient to a doctor who will.\(^\text{106}\) Arkansas, New Mexico, and North Carolina provide for special circumstances under which family members or a guardian may assert the patient's legal rights.\(^\text{107}\)

These attempts to legislate in such a delicate legal area sometimes have produced additional problems for patients and doctors.\(^\text{108}\) Doctors may misinterpret the legal implications of the act,\(^\text{109}\) or terms not clearly defined may result in disparate application of the act.\(^\text{110}\) The Quinlan court commented that it is not unusual in the medical community for doctors and other health care professionals to terminate or withhold extraordinary treatment in terminal cases without resort to the law.\(^\text{111}\) Some doctors therefore find that death-with-dignity legislation is an unwarranted intrusion into the personal doctor-patient relationship, and, as such, is

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102. Id.


109. Horan, supra note 96, at 491, 494. Physicians may assume that the lack of a directive prevents them from exercising their independent professional judgment as to the patient's best interests. Some acts require the physician to determine whether the directive complies with the legal requirements of execution prior to giving effect to it. Such a stipulation requires doctors to perform inordinate legal investigations into the circumstances surrounding the document's execution, a task for which physicians are not trained and for which they should not have to bear responsibility. Id.


111. 355 A.2d at 667.
an infringement on the exercise of professional judgment.\textsuperscript{112}

These problems, though, should not bar effective legislation in an area where guidelines are badly needed.\textsuperscript{113} After three years with natural death legislation in operation in a number of states, the fears of abuse and interference with the doctor-patient relationship have proved largely groundless.\textsuperscript{114} The primary problem with such legislation appears to be a general lack of awareness of the law or a lack of understanding about how to exercise one's right.\textsuperscript{115} Consequently, Washington State's Office of Program Research began an extensive educational campaign after that state's act became effective on June 7, 1979. The office prepared guidelines for physicians and declarants setting forth in simple terms the procedures for executing and implementing the directives. A voluntary network for distribution was devised with the help of professional organizations, senior citizen groups, consumer organizations, churches, and social service agencies.\textsuperscript{116}

Yet, in the absence of legislation or clearly formulated judicial guidelines Florida's citizens, especially its substantial elderly population and its medical community, may question the motives of a court which attempts to clarify its duty to enforce constitutional rights by passing an emotional hot potato to the legislature. If Senate President Phil Lewis' sentiments are representative, the legislature will probably pass it right back.

V. Conclusion

If the courts are not the proper place to resolve the general issue, and the legislature won't resolve it, patients, families, and doctors are placed in an agonizing dilemma. Faced with the physical, emotional, and economic burdens of life-prolonging medical decisions, they have two choices: act in their own best judgment and face legal uncertainty, or endure the additional delay and expense of litigation. Advances in medical science which allow doctors and hospitals greater and greater control over the time and conditions

\footnotesize{112. Horan, supra note 96, at 490.}

\footnotesize{113. But see Horan supra note 96, at 490-93. The author views legislation as counter-productive.}

\footnotesize{114. Manual, supra note 96, at 21.}

\footnotesize{115. Id.}

\footnotesize{116. Id. at 15.}
of death will only continue to compound the uncertain status of the rights of the terminally ill.

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