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Give Me Liberty and Give Me Death: The Right to Die and the California Natural Death Act

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GIVE ME LIBERTY AND GIVE ME DEATH:
THE RIGHT TO DIE AND THE CALIFORNIA
NATURAL DEATH ACT

Of all the wonders that I yet have heard,
It seems to me most strange that men should fear;
Seeing that death, a necessary end,
Will come when it will come.

Shakespeare
Julius Caesar
Act II, Scene II

INTRODUCTION

When Shakespeare wrote Julius Caesar, men had no need to worry about their right to die. It was inevitable. Then, as now, death was a subject both fascinating and repelling. Fascinating because of its mystery, it was, nevertheless, something to be dreaded. Today, the problems surrounding death have taken on dimensions not possible in the sixteenth century. Twentieth century medical technology challenges the inevitability of death. With respirators, transplants, and “miracle drugs,” people can be kept “alive” long past any point imagined by those living only fifty years ago. For many, these new procedures are a miracle. Vaccines for diseases like smallpox and polio, new treatments for measles, and a host of other medical developments, have meant that many who would have died or have been seriously impaired can live out their lives normally. These “miracles” are a nightmare for others. The same procedures and machines that bring life to the young often give to the terminally ill only an extension of their pain. Often they are physically dependent on others. When these people ask to have the treatments stopped, the machines removed, to simply “be left alone,” society’s answer is, too often—no.

The answer should be yes, but many courts are afraid the right to die, or so called “passive euthanasia,” will result in

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1. The right to die argued for in this comment is that generally referred to as
eugenics or criminal and civil liability for medical personnel. Since the judiciary is reluctant to recognize the right to die, legislative action is needed. This comment will focus in turn on the philosophical issues presented by the right to die, the constitutional basis for the right, and California's attempt to resolve the issue through legislation.¹

PHILOSOPHICAL FRAMEWORK

The law is society's means of protecting and enforcing fundamental values. To develop a system that effectively implements those values, the values themselves must be examined and understood. American society holds liberty as its most fundamental value. The right to die falls under the protection of liberty. Predictably, many treatments of this issue by courts and commentators have been confused, emotional responses to a sensitive subject.² The values affected by the right to die must be analyzed before a legal solution to this problem can be developed. The analysis in turn considers two aspects of the right to die: how the right derives from liberty; and what considerations justify limitation of the right.

Liberty and the Right To Die

The right to die, along with privacy, the right to bodily integrity, and several other constitutionally protected rights,
RIGHT TO DIE

falls under the umbrella of liberty.

The concept of liberty encompasses two basic types of freedom: "freedom from" and "freedom to." "Freedom from" is the absence of restraint, sanction, or interference generally in a person's life. Freedom from external impediments was highly prized by the philosophers of the seventeenth century. This freedom, said Hobbes, was the underlying reason for the formulation of societies—that men might be free from the restraints that made life in a state of nature nasty, brutish, and short. The philosophers of The Enlightenment supplemented this emphasis on "freedom from" by developing an emphasis on the "freedom to." The two concepts are interrelated because freedom from interference is often a prerequisite to exercise of the freedom to do or act. If a man wishes to espouse a particular political belief, and to convey that belief to others, he must be free. Free from physical restraint by those who disagree with his views. Unless men are physically able to act, by virtue of a freedom from restraints, the freedom to do cannot exist. The freedom to do guarantees the right of individual choice. It is through choice that this freedom is primarily exercised. "Freedom from" prevents one person from imposing his values and ideas upon another. It thus guarantees an individual the right to control the course his own life will take.

The right to privacy lies within both "freedom from" and "freedom to." Privacy affords an individual protection for intimate matters. In a positive, "freedom to" sense, privacy offers the right to make choices about intimate matters. The negative, "freedom from" aspect of privacy guarantees the right to be left alone while making and exercising these choices. A specific instance of the right to be left alone is the right to be free from bodily invasion, such as forced medical treatment. The positive concomitant of this is the right to choose what medical treatments will be administered.

4. See, e.g., IV B. DeSpinoza, ETHIC OF BENEDICT DESPINOZA (1927); J. Locke, SECOND TREATISE ON CIVIL GOVERNMENT (1955).
6. "Enlightenment is primarily a cultural historian's broad designation for a historical period, roughly the eighteenth century, in Western society. As a cultural period it is more closely linked with . . . formal philosophical thought than any other in the West." 2 THE ENCYCLOPEDIA OF PHILOSOPHY 519 (1967).
The right to die, like the privacy right, can be thought of as an aspect of both "freedom from" and "freedom to." It is an extension of "freedom from" as it is a specific exercise of the right to be free from bodily invasion. It falls under "freedom to," because it is a positive choice, made by an individual, to allow nature's course in death.

How Much Liberty? Limiting Liberty and the Right To Die

American society has accepted the value of liberty axiomatically. In the words of J.S. Mill, "It is useful . . . that the worth of different modes of life should be proven practically, when anyone thinks fit to try them. It is desirable, in short, that . . . individuality should assert itself." Furthering liberty is good. There is an inherent tension, however, between unrestrained individual liberty and the rights of other members of society. Thus, some constraints must be placed on an individual's freedom to act, but how can we best choose the limits to place on our actions?

One method advanced for constructing limitations is the formulation of positive directives. A chosen few decide that which they think to be the best mode of living. All others in the society then conform their behavior to the prescribed set of standards. This approach often underlies the arguments of those who would deny to people the right to die. At least one court has decided that life is better than death. The individual, therefore, must conform. His choice of death is not in his best interest, in the opinion of those who have set the standards. Yet, this method of choosing limitations is too restrictive. Certainly if liberty is good, and to be fostered, the best formula for setting limitations would be one allowing the greatest amount of freedom, while still avoiding the dangers of absolute freedom.

The potential danger inherent in absolute freedom seems to be the threat of harm to one (or more) member of society through the exercise of freedom by another member. Harm, then, is to be the yardstick by which limitations on a man's

11. See, e.g., id.
freedom to act are measured. Again, Mill writes:

The sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their members, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.¹²

How much harm and what kind of harm justifies societal interference with a person’s actions? Since liberty occupies a place of paramount importance, the harm that must be shown to override it is substantial. Actions that would cause substantial interference with the right of another to pursue his life would seem to be great enough to override a person’s otherwise paramount right to liberty. The harms inherent in murder or theft would justify society in restraining one of its members from acting. Minor forms of harm, such as displeasure caused by the style of another’s clothing, or sadness caused by disappointments such as unrequited love, that are really annoyances or vexations rather than harms, would not justify restraints on freedom to act.

Using the harm yardstick, one must ask whether there is a justification for preventing exercise of the right to die? An elderly patient is suffering from terminal cancer and wishes to exercise his right to die. What effect will his choice have upon other members of society?

The first and most obvious harm that might flow from a person’s exercise of the right to die is society’s loss of a contributing citizen. Yet, this patient is dependent upon equipment to continue his existence, and because this equipment is available to him only while he is physically confined, society will not be deprived of his physical labor. The patient, however, may still be capable of making useful mental contributions. Is society’s loss of the patient’s mental labor a sufficient harm to warrant refusal of the right to die? American society does not force its members to perform simply because they are capable of making a particular contribution.¹³ Addition-

¹² J. Mill, supra note 8, at 13.
¹³ "The notion that the individual exists for the good of the state is, of course, antithetical to our fundamental thesis that the role of the state is to ensure a maximum of individual freedom of choice and conduct." In re Osborne, 294 A.2d 372, 375 n.5 (D.C. Cir. 1972).
ally, the quality of forced mental labor would likely be poor.\textsuperscript{14} The effect of this loss on society is not substantial enough to suspend the patient's right to die.

What effect will the patient's choice have on the medical personnel involved in caring for him? Two possibly negative results might stem from a patient's right to die: liability and violation of personal or ethical standards. Criminal and civil liability can be eliminated by judicial or legislative provision. Along with this provision absolving medical personnel from liability, a provision preventing violation of personnel standards can be included. Medical personnel so wishing could be relieved from participating in the effectuation of the patient's choice to die. If these two potential harms can be so easily remedied, they do not justify denying the patient's liberty.

Finally, we must examine the effect of the patient's choice on his family and friends. Some may be happy because he will no longer be suffering. Others, however, may be distressed by his death. Although the emotional distress caused by the death of a friend or relative affects a person's life, that harm is not great enough to outweigh the patient's interest in controlling his body and choosing to die. Philosophically, therefore, prohibition of the right to die cannot be justified.

\textbf{A CONSTITUTIONAL RIGHT TO DIE}

\textit{Support for a Constitutional Right To Die}

Although most courts have not recognized a right to die based on the constitutional right of privacy, support for this right exists, both in the United States Constitution and in case law.

The Bill of Rights\textsuperscript{15} contains several provisions that expressly guarantee aspects of the privacy right. The first amendment guarantees freedom of speech,\textsuperscript{16} of the press,\textsuperscript{17} and of religious exercise.\textsuperscript{18} These rights are generally thought of as guaranteeing a right to make a positive choice. They also implicitly guarantee a right to be free from interference or

\begin{itemize}
  \item[14.] See A. SOLZHENITSYN, THE FIRST CIRCLE (1968), for perspectives on the Soviet Union's experiences with this coercion of mental labor.
  \item[15.] U.S. CONST. amends. I-X.
  \item[16.] U.S. CONST. amend. I, cl. 3.
  \item[17.] U.S. CONST. amend. I, cl. 4.
  \item[18.] U.S. CONST. amend. I, cl. 2.
\end{itemize}
sanction while exercising that right of positive choice. The third, fourth, and fifth amendments provide explicit guarantees of specific instances of the right to be left alone. Additionally, the fourteenth amendment, with its guarantee of liberty, confers the right of privacy, since privacy is subsumed by liberty. Justice Brandeis recognized that these guarantees were intended to secure the right to be left alone. In his dissent in Olmstead v. United States, Justice Brandeis observed that by these amendments the "makers of our Constitution . . . conferred, as against the government, the right to be left alone."

More recently, the Court has found a constitutionally protected interest in a situation closely analogous to that of the right to die—the abortion cases, Roe v. Wade and Doe v. Bolton. In Roe v. Wade, the Court cited several cases dealing with matters protected by the right of privacy. Most of the cited cases involved intimate decisions or other important matters dealing with family life and procreation. In particular, Eisenstadt v. Baird suggests that the right to be left alone extends to other decisions involving matters that are intimate and important. In that case the Court described the

21. "The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated . . . ." U.S. Const. amend. IV, cl. 1.
22. "No person shall . . . be compelled in any criminal case to be a witness against himself . . . ." U.S. Const. amend. V, cl. 5.
23. U.S. Const. amend. XIV, § 1, cl. 3.
25. Id. at 478 (Brandeis, J., dissenting). See note 30 infra.
30. In Eisenstadt the Court quotes with approval the following portion of Justice Brandeis' dissent in Olmstead:

The Makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfaction of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They con-
right of privacy as "the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." This definition sets forth three important factors for extending the application of the privacy right: 1) to whom does the right apply; 2) when (or with regard to what activities) may the right be invoked; and, 3) what protection does the right afford? In outlining the first factor, the Court emphasized the fact that privacy protects individuals. Because the right attaches to individuals, as well as relationships, a person need not be involved in, nor invoke any special relationship, such as marriage, in order to secure the protection offered by the privacy right. The right may be invoked to protect activities that "fundamentally" affect a person's life. The protection afforded these "fundamental" activities is freedom from unwarranted governmental intrusion: the government must have some substantial or compelling reason to interfere with these activities.

In *Roe v. Wade*, the Court found that a woman's abortion decision fell within this definition, and was, therefore, protected by the constitutional right of privacy. The Court had little doubt that such a decision would fundamentally affect a person. "The detriment that the state would impose upon the pregnant woman by denying the choice altogether is apparent." The Court noted a variety of factors that demonstrate the intimate nature and personal impact of the abortion decision.

Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may

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ferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.

Id. at 453 n.10 (quoting Olmstead v. United States, 277 U.S. 438, 478 (Brandeis, J., dissenting) (1928)).

31. Id. at 453 (emphasis in original).

32. Id.


34. 405 U.S. at 453.

35. Id. at 453 n.10, where the Court quoted the opinion in Stanley v. Georgia, 394 U.S. 557, 564 (1969). "[A]lso fundamental is the right to be free, except in very limited circumstances, from unwanted government intrusions into one's privacy."

36. 410 U.S. at 154.

37. Id. at 153.
be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing the child into a family already unable psychologically or otherwise, to care for it. 38

The Court concluded that any limitation on a person’s right to make personal decisions having such important repercussions must be justified by some compelling state interest.

Many of these considerations that support the Court’s inclusion of the abortion decision within the right to privacy also play an important role in the patient’s choice of passive euthanasia. Like the pregnant woman, the detriment that would be imposed by the state on the dying patient by denying all choice is very apparent. The person who is refused the right to die faces an unwanted extension of physical pain and immobility. A person forced to continue such an existence certainly faces “a distressful life and future.” 39 Psychological harm is also inflicted—from pain, from the effects of drugs, and from the knowledge that one is a burden to family and friends. The family of the dying patient, like that of the unwanted child, may be unable, psychologically or otherwise, to deal with the problems that a forced extension of the patient’s life would impose.

All of these considerations point to the fact that the exercise of the right to die affects a person at least as fundamentally as does the woman’s abortion decision. This decision is not only fundamental, but the privacy interest in exercising the right to die is of a more intimate nature than that of the decision to terminate a pregnancy. The Court found abortion inherently different from other situations covered by the right of privacy. 40 In these other privacy cases, the decisions made affected only their maker. Unlike these cases, the termination of a pregnancy affects a potentially independent creature. 41 For this reason, the Court found that “[t]he pregnant woman cannot be isolated in her privacy.” 42 Unlike the pregnant wo-

38. Id.
40. “The situation therefore is inherently different from marital intimacy, or bedroom possession of obscene material, or marriage, or procreation, or education, with which Eisenstadt and Griswold, Stanley, Loving, Skinner, and Pierce and Meyer were respectively concerned.” 410 U.S. at 159.
41. Id.
42. Id.
man, the decision of the person choosing to die affects only himself. He, therefore, can be more isolated in his privacy.

In Whalen v. Roe, the Court implicitly recognized a privacy interest in independent choice regarding medical treatment. The plaintiffs in Whalen claimed that their privacy interest in making "decisions about matters vital to the care of their health" without a governmental interference was improperly affected by a statute that required registration of patients receiving certain drugs. Although the Court recognized that the statute had deterred some valid use of the subject drugs, they nevertheless held that the intrusion on privacy was not "sufficiently grievous" to require constitutional protection.

The Whalen court also recognized a right to be free of governmental invasion and disclosure of personal matters. Here, too, the Court found the plaintiffs had not produced evidence of harm or intrusion sufficient to find a constitutional violation. The Court noted that the information collected by the government during the registration process was already given to or known by many people in the normal course of medical treatment. Further, the Court found the safeguards in the statute sufficiently protected against misuse of the information. Thus, the result in Whalen was based on the statute's minimal intrusion on privacy interests.

The right to die arguably falls within the right to choose medical treatment, it is a choice not to have a particular treatment. Indeed, the privacy interests in choosing not to undergo medical treatment are stronger than those in Whalen where the plaintiffs wished to receive a regulated treatment. Forced medical treatment is not an intrusion that occurs regularly. In the normal course of medical treatment, consent must usually be obtained before treating the patient. Unlike the harm suffered by the plaintiffs in Whalen, prohibiting refusal of medical treatment in the context of the right to die would inflict

44. Id. at 600.
45. Id. at 603.
46. Id. at 600.
47. Id. at 599.
48. Id. at 604.
49. Id. at 602.
50. Id. at 601-02.
substantial harm upon a person. Bodily integrity is violated and control over one's person is lost. The patient will suffer physically, psychologically, and possibly, monetarily.\(^\text{61}\)

The right to die is thus a fundamental right, protected under the broader right of privacy and the fourteenth amendment's guarantee of liberty. Like liberty itself, however, it is not absolute. Like the right of privacy, the right to die will be legally protected only when there are no countervailing compelling state interests.

**Developing a Constitutional Test To Protect the Right To Die**

In protecting the privacy interest in *Roe*, the Court applied maximum scrutiny,\(^\text{62}\) since it had found that the state action (in *Roe*, a state statute)\(^\text{63}\) affected a fundamental right.\(^\text{64}\) Since the right to die falls within the fundamental right of privacy, it too should be protected by a maximum scrutiny type of test. Utilizing maximum scrutiny as a guide, a practical test can be developed to protect the right to die.

Because social policy favors the exercise of individual liberty, maximum scrutiny assumes that the right under consideration is being validly exercised. The state, seeking to restrain the right, must show that its restraint is furthering a compelling state interest.\(^\text{65}\) In light of the philosophical considerations discussed above, the only interest a state could offer would be prevention of substantial harm to the patient asserting the right to die.\(^\text{66}\)

The second prong of maximum scrutiny requires that any restraint of a fundamental right to further a compelling state interest must be the least restrictive means of furthering that interest.\(^\text{67}\) This maximum scrutiny test could provide protection for the right to die in a broad range of cases. What fac-

51. See text accompanying note 39 supra.
52. 410 U.S. at 155.
53. Id. at 117.
54. Id. at 155.
55. Id.
56. It is interesting to note that one of the only instances in which the Court has upheld state action that deprived a person of a fundamental right was in Korematsu v. United States, 323 U.S. 214 (1944). The ground for upholding the action in that case was the prevention of what was believed at the time to be substantial harm to society.
57. 410 U.S. at 155.
tors should be considered in determining whether a situation falls within the conduct protected by the right to die?

Between active suicide and the plight of the terminally ill patient, exists a continuum of situations that may or may not be covered by the right to die. In determining whether a person's situation should be protected by the right to die, the following four factors should be balanced against the chances of recovery a person faces with the proposed treatment. First, whether recovery will be complete. Second, whether administration of the treatments will be limited, or will have to continue for the remainder of the person's life. Third, what type of medical procedure will be involved? Is the procedure one deemed ordinary or extraordinary? Will the treatments cause any unpleasant side effects, particularly any that will interfere with the person's lifestyle? Finally, in the case of persons seeking to exercise the right to die for religious reasons, special weight should be given the first amendment issues involved.

58. Although the philosophical argument of this comment supporting the right to die could theoretically be extended to its outer limits to encompass active suicide, this comment is limited to a treatment of the right to die, defined as "passive euthanasia." See note 1 supra. Some forms of action that are not clearly active suicide are also not argued for in this comment. The non-active situations that the legal test here developed would not protect might be classified as "passive suicide." Practical considerations, in this case the outer limit of behavior that most of society is ready to accept, contribute to defining the line at which the protected right to die stops.

59. An example of the type of situation that would fall within this questionable continuum is the case of a person suffering from renal failure. Using dialysis the patient's chances of recovery are probably fairly good. Against this fairly good prospect four factors must be balanced. First, will the recovery be complete? Given present medical techniques, no. Once the function of a major organ is permanently lost, the process cannot be reversed unless the patient receives a transplant. Thus, assuming that this patient is not a good candidate for a transplant, in at least one sense, recovery will not be complete. The second factor, length of treatments, is, in this case the remainder of the patient's life. Third, what type of treatments will be involved, ordinary or extraordinary? Only a generation ago, dialysis was practically unheard of. Today, it is becoming more common. It lies in the grey area of classification as far as this factor is concerned. It does perform an organ function artificially. Without it, death is certain; with it, death is distant for many. The side effects of the treatment can be substantial. In addition to frequent trips to a medical facility, the treatments themselves require a large investment upon the part of the patient. It has also been reported to have debilitating side effects on many. It does have unpleasant side effects that might interfere with the patient's lifestyle. The factors appear heavily weighted in favor of allowing a person in such a situation to refuse the treatment.

60. Most of the cases that have dealt with the right to refuse medical treatment and the right to die were brought by persons seeking to exercise their first amendment right to the free exercise of religion as well as the right to die. See, e.g., United States v. George, 239 F. Supp. 752 (D. Conn. 1965); John F. Kennedy Mem. Hosp. v.
Cases On the Right To Die Examined in Light of Maximum Scrutiny

Only a few courts have had occasion to decide whether a person has a right to die. Even fewer have recognized the right. How does the reasoning of these cases fare under the maximum scrutiny test?

In John F. Kennedy Memorial Hospital v. Heston, the New Jersey Supreme Court found that "there is no constitutional right to choose to die." The court forced the defendant to submit to medical treatment. The court grounded its decision on the state's interest in the life of its citizens. Closely related to this interest, was the state's interest in protecting its citizens from destroying themselves. Both these interests fail to meet the compelling harm requirement of the maximum scrutiny test. The second interest, protection from self, results in no harm of any kind to other members of society. The first interest would not result in harm great enough to justify restricting the defendant's right to die.

The interest of the medical personnel in practicing medicine according to the dictates of their own values was the second basis advanced by the court for its decision to force treatment. Included with this, was a concern for the liability to which the doctors might be subjected if they failed to administer treatment. This concern for liability and personal values fails the second requirement of the maximum scrutiny test. It is not the least restrictive means of furthering these interests. The court could have provided immunity from liability for the medical personnel involved, along with a decision to permit the defendant to decline treatment. A similar provision could have been made allowing anyone who wished, to remove himself from participation in the patient's decision.

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62. Id. at 583, 279 A.2d at 673.
63. Id.
64. Id.
65. Id. For an extended discussion of potential physician liability, see Comment, Euthanasia: The Physician's Liability, 10 JOHN MAR. J. PRAC. & PROC. 173 (1976).
In re Osborne\textsuperscript{67} is one of the few cases in which a person was allowed to refuse medical treatment. The court in that case applied a maximum scrutiny test\textsuperscript{68} and held that interference with a person's right to refuse medical treatment could be justified only by a compelling state interest.\textsuperscript{69} The thrust of the decision was qualified. The patient's right was conditioned on the fact that he had provided financially for his minor children.\textsuperscript{70} The denial of the right to one not wealthy enough to provide for his dependents is implicit in this condition. Would the financial burden placed upon the state in caring for the dependents of a person who exercised the right to die be sufficient to satisfy the compelling state interest standard? The result in Shapiro \textit{v.} Thompson\textsuperscript{71} suggests that wealth classifications that restrict exercise of a constitutional right will be strictly scrutinized.

The New Jersey Supreme Court recognized a limited right to die in \textit{Matter of Quinlan}.\textsuperscript{72} The reasoning of the court in that decision was in opposition to the approach of the maximum scrutiny test. The court focused initially on the paramount state interest in the life of its citizens. The court concluded, however, that the state's interest "weakens and the individual's right to privacy grows as the degree of bodily invasion increases and the prognosis dims."\textsuperscript{73} A point is finally reached at which the privacy interest of the individual overrides the state's interest in preserving life. No compelling justification is required of the state. Instead, the burden is on the person seeking to exercise the right to die to prove a compelling need to override the state's interest.\textsuperscript{74} Although the \textit{Quinlan} court did recognize a privacy right in connection with the right to die it did not afford the right full measure of protection it deserves under the constitution.\textsuperscript{75}

\begin{itemize}
  \item \textsuperscript{67} 294 A.2d 372 (D.C. App. 1972).
  \item \textsuperscript{68} Id. at 375.
  \item \textsuperscript{69} Id.
  \item \textsuperscript{70} Id.
  \item \textsuperscript{71} 394 U.S. 618, 633 (1969) (right to travel may not be penalized by purely financial state interests).
  \item \textsuperscript{73} Id. at 41, 355 A.2d at 664.
  \item \textsuperscript{74} Id.
  \item \textsuperscript{75} It is interesting to note the similarities between the approach taken by the \textit{Quinlan} court, and that taken by the United States Supreme Court in the area of criminal law and bodily invasion. In \textit{Rochin v. California}, the Court found that emetics administered by force shock the conscience, and therefore violate the Due
In the recent case of *Matter of Spring*, the Massachusetts Supreme Judicial Court reviewed an order of the Probate Court requiring an incompetent patient’s physician, wife and son to decide whether to terminate dialysis treatment. Justice Braucher based his decision for the court on the patient’s privacy rights to prevent invasion of bodily integrity. He noted that

a competent person has a general right to refuse medical treatment in appropriate circumstances, to be determined by balancing the individual interest against countervailing State interests, particularly the State interest in the preservation of life. In striking that balance, account is to be taken of the prognosis and of the magnitude of the proposed invasion.

The court extended the right to incompetent persons, to be exercised through substituted judgment.

Although the opinion contains strong language supporting the right to bodily integrity, the court did not apply maximum scrutiny, using instead, a balancing test. As in *Quinlan*, the invasiveness of the procedure was given heavy weight. Additionally, the state’s interest in life, preventing suicide, and the interests of third parties were considered. Although the court found that the interests of the incompetent patient in this case were controlling, it noted that in the proper case countervailing state interests may be sufficient to block exercise of the right to die. Although a strong step, *Matter of Spring* severely limits the protection given the right to die.

Other recent decisions have also allowed termination of

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Six years later in *Breithaupt v. Abram*, a blood sample taken from a suspect without his consent was found not to violate due process standards. The Court noted that “the blood test procedure has become routine in everyday life.” The intrusion of the defendant’s body was found to be too slight to justify protecting him against the greater interests of society. 352 U.S. 432, 436 (1957).

76. 405 N.E. 2d 115 (1980).
77. Id. at 119.
78. Id.
80. 405 N.E. 2d at 119.
81. Id. at 122, 123.
82. Id. See text accompanying notes 62-71 supra.
83. The countervailing state interests, in particular, do not seem compelling, in *Spring*. 
medical treatment in limited situations. In *Satz v. Perlmuter*, the Florida Supreme Court held that "a competent adult patient, with no minor dependents, suffering from a terminal illness has the constitutional right to refuse or discontinue extraordinary medical treatment where all affected family members consent." The right in this case is qualified by reference to the absence of minor dependents, "extraordinary medical treatment," and consent of affected family members.

*Application of Eichner* also grants a limited right to refuse treatment. *Eichner* involved an application to appoint a committee to act on behalf of an incompetent patient and to seek permission to terminate treatment. *Eichner* did not base this right on privacy, but rather on a general common law right to bodily integrity. Once again, the court severely limited the application of the right, saying it is subject to being overridden by State interests in appropriate circumstances. Among the state interests which must be weighed are interests in the protection of third parties, such as minor children, the maintenance of latitude for physicians and hospitals to fulfill their ethical obligations and, by far the most important, the preservation of all human life.

The court limited the exercise of the right to "artificial life-sustaining treatment," and to "narrow and extreme circumstances."

Although the *Eichner* court rejected the *Quinlan* substituted judgment analysis for cases involving incompetents, it used language similar to that of *Quinlan*, saying the court must ascertain the decision the person "would make if he became competent for a moment and consciously faced his afflictions." The court found that withdrawal of treatment was permissible because of the severity of the situation and because there was substantial evidence that withdrawal com-

84. 379 So. 2d 359 (Fla. 1980).
85. Id. at 360.
86. 423 N.Y.S. 2d 580 (1980).
87. Id. at 590-93.
88. Id. at 593.
89. Id.
90. Id. at 597.
The constitutional right to die should be recognized and given maximum scrutiny protection. Most courts have been unwilling to find such a right except under very limited circumstances. Thus, judicial application of the right has not been uniform. Courts are understandably wary of the problems of liability for medical personnel, and of the sensitive nature of the subject. Case-by-case recognition of the right to die is proving too slow to meet the needs created by our fast-paced technology. Legislative action in this area can more easily overcome these problems. Legislation can insure uniformity of the right itself, and uniform solutions of the attendant problems of liability. The California Natural Death Act is the first legislative attempt to resolve these problems.

THE CALIFORNIA NATURAL DEATH ACT: A STEP IN THE RIGHT DIRECTION

On September 30, 1976, California became the first state to statutorily recognize a right to die when it enacted the Natural Death Act (CNDA). The California Constitution guarantees the right to privacy. The legislature based the act on

91. Id.
94. Article I, section 1 of the California Constitution reads: “All people . . . have inalienable rights. Among those are . . . pursuing and obtaining . . . privacy.”

In People v. Privitera, 23 Cal. 3d 697, 591 P.2d 919, 153 Cal. Rptr. 431, cert. denied, 444 U.S. 949 (1979), the California Supreme Court narrowed the right to privacy under the California Constitution to exclude bodily integrity. The defendants in Privitera appealed a conviction of conspiracy to sell and prescribe an unproven cancer treatment—laetrile. The California Supreme Court held that neither the federal nor the state constitutional privacy right protected the “right to obtain drugs of unproven efficacy.” The court found that the privacy right under the federal constitution did not include medical treatment decisions. They relied on Roe v. Wade to support use of a rational basis test when dealing with a danger to health. In this case, the test was met. Id. at 701-02, 709, 591 P.2d at 921-22, 926, 153 Cal. Rptr. at 433-34, 438.

In her dissent, Chief Justice Bird makes a strong argument that both state and federal privacy rights prevent state interference with treatment choice based on the treatment’s efficacy. Id. at 711-741, 591 P. 2d at 927-946, 153 Cal. Rptr. at 439-458. Chief Justice Bird considers Rutherford v. United States, 582 F. 2d 1234 (10th Cir. 1978), rev’d and remanded, 544 U.S. 442 (1979), reheard, 616 F.2d 455 (1980), a guide to determination of the issues in Privitera. The majority in Privitera, however, distinguished Rutherford. They noted that “unlike Rutherford, [Privitera] is not an action
the right of privacy and on the "right to control the decisions relating to the rendering of their own medical care, including the decision to have life-saving procedures withheld or withdrawn in instances of a terminal condition." The CNDA comes into play, however, only if certain requirements are met. A direction to withdraw or withhold treatment can be executed by a competent adult at any time under the CNDA. Once executed, a directive remains effective for five years. It may be revoked at any time thereby cancelling the document. Unless one is a qualified patient within the definition of the CNDA, however, any directive executed will not have the full force of the "conclusive presumption" provided for by the CNDA. What entitles a person to status as a qualified patient under the CNDA? Within its definition of those protected by the right, lie most of the constitutional problems of the CNDA.

Constitutional Defects of the CNDA

The CNDA contains three major constitutional defects. First, the right recognized in the statute excludes many who should be protected by the right to die. Second, the definitions in the CNDA are so vague and ambiguous it is often difficult to tell who is or is not protected. Finally, so much discretion is given to the physician involved that the choice may not be made independently, but must be conditioned on physician-approval.

on behalf of the class of terminally ill cancer patients." 23 Cal. 3d at 707, 591 P. 2d at 925, 153 Cal. Rptr. at 437.

This distinction between Rutherford and Privitera might provide an opening for upholding the right to die. Presumably, the California court would uphold the right to die in those cases falling within the California Natural Death Act. See text accompanying notes 92-99 supra. This seems especially likely in light of Privitera's rationale of deference to legislative judgments. However, the strong language in Privitera indicates that pursuit of the right to die as a derivative of privacy is foreclosed.

In contrast to Privitera, the Rutherford court, on remand recognized that at least "the decision by the patient whether to have a treatment or not is a protected right" under the constitutional right of privacy. 616 F.2d 455, 457 (1980). Clearly, this interpretation of those aspects of treatment decision covered by privacy allows protection of the right to die.

96. Id. § 7188.
97. Id. § 7189.5.
98. Id. § 7189.
99. Id. § 7191(b).
100. Id. §§ 7187(c), (e), (f) & 7191(c).
The CNDA guarantees the right to have artificial procedures withheld from a person whose death is “imminent.”101 Unfortunately, persons who fall in the area between active suicide and imminently terminal are denied protection. Additionally, no provision is made for exercise of the right to die based on religious grounds. The CNDA thus invades both fourteenth and first amendment rights.

The second problem, the vagueness and ambiguities in the definitions, is probably the CNDA’s most serious defect. The definition of the type of procedures that may be withdrawn contains an inherent conflict—such procedures are those that artificially prolong the life of the patient.102 At the same time, a patient only qualifies under the CNDA if he is terminal whether or not the procedures are administered.103 If a person is imminently terminal, then none of the medical procedures that might be given to him will prolong his life, if a procedure would prolong a person’s life significantly, then he is not imminently terminal.

Added to the ambiguities on the face of the statute, are the problems stemming from lack of uniformity within the medical profession. Because the decision whether to withdraw treatment is conditional on the approval of the physician,104 current medical standards will have a substantial effect on whether a person is deemed imminently terminal and on whether a procedure is deemed to artificially prolong life. There is great controversy within the medical profession as to which procedures are artificial or extraordinary and which are not.105 In one study, over eight percent of the medical profession stated that they would consider a person imminently terminal only if death were to occur within a week or less.106 Because the CNDA provides that a directive becomes binding only if executed (or re-executed) within fourteen days after a person has been classified and informed that he is imminently terminal,107 many people will not be able to execute binding directives under the CNDA.

101. Id. § 7187(f).
102. Id. § 7187(c).
103. Id. at § 7187(c), (f).
104. Id. at §§ 7187(c), (e), (f) & 7191(e).
105. See, e.g., Redleaf, Schmitt & Thompson, supra note 82, at 932-33.
106. Id. at 933 n.92.
Finally, the large amount of discretion given to the physician in implementing this right unjustifiably restricts exercise of the right to die. The right to die protects the right of the individual to decide what medical treatment he will use or not use and his right to control his own body. Conditioning the right on physician approval removes a large measure of the control insured by the right. The CNDA gives even more discretion to the physician in that, if a directive does not qualify for the status of a conclusive presumption under the CNDA, it need not be followed by the physician; it is advisory only. Finally, there is no procedure for positive assertion of the right if the physician refuses to follow the directive, the only sanction he is subject to is a finding of professional misconduct.

If not perfect, the CNDA at least represents a major step towards recognition of the right to die. It needs to be amended to provide clarity in defining the procedures that may be withdrawn or withheld. The class of persons the CNDA protects should be expanded. A provision utilizing a balance of various factors, such as those discussed in this comment under the legal test for the right to die, should be added to the CNDA so that both persons within the continuum and persons seeking to exercise religious belief could take advantage of the CNDA.

CONCLUSION

In enacting the California Natural Death Act, the Legislature limited the right to die by including provisions to assuage their fears. Great discretion is given the physician for fear the patient will not know his own best interests. The right is narrowly restricted and vaguely defined to prevent premature exercise of the right. Courts and commentators, too, have based their decisions on fear. They advanced a "wedge" theory to deny the right to die, fearing this right will lead to eugenics. Citizens are afraid of the right to die because they are confused about what it means.

108. Id. §§ 7187(c), (e), (f) & 7191(e).
109. Id. § 7191(c).
110. Id.
111. Id. § 7191(b).
112. See text accompanying notes 58-60 supra.
This comment has attempted to dispel some of the confusion. In the sections dealing with the philosophical and constitutional considerations, the right to die was seen as an aspect of liberty. To exercise liberty, privacy shields an individual from interference with intimate decisions. No decision is more intimate than the choice to die; it is an exercise of the right to control our own lives, and is therefore the antithesis of eugenics.

From the confusion, stem the fears that prevent recognition of the right to die, and when the right is not recognized, liberty is curtailed. This is the real “wedge,” for if the government can justify removing our most basic right, control of our bodies, which lesser rights are safe?

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