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THE RIGHT TO DIE: Public Health Trust v. Wons FLORIDA MOVES AWAY FROM MASSACHUSETTS AND NEW JERSEY TOWARD CALIFORNIA AND MISSISSIPPI DESPITE Cruzan v. Harmon

Daniel R. Gordon*

I. INTRODUCTION: THE EMERGENCE OF THE RIGHT TO DIE IN FLORIDA

In 1989, the Florida Supreme Court in Public Health Trust of Dade County v. Wons1 held that a Jehovah's Witness could decide to refuse a blood transfusion even if that refusal is likely to result in death.2 Wons represented the culmination of eleven years of legal developments in Florida relating to the right to die.3 During those eleven years, the Florida courts expanded the right to refuse life saving medical treatment.4 As

1. See Satz v. Perlmutter, 362 So. 2d 160 (Fla. Dist. Ct. App. 1978), aff'd, 379 So. 2d 359 (Fla. 1980) (where the court held that a competent adult patient had the right to refuse medical treatment); John F. Kennedy Hosp. v. Bludworth, 432 So. 2d 611 (Fla. Dist. Ct. App. 1983), quashed on narrow grounds, 452 So. 2d 921 (Fla. 1984) (court approval was not necessary for the disconnection of extraordinary life support measures of a comatose patient where that patient had previously expressed an intent to refuse such treatment. All that was required was a medical determination that there was no hope of recovery); In re Guardianship of Barry, 445 So. 2d 365 (Fla. Dist. Ct. App. 1984) (holding that the state's interest in prolonging life is overridden by the privacy interests of a terminally ill, incompetent child, who is wholly lacking in cognitive brain functions and whose condition is incurable and irreversible); Corbett v. D'Alessandro, 487 So. 2d 368 (Fla. Dist. Ct. App. 1986), rev. denied, 492 So. 2d 1331 (Fla. 1986) (where the court stated that it would recognize the right to withdraw artificial, life-sustaining measures when science and medical technology determine that life has reached an unconscious and vegetative state); St. Mary's Hosp. v. Ramsey, 465 So. 2d 666 (Fla. Dist. Ct. App. 1985) (where the court upheld the right of a patient to refuse a blood transfusion on the basis of the patient's fear of an adverse reaction, religious beliefs, and recalcitrance); Wons v. Public Health Trust of Dade County, 500 So. 2d 679 (Fla. Dist. Ct. App. 1987), aff'd, 541 So. 2d 96 (Fla. 1989) (holding that the state's interest in having children raised by two loving parents was insufficient to overcome a patient's religious right to refuse a life-saving blood transfusion).

2. Id.

3. Id.
the courts enlarged those rights, the courts were faced with questions concerning how expansive the right to die is. Unfortunately, the courts never faced the question of expansiveness directly and thoroughly.  

The Florida courts depended on out of state courts, especially Massachusetts and New Jersey courts, for doctrines relating to the right to die, but that dependency involved a narrow group of older cases without reviewing changes in out-of-state doctrine in a disciplined fashion. As a result of failing to face the issue of expansiveness directly and refusing to review the development of doctrine in a systematic fashion, the Florida law relating to the right to die remains unclear even after the Wons decision.

The rationale of state courts, both Florida and outside Florida, are particularly important in the context of the right to die because the United States Supreme Court has agreed

5. See, e.g., Perlmutter, 362 So. 2d at 162. The District Court of Appeals limits its holding to the facts of only that case, and then postpones for a later date considerations of how its ruling would impact different circumstances. Id. The court seems unwilling to provide even general guidelines for future circumstances, and tries to avoid broader philosophical discussions about the role of the courts in making life and death medical decisions. Id.

6. See, e.g., Perlmutter, 362 So. 2d at 163, the court refers to, inter alia, Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 370 N.E.2d 417 (1977) (where the court held that a patient could not be deprived of his right to refuse medical treatment solely due to the fact that he was incompetent) and In Re Quinlan, 70 N.J. 10, 335 A.2d 647 (N.J. 1976), cert. denied sub nom. Gargor v. New Jersey, 429 U.S. 922 (1976) (The New Jersey Supreme Court held that the right of a patient to refuse extraordinary life preservation methods could not be exercised by the guardian alone where the patient was incompetent, unless the physician and the hospital's ethics committee, or some other like body, had determined that there was no chance of recovery). See generally Morgan & Harty-Golder, Constitutional Development of Judicial Criteria in Right to Die Cases: From Brain Dead to Persistent Vegetative State, 23 WAKE FOREST L. REV. 721 (1988); Note, The Foundations of the Right to Die, 90 W. VA. L. REV. 235 (1987).

7. See, e.g., Wons, 541 So. 2d at 97 (Fla. 1989) where the Florida Supreme Court refers to at least two cases cited even before Perlmutter, 362 So. 2d at 163, n.3. See, e.g., In re Osborne, 294 A.2d 372 (D.C. 1972); In re Estate of Brooks, 32 Ill. 2d 381, 205 N.E.2d 435 (1965). The Wons court also cites to modern Mississippi and Maryland cases, but does not review developments in Massachusetts, New York, or New Jersey, the States originally relied upon for doctrinal support. See, e.g., In re Brown, 478 So. 2d 1033 (Miss. 1985); Mercy Hospital, Inc. v. Jackson, 62 Md. App. 409, 489 A.2d 1130 (Ct. Spec. App. 1985).
to review *Cruzan v. Harmon* during the 1989-90 term. *Cruzan* is a right to die case decided by the Missouri Supreme Court which found that the United States Constitution fails to protect a patient's guardian's choice to allow a patient to die. Presumably, the United States Supreme Court will decide whether the constitutionally protected right to privacy extends to treatment refusal and withdrawal. Even if the Supreme Court affirms the Missouri Supreme court, the impact should be negligible in Florida and many other States, because right to die law often is based not only on federal constitutional grounds but also state constitutional and common law grounds.

This article will examine the recent *Wons* decision, the impact of *Cruzan* on *Wons* and out of state doctrinal bases for Florida right to die law, review the development of the right to die in Florida during the past eleven years, study the Massachusetts and New Jersey cases that provided doctrine for Florida's right to die, examine developments in California and Mississippi law relating to the right to die, and review conflicts in Florida Law after *Wons*, proposing resolutions to the conflicts by using California and Mississippi law.

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11. *See infra* notes 18-36 and accompanying text.
12. *See infra* notes 37-95 and accompanying text.
13. *See infra* notes 18-36 and accompanying text.
14. *See infra* notes 96-184 and accompanying text.
15. *See infra* notes 185-356 and accompanying text.
16. *See infra* notes 357-407 accompanying text.
17. *See infra* notes 408-472 and accompanying text.
II. Cruzan, Wons and the Cases That Provide Doctrinal Support for the Right to Die in Florida

The United States Supreme Court will decide in *Cruzan v. Harmon* whether the constitutionally protected right to privacy recognized in *Griswold v. Connecticut* and *Roe v. Wade* and limited by *Webster v. Reproductive Health Service* and *Bowers v. Hardwick* extends to treatment refusal and withdrawal. The patient in *Cruzan*, an automobile accident victim, will remain in a persistent vegetative state until her death, though she is not terminally ill and could survive for as long as thirty years. The Missouri Supreme Court found that the patient's "right to refuse treatment, whether that right proceeds from a constitutional right of privacy or common law right to refuse treatment, outweighs the immense, clear fact of life in which the state maintains a vital interest." The United States Supreme Court will focus on the breadth of application of the right of privacy.

A decision by the Supreme Court restricting the federal constitutional right to privacy in the context of treatment withdrawal would fail to weaken Florida right to die law and the out-of-state doctrinal or potential doctrinal cases for that law. The Florida law and out-of-state law is based on more grounds than the federal constitutional and common law. The Florida courts have recognized a relationship between the

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24. *Id.* at 411.
25. *Id.* at 424.
26. *In re Guardianship of Browning*, 543 So. 2d 258, 266 (Fla. Dist. Ct. App. 1989) (holding that the guardian of an incompetent individual may exercise that individual's right to forego artificially provided sustenance when the individual suffers from an incurable condition, even though not in a permanent, vegetative state).
right to refuse treatment and the freestanding privacy protection provision of the Florida Constitution, and that relationship was strengthened in an abortion case where Florida Supreme Court found a parental consent statute violated a minor's right to private decision making under Article I, § 23.

The out-of-state cases upon which the Florida courts rely or potentially could rely for doctrinal support also rest on other bases in addition to federal constitutional law. The Massachusetts courts treat the right to refuse medical assistance as a strongly protected common law right. Though the Massachusetts courts have never applied their state constitution directly to treatment refusal circumstances, the Supreme Judicial Court in a 1981 abortion funding case found that the Massachusetts Declaration of Rights protected privacy rights to a greater degree than the Federal Constitution. The New Jersey courts recognize that treatment refusal is protected by New Jersey Constitution Article I, paragraph 1,

27. FLA. CONST. art. I, § 23. "Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein. This selection shall not be construed to limit the public’s right of access to public records and meetings as provided by law." Id. See also Wons v. Public Health Trust of Dade County, 541 So. 2d 96, 101-02 (1989) (concurring opinion); Corbett v. D’Allesandro, 487 So. 2d 368, 370 (Fla. Dist. Ct. App. 1986); In re Guardianship of Barry, 445 So. 2d 365, 370 (Fla. Dist. Ct. App. 1984); John F. Kennedy Hosp. v. Bludworth, 432 So. 2d 611, 618-19 (Fla. Dist. Ct. App. 1983); In re Browning, 543 So. 2d 258, 267 (Fla. Dist. Ct. App. 1989).


30. Saikewicz, 373 Mass. at 738-39, 370 N.E.2d at 424; Commissioner of Corrections v. Myers, 379 Mass. 255, 399 N.E.2d 452, 455 (1979) (where the state's interest in preservation of life was counterbalanced by the defendant's interest in refusing dialysis treatment, even where the patient had a positive prognosis if treated); Brophy v. New England Sinai Hosp., 398 Mass. 417, 497 N.E.2d 626, 633 (1986) (where the court allowed the wife of a patient in a vegetative state to decide whether to discontinue artificial maintenance of food and hydration, under the doctrine of substituted judgment).


32. Quinlan, 70 N.J. at 10, 355 A.2d at 647, Matter of Farrell, 108 N.J. 335, 348, 529 A.2d 404, 410 (1987) (where the state's interests in preserving life, preventing suicide and safeguarding the medical profession were outweighed by the rights of a competent adult
though the common law provides sufficient bases for the right to refuse treatment. California also uses common law and state constitutional bases for the right to refuse treatment. Mississippi relies on Mississippi Constitution Article 3, sections 18 and 32, the freedom of religion and inherent rights of people provisions, to bolster the right to refuse treatment.

*Cruzan* should not impact Florida, Massachusetts, New Jersey, California, or Mississippi law. *Wons* will remain applicable in Florida, the doctrinal support on which *Wons* depends should remain valid.

### III. Public Health Trust Of Dade County v. Wons: The Right To Refuse Treatment And To Die

In a decision marked by disagreement within the court, the Florida Supreme Court in *Public Health Trust of Dade County v. Wons* held that a hospital patient, a relatively young mother of two children, could refuse medical treatment even when her life could be saved by accepting treatment and almost certain death would ensue by refusing treatment. The patient, Mrs. Wons, was a 38 year old mother and a patient to withdraw a life sustaining respirator).

36. *In re Brown*, 478 So. 2d 1033, 1037 (Miss. 1985).
37. *Id.* at 1036.
38. *See Public Health Trust of Dade County v. Wons*, 541 So. 2d 96 (Fla. 1979). Five of the seven justices formed the opinion of the court, while two justices, one of whom also joined the opinion of the court, joined in a concurring opinion, and a seventh justice stridently dissented. *Id.*
39. *Id.*
40. *Id.* at 98. The court stated that "the state's interest in maintaining a home with two parents for the minor children does not override Mrs. Wons constitutional right of privacy and religion." *Id.*
at a public hospital\textsuperscript{41} where she was being treated for dysfunctional uterine bleeding.\textsuperscript{42} Mrs. Wons had lost over 90\% of her available red blood cells, experienced extreme blood loss from her uterus, and suffered from the insufficiency of bone marrow for replacement of red blood cells already lost.\textsuperscript{43} In her physician’s opinion, her hematocrit had fallen so low that without an immediate blood transfusion she would die.\textsuperscript{44} 

The Circuit Court, in an emergency weekend session,\textsuperscript{45} ordered that an immediate blood transfusion be administered.\textsuperscript{46} After receiving the blood transfusion, Mrs. Wons recovered from her life threatening condition and was discharged from the hospital.\textsuperscript{47} Though she recovered, she was not cured of the underlying medical problem.\textsuperscript{48}

The Florida District Court of Appeals reversed the order of the Circuit Court, holding that Mrs. Wons possessed a constitutional right to refuse the administration of blood.\textsuperscript{49} The court based its decision on an amalgam of constitutional, privacy and religious freedom rights, relying on support for the privacy right in Florida cases\textsuperscript{50} and for the religious freedom right on out-of-state blood transfusion cases.\textsuperscript{51}

The District Court of Appeals recognized four state cases:

\begin{itemize}
\item \textsuperscript{41} Wons v. Public Health Trust of Dade County, 500 So. 2d 679, 680 (Fla. Dist. Ct. App. 1987).
\item \textsuperscript{42} Id. at 681.
\item \textsuperscript{43} Id.
\item \textsuperscript{44} Id.
\item \textsuperscript{45} Id. at 680.
\item \textsuperscript{46} Id. at 682-83.
\item \textsuperscript{47} Id. at 683.
\item \textsuperscript{48} Id. at 684.
\item \textsuperscript{49} Id. at 687-88.
\item \textsuperscript{50} Id. at 684-86. The original case in the line of cases was Satz v. Perlmutter, 362 So. 2d 160 (Fla. Dist. Ct. App. 1978), aff’d, 379 So. 2d 359 (Fla. 1980). \textit{See also supra} note 3.
\item \textsuperscript{51} Wons, 500 So. 2d at 686. The cases cited included \textit{In re} Estate of Brooks, 32 Ill. 2d 361, 205 N.E.2d 435 (1965); \textit{In re} Osborne, 294 A.2d 372 (D.C. 1972); Mercy Hospital, Inc. v. Jackson, 62 Md. App. 409, 489 A.2d 1130 (Ct. Spec. App. 1985); \textit{In re} Brown, 478 So. 2d 1033 (Miss. 1985).
\end{itemize}
interests to be weighed against Mrs. Won's constitutional right to refuse treatment. First, the state had an interest in the preservation of life. Second, the state protected innocent third parties from injury, especially minor children who would be abandoned. Third, the state had a duty to prevent suicide. Finally, the state played a role in maintaining the ethical integrity of the medical profession. Because the constitutional rights to privacy and religious freedom were so weighty in American constitutional tradition, the Florida District Court of Appeals found that only the "most grave of societal interests may overcome the right to refuse medical treatment."

Although four grave or compelling societal interests existed, the Florida District Court of Appeals only applied one to Mrs. Wons. The court accepted a concession by the appellee hospital that three of the four interests were not relevant to Mrs. Wons. The court never explained explicitly why it accepted the concession, but referred to a transfusion case decided by another Florida District Court of Appeals. The Wons court reviewed how the other district court of appeals applied the four interests and in doing so implicitly dismissed the three interests as irrelevant.

In reviewing *St. Mary's Hospital v. Ramsey*, the Wons court found that although the state may have had an interest in preserving life, a competent individual possessed an equally

52. *Wons*, 500 So. 2d at 684.
53. *Id.*
54. *Id.*
55. *Id.* at 688.
56. *Id.*
57. *Id.*
58. *Id.* at 687.
59. *Id.* at 685-86 (the court applied only the state's interest in protecting minors).
60. *Id.*
61. *Id.* (quoting *St. Mary's Hospital v. Ramsey*, 465 So. 2d 666 (Fla. Dist. Ct. App. 1985)).
strong interest in autonomously making decisions about his or her life, especially when decisions were based on religious scruples.\textsuperscript{63} Also, blood transfusion patients were not suicidal because the court records plainly indicated that they did not desire to die,\textsuperscript{64} but wanted to live without the transfusion if God would allow them to live.\textsuperscript{65} Finally, medical ethics were not negatively impacted when a patient refused a transfusion because the medical profession recognized a competent patient's right to refuse treatment.\textsuperscript{66}

The Florida District Court of Appeals in \textit{Wons} only applied the state's interests in protecting innocent third parties, especially minors.\textsuperscript{67} Mrs. Wons was the mother of two children ages twelve and fourteen,\textsuperscript{68} but the court decided that the parent-child relationship alone did not outweigh the mother's right to refuse treatment.\textsuperscript{69} The court found that even if Mrs. Wons died, her children would receive care from her husband, mother, and brothers.\textsuperscript{70} The existence of an extended family ensured that the children would not be abandoned.\textsuperscript{71} In addition to the existence of the extended family, the court also found that the children "will no doubt cherish the memory of the courageous mother who . . . stood by her religious convictions."\textsuperscript{72} Even in death, Mrs. Wons would be an inspiration to her children and as such, would continue to provide spiritual and moral support to her children.\textsuperscript{73}

The Florida Supreme Court approved of the Florida
District Court of Appeals decision. The Florida Supreme Court began its analysis by outlining the four factors that would indicate that existence of a compelling state interest. However, the Florida Supreme Court followed the lead of the District Court of Appeals by applying only the state’s interest in innocent third parties. The Florida Supreme Court found that the state’s interest in protecting Mrs. Wons’ children from the absence of a mother did not override her constitutional rights to privacy and religious freedom. The court also observed that although the existence of two parents is important to the development of children, the preference for a two parent family does not outweigh constitutional rights. The court failed to explain its thinking. The court referred to what it characterized as a "well-reasoned" and "eloquent" opinion by the Florida District Court of Appeals. However, nowhere did the Florida Supreme Court focus on the district court of appeals discussion concerning the abandonment of children. Instead, the Florida Supreme Court referred to the "highly articulate opinion" of the court below concerning the deeply rooted importance of freedom of privacy and religion in American society. The Florida Supreme Court neglected to clarify a standard to be met to prove that the protection of innocent third parties requires that medical treatment be administered.

Wons included a concurring opinion joined by Chief Justice Ehrlich, who also joined the majority opinion of the court. The concurring opinion was clearer than the majority regarding what standard to apply in determining whether the

74. Public Health Trust of Dade County v. Wons, 541 So. 2d 96 (Fla. 1989).
75. Id. at 97.
76. Id.
77. Id. at 97-98.
78. Id.
79. Id. at 98.
80. Id.
81. Id.
82. Id. at 98-102.
interest in protecting third parties outweighed the rights of privacy and religious freedom.\textsuperscript{83} Absent abandonment, the state had no compelling interest that overcame the right to refuse treatment.\textsuperscript{84} In addition, the court held that the state's interest in the preservation of life must be balanced against the patient's quality of life.\textsuperscript{85} Chief Justice Ehrlich, in his concurring opinion, articulated that because Mrs. Wons did not desire to die, the state's interest in the prevention of suicide was not implicated.\textsuperscript{86} Also, the state's interest in the ethical integrity of the medical profession was weak\textsuperscript{87} and "[g]iven the fundamental nature of the constitutional rights involved, protection of the ethical integrity of the medical profession alone could never override these rights."\textsuperscript{88} The dissent disputed the majority's application of the state interest in the protection of innocent third parties.\textsuperscript{89} Justice Overton subjectively viewed abandonment in terms of the actions of individual parents.\textsuperscript{90} In this case "the state's interest in preventing a mother with minor children from abandoning them through death is sufficient justification for ordering the blood transfusion."\textsuperscript{91} It was irrelevant that the children would be cared by another parent or extended family.\textsuperscript{92} The dissent bolstered its thinking by accusing the majority of expanding the right to refuse treatment beyond what the Florida Supreme Court originally intended.\textsuperscript{93} Originally, the terminal nature of an illness allowed the patient

\textsuperscript{83} Id.  
\textsuperscript{84} Id. at 99.  
\textsuperscript{85} Id. at 100.  
\textsuperscript{86} Id.  
\textsuperscript{87} Id.  
\textsuperscript{88} Id. at 101.  
\textsuperscript{89} Id. at 103-04.  
\textsuperscript{90} Id. at 104.  
\textsuperscript{91} Id. at 104.  
\textsuperscript{92} Id.  
\textsuperscript{93} Id. at 103.
to chose no treatment. Mrs. Wons could recover if she accepted the blood transfusion and therefore the abandonment of these minor children through death would be totally unnecessary. The dissent feared that the majority would allow a parent to choose death over parenthood, which was distinguishable from circumstances where a parent faced certain death and chose to allow death to occur naturally.

IV. THE DEVELOPMENT OF THE RIGHT TO DIE IN FLORIDA: Perlmutter AND PROGENY

The Wons case culminated eleven years of development of Florida right to die law. In 1979, a Florida District Court of Appeals in Satz v. Perlmutter approved a petition by a seventy-three year old gentleman suffering from Lou Gehrigs disease to be disconnected from a mechanical respirator. The patient was aware of his predicament and completely in command of his abilities to make treatment decisions. Without an extensive explanation concerning the origins or nature of the privacy right to refuse medical treatment, the Perlmutter court applied, for the first time in such a context in Florida, the four state interests subsequently applied in Wons. The court identified these interests as the preservation of life, protection of innocent third parties, prevention of suicide, and the preservation of the integrity of the medical profession. The court acknowledged that the state had an interest in preserving life, but the strength of that interest

94. Id. at 104.
95. Id. at 105.
96. See supra note 3.
97. Wons, 541 So. 2d at 97.
99. Id.
100. Id. at 161.
101. Id. at 162.
102. Id.
depended on the circumstances of the life involved.\textsuperscript{103} The court distinguished between curable and incurable diseases, and found that the state interest failed to be compelling where the disease was incurable.\textsuperscript{104}

The \textit{Perlmutter} court refused to find that the three remaining state interests outweighed the patient’s right to choose not to be assisted by a ventilator.\textsuperscript{105} The protection of third parties was not relevant to the case because not only were all the patient’s children adults, but they agreed with his decision.\textsuperscript{106} The court found that the patient was not committing suicide even though his decision probably would have resulted in his death.\textsuperscript{107} The court concluded that the patient wanted to live, but without a mechanical breathing device,\textsuperscript{108} and that he did not self-induce the disease.\textsuperscript{109} Also, the court perceived little difference between declining treatment at diagnosis and discontinuing treatment after diagnosis.\textsuperscript{110} Hence, a mortally ill patient could not be forced to undergo surgery and could decide to end a therapy already underway. The refusal of original treatment was a passive choice, while the decision to end therapy already underway as an active choice failed to concern the court.\textsuperscript{111} The \textit{Perlmutter} court also recognized that there was no conflict between the professional commitment of the medical profession to heal and the deadly role that medical professionals would play in disconnecting a patient from a ventilator.\textsuperscript{112}

\textit{Perlmutter} firmly established the right to withdraw

\textsuperscript{103} \textit{Id.}
\textsuperscript{104} \textit{Id.}
\textsuperscript{105} \textit{Id.} at 162-63.
\textsuperscript{106} \textit{Id.} at 162.
\textsuperscript{107} \textit{Id.} at 163.
\textsuperscript{108} \textit{Id.}
\textsuperscript{109} \textit{Id.}
\textsuperscript{110} \textit{Id.}
\textsuperscript{111} \textit{Id.}
\textsuperscript{112} "[T]he prevailing ethical practice seems to be to recognize that the dying are more often in need of comfort than treatment." \textit{Id.}
treatment even when death was likely. However, the Florida District Court of Appeals limited the right to the circumstances of *Perlmutter* involving a competent adult. Questions existed concerning whether the right to withdraw treatment extended beyond a competent elderly adult suffering from an incurable, terminal disease. The Florida District Court of Appeals in *Perlmutter* specifically acknowledged that its holding did not necessarily apply to an incompetent patient. Within a few years after *Perlmutter*, the Florida courts were faced with questions concerning how far to extend *Permutter*.

*John F. Kennedy Hosp. v. Bludworth* involved many of the same circumstances as *Perlmutter*, but the patient in *Bludworth* had suffered permanent brain damage. At the time when the patient was placed on a mechanical ventilator, he was suffering from acute respiratory failure, chronic interstitial fibrosis, and gastrointestinal bleeding. The patient's condition had been diagnosed as terminal. The Florida Supreme Court held that terminally ill incompetent persons possessed the same right as competent persons to have treatment withdrawn where such persons were kept alive by "extraordinary artificial means" and were at the threshold of death. The court focused on the artificiality of the methods used to extend life and distinguished between the continuation of life and the prolongation of the dying process. As a result, the court developed a "sliding scale" analysis of state

113. *Id.* at 164.
114. *Id.* at 162.
115. *Id.*
116. *Id.*
117. *See In re Guardianship of Barry, 445 So. 2d 365, 370 (Fla. Dist Ct. App. 1984).*
118. *452 So. 2d 921 (Fla. 1984), quashing 432 So. 2d 611 (Fla. Dist. Ct. App. 1983).*
120. *Id.*
121. *Id.*
122. *Id.* at 923.
123. *Id.*
interests for the terminally ill patient. The state's interests preventing the termination of life weakened as the patient's prognosis worsened and the bodily invasion involved in treatment became greater.\textsuperscript{125} The court stated, "[t]he issue in these cases is not whether a life should be saved . . . it is how long and at what expense the dying process should be prolonged."\textsuperscript{126} Bludworth left little doubt that an adult patient, competent or incompetent, suffering from an incurable, terminal disease facing imminent death may be withdrawn from treatment.\textsuperscript{127}

Perlmutter and Bludworth involved adult patients. Neither case discussed whether the right to withdraw treatment resulting in almost certain death would apply to a child. In re Guardianship of Barry,\textsuperscript{128} a child was born with a syndrome that caused the destruction of most of the child's brain.\textsuperscript{129} Within two days of birth, the child was placed on a ventilator in a permanent vegetative state.\textsuperscript{130} With the ventilator, the child's life expectancy was approximately two years, and without the ventilator, his life expectancy was no more that two hours.\textsuperscript{131} The Barry court followed the Florida District Court of Appeals in Bludworth, holding that an incompetent patient, even a child, had the same rights as a competent patient to have treatment withdrawn.\textsuperscript{132} The court found that the state interest in preserving and prolonging life was overriden where a patient was terminally ill with an incurable and irreversible condition.\textsuperscript{133} The Barry court expanded on the analysis Perlmutter and Bludworth by also

\textsuperscript{124} Id.
\textsuperscript{125} Id. at 924.
\textsuperscript{126} Id.
\textsuperscript{127} Id. at 926.
\textsuperscript{128} 445 So. 2d 365 (Fla. Dist. Ct. App. 1984).
\textsuperscript{129} Id. at 370.
\textsuperscript{130} Id. at 368.
\textsuperscript{131} Id.
\textsuperscript{132} Id. at 370.
\textsuperscript{133} Id. at 371.
focusing on the hopelessness of meaningful life for the child due to the lack of cognitive brain function, lack of awareness of surroundings, and hopelessness for developing such awareness. The court expanded the right to withdraw treatment from children suffering both permanent, incurable, and irreversible physical and mental defects when death was likely.

Perlmutter, Bludworth, and Barry allowed for death with dignity for both competent and incompetent patients, even minors. In all three cases, patients were spared death by ventilators. The courts in the three cases viewed the mechanical devices as "extraordinary" or "artificial" measures, treatments or methods. What constituted such measures, treatments or methods was not certain and whether nutrition would be considered such a withdrawable method was also not mentioned. In Corbett v. D’Alessandro, the patient’s condition was similar to that of the patient in Bludworth. In Corbett, the patient languished in a persistent vegetative state for two years until her husband petitioned for withdrawal of life sustaining treatment. No reasonable prospect for regaining cognitive brain function existed. The court never questioned whether the right to withdraw treatment existed, but did tackle the question of whether nutritional sustenance constituted a withdrawable extraordinary life prolonging procedure. The court refused to differentiate artificial feeding devices such as

134. Id.
135. Id. at 372.
137. Bludworth, 452 So. 2d at 924.
138. See, e.g., In re Guardianship of Barry, 445 So. 2d 365, 369 (Fla. Dist. Ct. App. 1984); Bludworth, 452 So. 2d at 922; Perlmutter, 362 So. 2d at 162.
140. Id. at 369.
141. Id. at 370.
142. Id. at 370-72. Nutritional sustenance is a life prolonging nutrition artificially supplied through a nasogastric tube. Id.
nasogastric tubes from other procedures such as ventilators. Instead, the court focused on the word "sustain" as it was used by the *Bludworth* court. The *Corbett* court found no difference between sustenance with food or other medical procedures. When a patient was vegetative and comatose and faced imminent death, any method of life prolongation was artificial. Hence, a patient possessed a right to withdrawal of treatment, even feeding, where the treatment accomplished only the continuation of a vegetative and comatose state in the face of imminent death.

From *Perlmutter* to *Corbett*, the Florida courts consistently applied a right to choose death where a patient’s condition proved hopeless and death was inevitable. In such circumstances, treatment could be withdrawn as a matter of right if death was imminent. A year before the *Corbett* decision, a Florida District Court of Appeals in *St. Mary’s Hospital v. Ramsey* applied the right to refuse treatment when the prognosis for recovery was positive. In *Ramsey*, the patient was twenty-seven years old, suffered from kidney disease, and required the regular use of renal dialysis. During the treatment process, the patient needed a blood transfusion and refused the transfusion on religious grounds. If he had accepted the transfusion, his continued use of renal dialysis would have assured a "not unreasonably short" life expectancy. Without distinguishing the circumstances of *Perlmutter* and *Bludworth*, the *Ramsey* court applied the four

143. *Id.* at 371.
144. *Id.* at 370-71.
145. *Id.*
146. *Id.*
147. *Id.* at 371.
148. *Id.*
150. *Id.* at 667-68.
151. *Id.* at 667.
152. *Id.*
state interests recognized by the *Perlmutter* court.\textsuperscript{153}

The *Ramsey* court found that a patient may choose to refuse treatment as long as no overriding reason to preserve life existed.\textsuperscript{154} The right to refuse treatment was a basic right "whether his refusal to do so arises from fear of adverse reaction, religious belief, recalcitrance or cost."\textsuperscript{155} The court viewed the state interest in preservation of life in terms of self determination.\textsuperscript{156} So long as an adult possessed a right to determine questions about his or her life, the state's interest in preservation of life could not outweigh the right to choose treatment. The court applied the state interest in protecting innocent third parties without extensive discussion even though the patient was the father of a minor child.\textsuperscript{157} The court found no abandonment because the child lived with her mother in another state and would be the beneficiary of a small annuity if her father died.\textsuperscript{158} Also, the court stated that the mother and extended family would provide support to the child.\textsuperscript{159} The court found that the patient wished to live and did not self-induce his malady, and therefore the state interest in the prevention of suicide was not implicated.\textsuperscript{160} Finally, the refusal to accept a blood transfusion did not undermine medical ethics because the medical profession was obligated to acquiesce to the treatment decisions of patients.\textsuperscript{161}

*Ramsey* added new dimensions to the right to refuse or withdraw treatment that developed in *Perlmutter*, *Bludworth*, *Barry*, and *Corbett*. Leaping from patients in extremis to patients who could survive, the *Ramsey* court failed to explain the broader application of the right to refuse treatment.

\textsuperscript{153} Id. at 668-69.
\textsuperscript{154} Id. at 668.
\textsuperscript{155} Id.
\textsuperscript{156} Id.
\textsuperscript{157} Id.
\textsuperscript{158} Id.
\textsuperscript{159} Id.
\textsuperscript{160} Id. at 669.
\textsuperscript{161} Id.
Additionally the Florida Supreme Court in *Public Health Trust of Dade County v. Wons* appeared to have acquiesced to that leap without explanation.\(^{162}\) The *Wons* court cited to *Ramsey* and a number of out-of-state cases without explaining the rationale behind expanding the *Perlmutter* privacy right to patients with positive chances for survival.\(^{163}\)

In Florida a patient even with minor children possessed the right to refuse treatment, but what was troubling was that the Florida courts failed to rationalize why that right existed. In *Perlmutter*, the Florida District Court of Appeals pointed to out of state law as the basis of its decision.\(^{164}\) Possibly, a re-examination of that and other out of state law will help to understand why in *Ramsey* and *Wons*, the Florida courts expanded the right to choose a likelihood of death.

**V. Florida Right To die Law**

**After Wons: In Re Browning**

In 1989, after *Wons* was decided, a Florida District Court of Appeals in *In Re Browning*\(^{165}\) upheld a legal guardian’s authority to decide whether to withdraw treatment from a patient.\(^{166}\) In *Browning*, the patient was an eighty-eight year old victim of a massive stroke that had created major, permanent, and irreversible brain damage.\(^{167}\) Because the patient was unable to swallow, she was fed through a nasogastric tube\(^{168}\) which the guardian desired to be withdrawn.\(^{169}\) Though damage to the patient’s brain was catastrophic and irreversible, uncertainty existed about her

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163. *Id.*
166. *Id.* at 261.
167. *Id.*
168. *Id* at 262.
169. *Id.*
While one physician characterized her condition as a persistent vegetative state with limited neurological activity above the brain stem, another physician described the patient as alert enough to follow people with her eyes. A nurse heard the patient mumble words on occasion.

The court focused on fashioning a remedy for a less than competent patient to vindicate the right to choose whether to continue treatment. The court decided that a surrogate decision maker could utilize an informal forum to make such a decision. The guardian is required to weigh a number of factors including the patient's condition, the probability of regaining consciousness, the clarity of the patient's wishes, and the state interests discussed in Perlmutter. A decision to withdraw treatment may only occur when clear and convincing evidence of what the patient's desires would be if the patient were competent to make a decision exists.

In fashioning the remedial procedure, the court in Browning focused on a number of doctrinal issues. First, the court rejected the use of dichotomies to distinguish between medical conditions. Terminal as opposed to non-terminal diseases or imminence of death as opposed to probability of continued life proved unhelpful for making withdrawal decisions. Instead the court adopted a multifactor balancing test that allowed for "a more complete and descriptive analysis of the patient's physical condition." Second, the Browning Court discussed the state interests or factors utilized by the

170. Id. at 261-62.
171. Id. at 263.
172. Id.
173. Id. at 267.
174. The court failed to adequately define the nature of an informal forum, though health care facility bioethical committees were mentioned. Id. at 269 n.16.
175. Id. at 271.
176. Id. at 272-73
177. Id. at 271-72.
178. Id. at 271.
Florida courts beginning with *Perlmutter* and including *Wons*. The *Browning* court characterized the state interests as both interests and factors, finding that the factors were not exclusive. The court recognized that the four factors overlapped each other and that a longer, more precise list of factors could be defined.

The court also recognized quality of life as a consideration in deciding whether to withdraw treatment. However, the court found that when quality of life was a consideration, the four state interests or factors became weightier in a decision. The state interest in protecting life sharply increases because a decision to withdraw treatment based on quality of life considerations comes closer to suicide. The state interest in the ethics of the medical profession also becomes weightier when quality of life issues are involved, because the personal values of medical practitioners may forbid them from participating in treatment withdrawal.

Before it is possible to examine the implications of *Wons* and *Browning* on future Florida right to die law, the out-of-state doctrinal bases for the Florida law needs to be examined along with other out-of-state law that could clarify and strengthen the right to die in Florida.

179. *Id.* at 269.
180. *Id.* at 266.
181. *Id.* at n.11.
182. *Id.* at 270.
183. *Id.*
184. *Id.* at 269-70.
185. "While the state cannot allow the ethics of physicians or nurses to override the constitutional rights of patients, they are a legitimate concern which should not be lightly disregarded." *Id.* at 270.
VI. THE DOCTRINAL BASIS FOR THE FLORIDA RIGHT TO DIE: MASSACHUSETTS AND NEW JERSEY PRIVACY LAW

The Florida courts based the law protecting the right to refuse or withdraw life saving or life extending treatment on Superintendent of Belchertown State School v. Saikewicz, a 1977 Massachusetts case. The Perlmutter court began its analysis with and consistently relied on Saikewicz. Not only did the Perlmutter court adopt the four state interests used in Saikewicz, but the Florida District Court of Appeals that decided Perlmutter explicitly agreed with Saikewicz. The Perlmutter court stated, "we adopt the view of the line of cases discussed in Saikewicz . . . ." Even when the Perlmutter court stated that "we find, and agree with, several cases upholding the right of a competent adult patient to refuse treatment for himself," the court first cited to Saikewicz and then to cases from a number of other states. References to Saikewicz appeared throughout Perlmutter. The Florida cases that followed Perlmutter continued to refer to Saikewicz. In order to understand the holdings and doctrine of Perlmutter and the Florida right to die cases that followed Perlmutter, an understanding of Saikewicz and subsequent Massachusetts privacy law is necessary.

188. Id.
189. Id.
190. Id. at 163.
A. Saikewicz and the Right to Withdraw Treatment in Massachusetts

The Massachusetts courts in *Superintendent of Belchertown v. Saikewicz* faced immediately the issue of withholding treatment from an incompetent patient. *Saikewicz* contrasted with *Perlmutter*, the first Florida withdrawal of treatment case, because *Perlmutter* involved a competent adult patient and *Saikewicz* involved an incompetent adult. Unlike the Florida courts which postponed deciding whether the right to choose treatment extended to an incompetent patient, the *Saikewicz* court immediately held that the right to decline treatment applied equally to competent and incompetent patients alike. The patient in *Saikewicz* suffered from leukemia, an incurable disease at that time. The disease was invariably fatal and for the fifty percent of the cases in which remission could be induced, remission lasted between two and thirteen months. If the disease remained untreated, death would result in a matter of weeks or months. The patient in *Saikewicz* was a sixty-seven year old profoundly retarded individual who had resided in a state hospital for almost forty years. The proposed chemotherapy treatment would have entailed severe side effects and would have required the cooperation of the patient, which was impossible here due to his incompetency.

The Massachusetts Supreme Judicial Court decided the issue in the narrow context of life prolonging rather than life saving treatment. Though the court never explicitly

194. *Id.* at 745, 370 N.E.2d at 427.
195. *Id.*
196. *Id.* at 729, 370 N.E.2d at 419.
197. *Id.* at 732, 370 N.E.2d at 420.
198. *Id.* at 733, 370 N.E.2d at 421.
199. *Id.* at 731, 370 N.E.2d at 420.
200. *Id.* at 734, 370 N.E.2d at 421.
201. *Id.* at 735, 370 N.E.2d at 422.
distinguished life saving treatment from life prolonging treatment, the court provided indications of differences between treatment types. The court discussed life prolongation as new techniques, extraordinary measures, and advances in medical science that allowed for greater control over dying. The new extraordinary techniques prolonged life thereby prolonging suffering for the patients and the patient's family. Discussing life saving and life prolonging modalities, the court started its analysis with whether a right to withhold treatment existed. The court based its discussion on a distinction between allowing the natural course of disease and death to progress and causing death. The court failed to provide examples of each type of treatment and conceded that the distinction was subtle. The court also found that medical ethics allowed withholding treatment where no hope of recovery existed and recovery was defined as life without intolerable suffering.

The Saikewicz court recognized two doctrinal bases for the right to withdraw or withhold treatment. First, the common law right to privacy accorded an individual "a strong interest in being free from nonconsensual invasion of his bodily integrity." Second, the federal constitutional right to privacy recognized in Griswold v. Connecticut and Roe v.

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202. Id. at 737, 370 N.E.2d at 432.
203. Id. at 737-38, 370 N.E.2d at 423.
204. Id. at 737, 370 N.E.2d at 423. The discussion involved medical ethics and the terminally ill. Id.
205. Sometimes a lack of treatment resulted in death occurring naturally, while at other times no treatment was tantamount to killing the patient. Id. at 738, 370 N.E.2d at 423.
206. Id.
207. Presumably, the natural course of death should be allowed to progress where intolerable suffering existed. Id.
208. Id. at 739, 370 N.E.2d at 424.
209. A good example of common law protection was the doctrine of informed consent. Id. The individual was deemed to possess control over his or her person, thereby assuring protection of his or her status as a human being. Capron, Informed Consent on Catastrophic Disease Research and Treatment, 123 U. PA. L. REV. 340, 366-67 (1984).
Wade\textsuperscript{211} protected individual dignity and self-determination.\textsuperscript{212} The federal constitutional right "encompasses the right of a patient to preserve his or her right to privacy against unwanted infringements of bodily integrity . . . .\textsuperscript{213}

After reviewing the bases for the right to withdraw or withhold treatment, the Saikewicz court recognized that the combined common law and constitutional right to bodily privacy could be outweighed by public or state interests.\textsuperscript{214} The court reviewed how other state courts weighed public interests against the right to bodily privacy. A number of cases existed where no state interests were recognized and the right to privacy was accorded a very strong weight.\textsuperscript{215} However, in reviewing such cases, the Saikewicz court parenthetically noted that even those cases recognized public health, safety, and morals interests.\textsuperscript{216} In fact, the Saikewicz court found a number of cases which recognized state interests such as preventing suicide, protecting minors, the medical profession's commitment to saving life, preserving life, and hospitals' commitments to fully caring for patients in their custody and control.\textsuperscript{217}

In light of its review of out-of-state cases, the Saikewicz court implied that the state interest in the preservation of life was not uniformly strong in all cases.\textsuperscript{218} The state interest might have been strong when a disease was curable, but much weaker when treatment resulted in a brief extension of life.\textsuperscript{219} In Saikewicz, the state interest in life was counterbalanced by the strong physical and emotional burdens placed on the

\begin{itemize}
  \item \textsuperscript{211} Roe v. Wade, 410 U.S. 113 (1973).
  \item \textsuperscript{212} Saikewicz, 373 Mass. at 739, 370 N.E.2d at 424.
  \item \textsuperscript{213} Id. at 740, 370 N.E.2d at 424 (citing In re Quinlan, 70 N.J. 10, 38-39, 355 A.2d 647, 662-64 (1976)).
  \item \textsuperscript{214} See id. at 740-45, 370 N.E.2d at 424-27.
  \item \textsuperscript{215} Id. at 740, 370 N.E.2d at 424-25.
  \item \textsuperscript{216} Id. at 370 N.E.2d at 425.
  \item \textsuperscript{217} Id. at 740-41, 370 N.E.2d at 425.
  \item \textsuperscript{218} Id. at 740-41, 370 N.E.2d at 425-26.
  \item \textsuperscript{219} Id. at 742, 370 N.E.2d at 425-26.
\end{itemize}
RIGHT TO DIE

patient.\textsuperscript{220} In addition, the \textit{Saikewicz} court referred vaguely to the state interest in protecting other parties because the patient in \textit{Saikewicz} had no minor children. The court talked in general terms about the need to prevent abandonment by parents, but never defined abandonment precisely.\textsuperscript{221} Also, the court declined to extensively discuss the state interest in preventing suicide because this interest was inapplicable to the case.\textsuperscript{222} Last, the court was consistent when it discussed the state interest in preserving medical ethics. The court opened its analysis of the case by reviewing the relationship between contemporary medical ethics and treatment for the terminally ill.\textsuperscript{223} In its discussion, the court observed that modern medicine often provided the dying with comfort rather than treatment.\textsuperscript{224} The dichotomy between comfort and treatment fits well with prior dichotomies between curable and incurable diseases and life prolongation and lifesaving treatments.

\textit{Saikewicz} established a right to withdraw from or forego treatment involving an incurable disease that invariably resulted in death.\textsuperscript{225} In such circumstances, treatment was considered useless, prolonging suffering. Inevitable death should be allowed to occur. The right to refuse treatment and risk inevitable death was a combined common law and constitutional right. A number of Massachusetts cases followed \textit{Saikewicz}.\textsuperscript{226} To understand how Florida law after \textit{Perlmutter} developed in the light of \textit{Saikewicz}, it will be helpful to review the development of Massachusetts law after

\textsuperscript{220} \textit{Id.} at 744, 370 N.E.2d at 427.
\textsuperscript{221} \textit{Id.} at 742, 370 N.E.2d at 426.
\textsuperscript{222} \textit{Id.} at 743 n.11, 744, 370 N.E.2d at 426 n.11, 427.
\textsuperscript{223} \textit{Id.} at 745, 370 N.E.2d at 427.
\textsuperscript{224} \textit{Id.} at 743, 370 N.E.2d at 426.
\textsuperscript{225} \textit{Id.} at 745, 370 N.E.2d at 427.
B. Massachusetts Law after Saikewicz

The case law following Saikewicz reflected not only clarification of the basic doctrine developed in Saikewicz, but also confusion and inconsistency in the application of Saikewicz. First, the Massachusetts courts consistently have allowed patients to withdraw or be withdrawn from treatment even where death was neither imminent nor certain within the foreseeable future. The Massachusetts courts failed to explain why the imminence of death was not required as Florida first required. One likely reason that imminence of death was not required was a recognition that modern medical technical technology created a hybrid existence in which death has begun but life continues. A hybrid existence could continue for years, sometimes for decades, especially when mechanical devices provided basic functions for the body.

The Massachusetts courts avoided focusing on treatment types or the rationale of patients for refusing treatment. Distinctions between types of therapies were not made. Nutrition was considered the same as any other medical treatment. In addition, patients were allowed to refuse treatment for wise or unwise reasons. The courts avoided judging the rationale for a medical care decision unless the rationale touched on public safety. So long as a patient was minimally competent to be informed concerning the consequences of no treatment, the wisdom of the decision was

228. Id.
230. Id. at 437, 497 N.E.2d at 637.
not relevant, though the objective circumstances of the disease and treatment were relevant to whether the patient had a right to refuse treatment.

Although the Massachusetts courts consistently applied the four state interests fashioned in Saikewicz, the courts struggled with defining and according weight to those interests. In fact, within two years of Saikewicz, the Massachusetts Supreme Judicial Court identified a fifth state interest, the maintenance of orderly and secure prisons, which was balanced against a prison inmates’ right to refuse hemodialysis. By identifying an additional state interest, the court implied that the four state interests identified in Saikewicz were neither all inconclusive nor established permanently for all future cases. Apparently, the Massachusetts courts were free to identify new state interests and apply appropriate state interests flexibly where new circumstances required.

As the courts recognized a new state interest, the original interests were further developed. The Massachusetts courts dealt with the interest in preserving the integrity of the medical profession on an uneasy basis. On one hand, the courts applied a "sliding scale" to medical ethics and withdrawal of treatment. When a patient faced certain death, medical ethics did not require life-saving treatments, but where the prognosis was positive and the treatment non-invasive, medical ethics required treatment even where "such 'reasonable force' as is necessary is used" to administer treatment. Hence, the state possesses a strong enough

234. Lane, 6 Mass. App. at 383, 376 N.E.2d at 1236.
235. Id. at 378-79 n.2, 376 N.E.2d at 1233 n.3.
238. Id. at 265, 399 N.E.2d at 458; Brophy, 398 Mass. at 439-41, 497 N.E.2d at 638-39.
239. See Myers, 379 Mass. at 255, 399 N.E.2d at 452.
240. Id. at 263, 265, 399 N.E.2d at 457.
interest in the ethics of the medical professional to require a patient whose disease is curable to complete treatment especially where the treatment is relatively non-invasive. On the other hand, the patient's right to control his or her own body was so strong that the right almost always outweighed medical "institutional considerations." As a result, the state interest in medical ethics was not a controlling interest in deciding whether to allow a patient to refuse treatment, though medical ethics could be one factor among a number to weigh against allowing a patient to refuse treatment.

Medical ethics could require treatment, but rarely would the individual's right to self-determination cede to the ethical requirements of physicians and hospitals. Although courts were concerned about medical ethics, they prioritized individual decision-making. The balance favoring patients encouraged a compromise with the ethical needs of medical professionals and institutions. Courts were faced with physicians who refused to participate in a patient's legally protected decision to refuse treatment, and the Massachusetts courts refused to require the physicians to participate so long as alternative medical resources that would cooperate with the patient existed. Physicians and hospitals would not be required to allow a patient to die so long as the patient could be transferred to the care of other medical professionals.

The Massachusetts courts refused to view a patient who refused treatment as committing suicide. There are three rationales for the courts distinction for why suicide did not exist. First, the courts dichotomized the cause of death by

241. Id. at 265, 399 N.E.2d at 458.
242. Id.
244. Id. at 429, 497 N.E.2d at 639.
245. Id. at 441, 497 N.E.2d at 639.
246. Id.
247. Id. at 439, 497 N.E.2d at 638.
248. Id.
distinguishing between discontinuation or refusal of treatment as the agent of death and the disease as the cause of death.\textsuperscript{249} In treatment withdrawal circumstances, the lack of treatment allowed nature to take its course.\textsuperscript{250} The patient succumbed to the disease and not the lack of treatment. Second, natural causes would be the reason for death even where a patient refusing treatment could be restored to a relatively normal, healthy life.\textsuperscript{251} Suicide failed to exist because the patient lacked "the specific intent" to cause his or her own death,\textsuperscript{252} because the patient wished not to die but to live without treatment, or to accomplish some other goal by refusing treatment.\textsuperscript{253} Last, the courts refused to judge the motives of the patient and found that an informed patient could refuse treatment for any reason, "wise or unwise."\textsuperscript{254} It was not relevant that the patient's motives were less than pure.

The state interest posing the greatest difficulties for the Massachusetts courts was the protection of life.\textsuperscript{255} The courts developed two ways to apply that interest.\textsuperscript{256} First, the courts created dichotomies similar to those utilized in applying the state interest in preventing suicide.\textsuperscript{257} The \textit{Saikewicz} court originally distinguished between life prolonging and life saving treatment.\textsuperscript{258} After \textit{Saikewicz}, the courts applied such dichotomies in gauging the strength of the state interest in protecting life. Not only did the courts recognize a life prolonging as opposed to life saving dichotomy, but also

\begin{itemize}
\item \textsuperscript{249} \textit{Id.}
\item \textsuperscript{250} \textit{Id.}
\item \textsuperscript{251} \textit{See Commissioner of Corrections v. Myers, 379 Mass 255, 258-59, 399 N.E.2d 452, 454 (1979).}
\item \textsuperscript{252} \textit{Id.} at 262, 399 N.E.2d at 459.
\item \textsuperscript{253} \textit{Id.} at 259, 399 N.E.2d at 454.
\item \textsuperscript{254} \textit{Lane v. Candura, 6 Mass. App. 377, 383, 376 N.E.2d 1232, 1236 (1978).}
\item \textsuperscript{255} \textit{Myers, 379 Mass. at 262, 399 N.E.2d at 456.}
\item \textsuperscript{256} \textit{See Brophy v. New England Sinai Hospital, 398 Mass. 417, 497 N.E.2d 626 (1986); Myers, 379 Mass. at 255, 399 N.E.2d at 452.}
\item \textsuperscript{257} \textit{See supra} notes 246 to 253 and accompanying text.
\item \textsuperscript{258} \textit{See Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 736-38, 370 N.E.2d 417, 422-24 (1977).}
\end{itemize}
curable as opposed to incurable dichotomy and extraordinary cure as opposed to ordinary cure dichotomy. However, the dichotomies failed to serve their purpose. To find that the state interest in protecting life outweighed the patient’s right to refuse treatment where the disease was curable as opposed to where it was incurable proved unhelpful and confusing.

A prime example of the confusion caused by dichotomizing occurred in *Matter of Dinnerstein*. In response to the *Saikewicz* requirement of a court order to withhold life prolonging treatment to an incompetent dying patient, many physicians feared placing a no resuscitation order on a terminally ill patient’s chart without a court order. The physicians feared that resuscitation was considered a life prolonging treatment. The *Dinnerstein* court observed that the *Saikewicz* court never intended to distinguish between life prolonging and life saving, and that both terms meant "effecting a permanent or temporary cure." Hence, physicians could enter a "no code" order without a court order where no likelihood of improvement in health conditions existed. Generally, the use of dichotomies proved unhelpful to the courts and another method of deciding when the state interest in protecting life outweighed the right to refuse treatment had to be developed.

Instead of applying dichotomies to gauge the strength of the state interest in life, the Massachusetts courts developed a sliding scale for balancing state interests against

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259. See *Brophy*, 398 Mass. at 433, 497 N.E.2d at 635.
260. *Id.* at 437, 497 N.E.2d at 637.
264. *Id.* at 472, 380 N.E.2d at 138.
265. *Id.* at 474-76, 380 N.E.2d at 138-39. A "no code" order entered in a patient's medical record instructs the medical staff not to summon the code team in the event of a cardiac or respiratory arrest. *Id.* at 472, 380 N.E.2d at 136.
individual rights. The state interest in protecting life strengthened and the individual's right to refuse treatment weakened when medical conditions and treatments had different impacts on patients. A number of impacts were identified. The greater the magnitude of the invasiveness of treatment, the weaker the state interest became, especially where the prognosis was poor. Hemodialysis or surgery such as a gastrostomy were considered invasive procedures and burdensome to the patient while the oral or intravenous administration of drugs were considered non-invasive treatments. Overall, the state interest in preserving life strengthened where the disease posed no threat to life and a positive prognosis existed. At the end of the continuum favoring state interests was a normal, functioning, existence, and favoring the right to refuse treatment was the patient nearing the end of a normal life span with incapacitating afflictions and treatment prolonging suffering. Omitted from the sliding scale were quality of life questions. The state interest failed to weaken as a patient's quality of life worsened. Instead, the courts focused on likelihood of recovery and the traumatic nature of the treatments involved.

A sliding scale approach to balancing state interests,
especially the interest in preserving life against individual rights, seemed reasonable. State interests were not static, and a state may have possessed a greater interest in preserving life in certain circumstances than in other circumstances. However, the Massachusetts courts were inconsistent in applying the sliding scale approach. The right to refuse treatment was accorded where the trial judge found that the refusal of treatment would lead to "the needless loss of human life that could be saved." The patient in Littleton v. Poitrast suffered from severe internal bleeding of unknown origins and consented to testing and surgery but not to blood transfusions because she was a Jehovah's Witness. The Massachusetts Supreme Judicial Court justice who wrote the memorandum of decision did not counter the trial judge's finding that a "[b]lood transfusion is relatively painless, safe and minimally intensive with a high degree of success in treating cases." Yet, the lack of intrusiveness of the treatment and the positive prognosis for the patient appeared to play no role in the justice's decision to allow the patient to refuse treatment. The justice failed to provide fully rationales for his decision, but seemed to focus on the existence of a competent, informed individual making a rational decision on religious bases. Certainly, Littleton was not decided on the basis that the patient was competent, because Saikewicz originally held that the rights of competent and incompetent patients remained

279. See, e.g., Commissioner of Corrections v. Myers, 379 Mass. 255, 266-67, 399 N.E.2d 452, 456 (1979). "There is a substantial distinction in the State's insistence that human life be saved where the affliction of curable, as opposed to the State interest where ... the issue is not whether, but when, for how long, and at what cost to the individual that life may be briefly extended."


282. Id.

283. Id.

284. Id.
the same. Possibly, *Littleton* applied an individual rights weighted definition of the state interest in protecting life. The state's interest in protecting life was viewed as more than just prolonging "mere corporeal existence." The state protected life in which the individual has a "right to protect his humanity." The interest of the state in preserving life also included the right of the individual to avoid efforts to sustain life that demeaned and degraded individual dignity and a sense of humanity. However, quality of life did not constitute part of this individual rights weighted view of the state interest in life because the courts refrained from pronouncing judgment on whether life was worth living. Instead, the courts focused on allowing individuals to choose to die with dignity or at least live in a dignified manner. *Littleton* included a human dignity component as part of the state interest in preserving life. The patient in *Littleton* was allowed to decide for herself what treatments compromised her sense of personhood and dignity. If the approach of *Littleton* involved such a human dignity component, the weighting of the sliding scale approach was questionable. The state might have claimed a strong interest in the patient accepting treatment when the prognosis was positive and the treatment relatively non-intrusive, but the right to self-determination continued to weigh heavily toward the right to choose by the individual.

Not only was the Florida right to die law based on out-of-state law, especially *Saikewitz*, but *Saikewitz* and subsequent

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287. *Id.*

288. *Id.*

289. *Id.*


291. *Id.*
Massachusetts law also relied on out-of-state law.

C. Quinlan and New Jersey Right to Die Law

The Florida right to die law relied on Saikewicz for its basis, however the court in Saikewicz relied on Matter of Quinlan\(^{292}\) which was based on federal constitutional law.\(^{293}\) In Quinlan, a twenty-two year old patient\(^{294}\) remained in a chronic, persistant vegetative state lacking cognitive function and required a respirator to aid breathing.\(^{295}\) Treatment would have neither cured nor improved the patient's condition and, at the time of the appeal, the patient's probable lifespan was no more than one year.\(^{296}\) The patient's father advanced three legal arguments in support of disconnecting the patient from the respirator.\(^{297}\) First, he asserted that the federal constitutionally protected right to free exercise of religion\(^{298}\) allowed him, as a practicing Catholic, to follow his conscience and require physicians to withdraw life support from his daughter.\(^{299}\) The court found that the free exercise clause failed to protect the withdrawal of treatment because withdrawal of treatment constituted conduct and not protected belief.\(^{300}\) The government could have controlled religious conduct such as requiring religiously prohibited vaccinations or forbidding rituals such as snake handling.\(^{301}\) The state's interest in preserving life overcame ambiguous beliefs of a


\(^{293}\) Quinlan, 70 N.J. at 35-36, 355 A.2d at 661-62.

\(^{294}\) Quinlan, 70 N.J. at 18, 355 A.2d at 651.

\(^{295}\) Id. at 25, 355 A.2d at 655.

\(^{296}\) Id. at 26, 355 A.2d at 655.

\(^{297}\) Id. at 34-42, 355 A.2d at 660-64.

\(^{298}\) Id. at 35, 355 A.2d at 661.

\(^{299}\) Id. at 29-34, 355 A.2d at 657-60.

\(^{300}\) Id. at 35-36, 355 A.2d at 661-62.

\(^{301}\) Id. at 35-36, 355 A.2d at 661.
religion concerning withdrawal from extraordinary life prolonging treatment.³⁰²

The second legal argument asserted by the patient's father was that continued treatment constituted cruel and unusual punishment of the patient.³⁰³ The court determined that cruel and unusual treatment was irrelevant to the patient's circumstances because the patient was not imprisoned by state authorities.³⁰⁴ "Neither the State, nor the law, but the accident of fate and nature, has inflicted upon her conditions which though in essence cruel and most unusual, yet do not amount to 'punishment' in any constitutional sense."³⁰⁵

The court accepted the third legal argument advanced by the patient's father, that a right of privacy protected the choice to accept or reject treatment.³⁰⁶ Unlike the Massachusetts court in *Saikewicz* which based its decision on both common and constitutional bases, the *Quinlan* court based its decision solely on federal constitutional doctrine,³⁰⁷ referring obliquely to the New Jersey Constitution.³⁰⁸ The *Quinlan* court utilized the protections of personal choices relating to child bearing and family life recognized in *Griswold* v. Connecticut³⁰⁹ and *Roe v. Wade*³¹⁰ to hold "[p]resumably this right is broad enough to encompass a patient's decision to decline medical treatment under certain circumstances...."³¹¹

The *Quinlan* court also recognized that the state

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³⁰² Id. at 35-37, 355 A.2d at 661.
³⁰³ Id. at 37, 355 A.2d at 662.
³⁰⁴ Id.
³⁰⁵ Id. at 38, 355 A.2d at 662.
³⁰⁶ Id.
³⁰⁷ Id. at 39-40, 355 A.2d at 662-63.
³⁰⁸ Id. at 40, 355 A.2d at 663. See also N.J. CONST. art. I, § 1. (1947).
³⁰⁹ Griswold v. Connecticut, 381 U.S. 479 (1965). The United States Supreme Court held that there was a fundamental right to privacy in "the private realm of family life." Id. at 495 (Goldberg, J., concurring).
³¹⁰ Roe v. Wade, 410 U.S. 113 (1973) (holding that a person's right to privacy, encompassed in the 14th Amendment's concept of personal liberty, is broad enough to encompass a woman's decision whether to terminate her pregnancy).
interests in the preservation and sanctity of human life and the role of the physician in administering medical treatment had to be balanced against the patient’s privacy right.\textsuperscript{312} However, in Quinlan, the right to privacy strongly outweighed the state interests.\textsuperscript{313} The court applied a sliding scale test to the weight to be assigned to the state interests similar to that used by the Massachusetts courts,\textsuperscript{314} using the degree of bodily invasion involved in treatment and the prognosis for recovery by the patient.\textsuperscript{315} The state interests weakened and the right to privacy strengthened as bodily invasion increased and prognosis worsened.\textsuperscript{316} For instance, no state interest could compel a patient to remain in an irreversable vegetative state.\textsuperscript{317} The court could have ended its discussions of state interests at that point, but opted to discuss treatment withdrawal in relation to medical ethics.\textsuperscript{318} The court indicated that medical professionals would be faced with troubling questions concerning what circumstances were appropriate for ordering an end to treatment.\textsuperscript{319} The court recognized that although professional independence had to be respected,\textsuperscript{320} physicians needed guidelines for making decisions that would result in the death of patients.\textsuperscript{321} The court recommended the creation of medical ethics committees at hospitals to screen the appropriateness of treatment withdrawal decisions.\textsuperscript{322}

The New Jersey cases that followed Quinlan strengthened the right to refuse treatment and to die and clarified the

\textsuperscript{312} Id. at 38-42, 355 A.2d at 662-64.

\textsuperscript{313} Id.


\textsuperscript{315} Id.

\textsuperscript{316} Id. at 41, 355 A.2d at 664.

\textsuperscript{317} Id. at 39, 355 A.2d at 663.

\textsuperscript{318} Id. at 42-51, 355 A.2d at 664-69.

\textsuperscript{319} Id.

\textsuperscript{320} Id. at 50, 355 A.2d at 669.

\textsuperscript{321} Id.

\textsuperscript{322} Id. at 49, 355 A.2d at 668.
doctrinal grounds for that right. Quinlan had been decided solely on a federal and possibly a state constitutional basis, but subsequent cases were decided on common law grounds. The common law protected the basic right of the individual to control his or her own body, and competent adults traditionally possessed the right to choose what treatment was proper. The common law was not just added as a basis for the right to refuse treatment resulting in death, but provided the sole basis in lieu of the constitutional right to privacy. The constitutional right continued as a valid underpinning to right to die doctrine, but no reason existed for applying the constitutional protection because the common law protection provided a sufficient basis for treatment refusals and withdrawals. Such an approach differed from Massachusetts where the courts utilized both constitutional and common law doctrine.

The New Jersey courts also joined Massachusetts and later Florida in recognizing four standard state interests, to be weighed and balanced against the individual right to privacy. However, the New Jersey courts after Quinlan explicitly and strongly weighted the balance between state interests and individual privacy rights strongly in favor of

326. Schiller, 148 N.J. Super. at 178, 372 A.2d at 366 (A guardian, who was appointed for a mentally incapacitated patient, was entitled to make all life saving decisions).
327. Conroy, 98 N.J. at 348, 486 A.2d at 1223.
328. See supra notes 30-31 and accompanying text.
331. See Satz v. Perlmuter, 362 So. 2d 160, aff'd, 379 So. 2d 259 (Fla. 1979); See also supra notes 100-111 and accompanying text.
individual privacy rights. Generally, the right to self determination outweighed any countervailing state interests, especially where a patient was competent to make a decision. In a circumstance where a patient existed in a persistent vegetative state, no state interest could outweigh the right not to choose treatment and die.

The New Jersey courts weighted the balance even more heavily in favor of individual privacy by viewing three of the four state interests in terms favoring the right to refuse treatment. First, the state interest in protecting life, the strongest of the four state interests, failed to be strong enough standing alone to foreclose a patient, especially a competent one, from deciding to forego treatment. Hence, the very life that the state had an interest in protecting would have been devalued by barring a patient, especially a competent one, from making a choice to accept or reject treatment, because the right to choose was a basic constituent of life being protected by the state. Though the Florida and Massachusetts courts recognized that the right to choose was an important part of life, neither was as clear and explicit as the New Jersey courts.

Two state interests de-emphasized by the New Jersey

336. Conroy, 98 N.J. at 349, 486 A.2d at 1223. The belief that people may make personal choices concerning their own lives was a basic value and every person possessed a strong interest in directing the course of his or her own life. Id. at 350, 486 A.2d at 1223-24.
courts were the prevention of suicide and the promotion of the integrity of the medical profession. Preventing suicide failed to be implicated in the decision to forego medical treatment, because death resulted from the underlying disease, not from self-inflicted wounds and no specific intent to die existed. The New Jersey courts never explained what read like an automatic finding that suicide was not involved when a person refused treatment knowing that death would result. The New Jersey Supreme Court vaguely recognized that "[t]he difference is between self-infliction or self-destruction and self-determination."

The New Jersey courts downplayed any conflict between ethical responsibilities of medical professionals and patients rights to forego treatment. Where disease was incurable, physicians were dedicated to easing the process of death and not treating the patient. In addition, the right of the individual to control his or her body outweighed concerns about the medical profession. The courts found that the medical profession accepted such a balance because the profession recognized the right to refuse life sustaining treatment even when refusal would be deemed a "wrong decision." Accordingly, the courts and medical profession appeared to agree about the right to refuse treatment. However, even where courts vaguely recognized that potential medical ethical conflicts might exist, the courts refused to explain the conflicts or propose resolutions.

The one state interest that the New Jersey courts recognized as potentially weightier than individual privacy was

343. Id.
344. Id. at 351-52, 486 A.2d at 1224-25.
345. Id.
346. Id. at 351, 486 A.2d at 1225.
348. Id.
the protection of third parties. Third parties were viewed in expansive terms of "the health, safety, or security of others". The state interest was strong where children were affected by the refusal treatment, though the negative impact on the children of a parent’s prolonged terminal illness could be taken into consideration.

Although the right to refuse treatment was protected strongly in circumstances where a patient was competent to make a treatment choice, the incompetency of a patient should not lessen or undermine that right. Incompetent patients possessed the same right to forego treatment as competent patients. While protecting the right to forego treatment, the New Jersey courts developed different procedures for determining when a patient may exercise that right based on the condition and circumstances of the patient involved. In developing the procedures, the courts distinguished between competent patients, patients in a vegetative state, and patients not in a vegetative state but with limited capacities to understand their conditions and interact with people around them. The courts developed the different procedures to ensure that patients were not abused, especially elderly patients in nursing homes. Hence, the courts balanced the rights of less than competent patients to forego treatment with the right to avoid the premature end to treatment.

350. Id. at 353, 486 A.2d at 1225.
352. See, e.g., Conroy, 98 N.J. at 350, 486 A.2d at 1223.
Although Massachusetts and New Jersey law provided doctrinal bases for the Florida right to die law, a number of other state and federal courts have rendered decisions concerning the right to refuse treatment where death may result.\textsuperscript{358} Massachusetts and New Jersey provided the strongest precedent for the Florida court.\textsuperscript{359} However, the California and Mississippi courts have perspectives on the right to die that may be helpful to the Florida courts as the Florida courts protect the right to forego treatment after \textit{Wons v. Public Health Trust of Dade County}.\textsuperscript{360}

\textbf{A. The California Perspective}

The California courts\textsuperscript{361} are more protective of the right to forego treatment than either the New Jersey or Massachusetts courts. In California, patients' rights are paramount to state interests or societal considerations and are accorded significantly greater weight in balancing countervailing considerations.\textsuperscript{362} Even the state interest in the preservation of life when forming the basis of moral belief of physicians who oppose discontinuing treatment is outweighed

\begin{footnotesize}

\textsuperscript{359} See, e.g., \textit{supra} notes 185-356 and accompanying text.


\textsuperscript{362} Bartling, 163 Cal. App. 3d at 194-95, 209 Cal. Rptr. at 225; Bouvia, 179 Cal. App. 3d at 1139, 225 Cal. Rptr. at 303.
\end{footnotesize}
by the patient's right to self-determination. The patient controls potentially life threatening treatment decisions even where the patient is neither comatose nor facing imminent death. Such an approach leads to a philosophy of judicial self-restraint and as a result, California courts limit their involvement in treatment decisions, allow patients to make their own decisions relying on the advice of physicians. The decision to forego treatment is viewed by at least one California court as "primarily ethical and not legal," especially in the context of the persistently vegetative patient.

The basis for such an expansive view of the patient's right to forego treatment and to control his or her body exists in ideas about the relationship between people and medical technology. Under California law, human beings are not considered the passive subjects of medical technology and techniques. Protecting self-determination in medical treatment constitutes an important means for society to respect the integrity of persons and individuals. California law reflects a concern about individuality and the protection of individual dignity in an era when machines and those who control machines could easily overcome individual desires in the name of saving lives. Even the state interest in protecting life involves assuring that medical decisions are made appropriately for incompetent patients.

The California courts give credence to medical decisions made by individuals, but other societal and individual considerations enter into determining whether to allow

363. Id. at 195, 209 Cal. Rptr. at 225.
366. Id. at 199-200, 245 Cal. Rptr. at 848.
367. Id. at 208, 245 Cal. Rptr. at 854.
368. Id. at 208, 245 Cal. Rptr. at 854-855.
369. Id. at 209, 245 Cal. Rptr. at 855.
370 Id.
treatment to be refused or withdrawn. Treatment may not be refused or withdrawn in all circumstances. The California courts recognize the existence of the four state interests applied by Massachusetts, New Jersey, and Florida courts. However, the California courts neglect to apply the four state interests explicitly or in depth. Instead, the four state interests are mentioned and quickly counterbalanced by individual rights considerations. A good example occurs in Bouvia v. Superior Court where the opinion mentions the four state interests and then discusses the state interests in life and preventing suicide in the context of quality of life and the patient's general and physical and mental circumstances.

The California courts apply a cost benefit analysis to decide whether a patient should undergo therapy. The courts review whether treatment is proportionate or disproportionate in terms of benefits gained by the patient or burdens suffered by the patient. Extremely painful and intrusive therapy may be proportionate and therefore acceptable if a cure is probable, but where the prognosis is poor, even minimal treatment is disproportionate and unacceptable. The cost benefit analysis includes considerations of how long treatment is likely to extend life and the conditions under which life will be extended. Underlying the cost benefit analysis is an assumption that no duty to provide or accept useless therapy exists, and useless

373. Bouvia, 179 Cal. App. 3d at 1127, 225 Cal. Rptr. at 297.
374. Id. at 1143-46, 225 Cal. Rptr. at 304-07.
376. Id.
377. Id. at 1018-19, 195 Cal. Rptr. at 491.
378. Id. at 1019, 195 Cal. Rptr. at 492.
therapy includes any therapy which fails to improve a prognosis.\textsuperscript{379}

Quality of life remains as much a factor as quantity of future life in determining whether to allow a patient to forego treatment.\textsuperscript{380} In \textit{Bouvia}, the patient could live as long as twenty years if the courts allowed forced feeding to continue.\textsuperscript{381} The California Appellate Court criticized the trial court for failing to give quality of life equal weight with quantity of future life.\textsuperscript{382} The appellate court even suggested that quality of life constituted a more significant consideration in deciding to permit refusal of treatment than quantity of future life.\textsuperscript{383} Quality of life was diminished where the patient viewed her life as hopeless, useless, unenjoyable, and frustrating, and where the patient, helpless and unable to care for herself, considered "her existence meaningless."\textsuperscript{384} In such circumstances, a patient may be permitted to choose a cessation of treatment and a significantly shortened life. The California courts refused to allow a patient to face unendurable suffering if the patient chose not to do so, stating "we do not believe it is the policy of this state that all and every life must be preserved against the will of the sufferer."\textsuperscript{385}

The California courts favor the rights of patients so strongly that a competent patient's desire to forego treatment overrides medical professionals' ethical opposition to such a decision.\textsuperscript{386} Hence, medical professionals may be required to withdraw treatment over their own strong opposition where the transfer of the patient to an alternative facility is not

\textsuperscript{379} \textit{Id.} at 1018, 195 Cal. Rptr. at 491. The impact of future improvement on a patient's ability to live a meaningful life is a component of prognosis. \textit{Id.}


\textsuperscript{381} \textit{Id.} at 1142, 225 Cal. Rptr. at 304.

\textsuperscript{382} \textit{Id.}

\textsuperscript{383} \textit{Id.}

\textsuperscript{384} \textit{Id.} at 1143, 225 Cal. Rptr. at 304.

\textsuperscript{385} \textit{Id.} at 1143, 225 Cal. Rptr. at 305.

\textsuperscript{386} \textit{See supra} note 362.
possible. Even where a transfer may be possible, a competent patient may require unwilling medical staff to accede to a treatment decision that violates the moral beliefs of the staff. However, where a patient is incompetent, a patient's conservator may be unable to force medical personnel to acquiesce to a decision to withhold treatment, and the conservator may be required to transfer the patient to the care of alternative medical service providers who would acquiesce to the conservator's decision.

California law according expansive protection to the right of the patient to choose to shorten his or her life by refusing treatment is based on two underlying dichotomies. First, the courts recognize a distinction between passive and active behaviors. The courts are faced with rationalizing how stopping life support equipment could be considered passive. Stopping a machine seems to be active behavior, but the courts analogize the machine to the manual provision of therapy. Hence, each time the machine provides therapy constitutes a separate administration of treatment and therefore when the machine is stopped, subsequent discrete treatments would be withheld, just as manual treatments not provided would be withheld. Also, a distinction between effecting a cure and gaining time to permit other treatments to address a pathology is recognized. Gaining time is viewed as useless if there is little likelihood of a cure in the future. Both dichotomies allow the California courts to fashion a protective standard for patient treatment decisions because they recognize that at some point medical technology becomes

389. Id. at 311, 253 Cal. Rptr. at 533-34.
391. Barber, 147 Cal. App. 3d at 1017, 195 Cal. Rptr. at 490.
392. Id.
limited and the legal system’s regulation of that technology cedes to individual autonomy. Such a view is consistent with the notion that the law recognizes that people control technology and that individual decision making constitutes a form of control over technology.

B. The Mississippi Perspective

Mississippi law, like California law, provides strong protection for the right to forego treatment even when death is likely to result. In *In re Brown* a hospital patient fell victim to an attempted homicide, suffering life threatening gunshot wounds. The victim acquiesced to surgery but refused a blood transfusion on religious grounds. The victim’s daughter was charged with shooting the victim and murdering the victim’s daughter’s father. A district attorney sought to require that the victim accept a blood transfusion because the victim served as the only eyewitness to both crimes. The chances of survival without a blood transfusion were fair, but improved to very good with a transfusion. The Mississippi Supreme Court held that the victim possessed the right to refuse the blood transfusion even when she served as an important witness in the prosecution of major crimes.

The court based its holding on both the right to free exercise of religion and the right to privacy. However, the right of privacy alone was a sufficient basis for the decision, as that right was viewed as particularly strong and personal.

393. *Id.* at 1017-18, 195 Cal. Rptr. at 490-91.
394. *In re Brown*, 478 So. 2d 1033 (Miss. 1985).
395. *Id.* at 1035
396. *Id.*
397. *Id.*
398. *Id.*
399. *Id.* at 1036.
400. *Id.*
401. *Id.* at 1037.
protecting the inviolability of the person. The right to privacy did not depend for its application on religious or other beliefs, and could be claimed by individuals for "motives noble or base." The exercise of the right to privacy did not require individuals to provide reasons. It was sufficient that the person exercising the right to privacy was a human being. Rights such as the right to privacy could be outweighed only by few particularly strong state interests. Once a right to privacy was defined by a rule of law, any limits to the right must also be created by rule of law, and the right prevailed against mere public or private interests. Such rights were immune from invasion by governmental authorities or private people even when protecting those rights proved inconvenient to society. The Mississippi Supreme Court buttressed its views about the free exercise of religion and privacy by viewing those rights as protection against the tyranny of the majority and the power of the state. Such a perspective is broader than that of even the California courts which viewed the right of privacy in the medical choice context as allowing the individual a strong measure of control over modern technology.

Because the right to privacy was accorded such strong protection, the Mississippi Supreme Court limited the right only in those very narrow circumstances when the refusal of treatment created a great and imminent danger to society. Such a danger failed to exist in Brown even where the state needed the hospital patient to serve as a witness in a murder trial. In Brown, the patient’s right to refuse treatment was not outweighed even by the state’s interest in bringing a murderer to trial, and the right to privacy prevailed even against the

402. Id. at 1040.
403. Id.
404. Id.
405. Id. at 1036.
406. Id.
407. Id. at 1040.
danger of a murderer escaping prosecution and possibly even murdering again.  

VIII. FLORIDA RIGHT TO DIE LAW AFTER Public Health Trust v. Wons: RESOLVING THE CONFUSION CREATED BY Wons

The Florida Supreme Court in Public Health Trust of Dade County v. Wons evidenced a split of opinion involving a number of right to die issues. First, the ambiguities and differences of opinions will be identified and examined, and then potential resolutions utilizing out-of-state law will be suggested.

A. Discrete State Interests or Factors Indicating the Existence of a Compelling State Interest

The majority in Wons retreated from applying four discrete state interests. In Perlmutter, the District Court of Appeals identified and listed four interests applying each one separately and explicitly. Though the Perlmutter court mentioned only the preservation of life as a relevant interest in the Perlmutter circumstances, the court applied each as one of four counterweights to the right to refuse medical treatment. In Bludworth, the Florida Supreme Court identified the four counterweights as "the state's interests". The majority in Wons downgraded the state interests to factors or criteria indicating whether a compelling state interest
overrode the right to forego treatment. The factors failed to provide "a bright line test," but were intended to be considered "while reaching the difficult decision of when a compelling state interest may override the basic constitutional rights. . . ." The dissent in Wons joined the majority by characterizing the state interests as factors, while the concurring opinion continued to apply the interests as four discrete and separate counterweights, implying that no one state interest alone may be weighty enough to overcome the right to forego treatment. The Browning court also evidenced confusion about the weight of the state interests. The court characterized the interests both as interests and factors, and stated explicitly that the four interests were not exclusive.

The ambiguous and conflicting characterization in Wons of the original four interests identified in Perlmutter and Bludworth indicates that the Florida Supreme Court is seeking flexibility in balancing the right to forego treatment against countervailing considerations. First, the factors characterization allows for the easy addition of factors other than the original four and for contouring the analysis concerning countervailing circumstances to the needs of each case. For instance, the Florida courts could weigh public safety considerations such as prison security identified by the Massachusetts court in Meyers or punishing wrongdoers as in the homicide prosecution considered by the Mississippi court in Brown.

415. Wons, 541 So. 2d at 97.
416. Id.
417. Id. at 103 (Overton, J., dissenting).
418. Id. at 98-101 (Ehrlich, J., concurring).
419. Id. at 99 n.2 (majority opinion).
420. In re Guardianship of Browning, 543 So. 2d 258, 266 (Fla. Dist. Ct. App. 1989). "While we do not attempt the task today, we suspect that the states interests could be delineated in a longer and more precise list." Id. at 266 n.11.
421. See supra note 236 and accompanying text.
422. See supra notes 406-407 and accompanying text.
By downgrading the state interests into factors or criteria, the Florida Supreme Court implicitly accords greater weight to the right to forego treatments. The court in Wons implies that more than one factor or a variety or configuration of factors would be needed to outweigh the right to choose no treatment. Hence, no one state interest could overcome the right to privacy. The concurring opinion in Wons implies the same even while continuing to refer to the factors as state interests. The Florida Supreme Court appears to be inching toward assigning the right to forego treatment the same strength and importance accorded by the California courts which recognize the four state interests but apply them loosely. By using factors instead of state interests, the Florida courts could consolidate the four factors into one particularly compelling factor similar to the approach of the Mississippi courts, which bars refusal of treatment where great and imminent public danger exists. By recognizing only one compelling countervailing counter weight to the right to forego treatment, the Mississippi courts elevated the right to choose no treatment into an almost absolute right. Such an approach would strengthen the right to forego treatment in Florida.

B. Abandoning Promoting the Integrity of the Medical Profession

In Perlmutter, the District Court of Appeals referred to Saikewicz when discussing the potential impact of withdrawal of treatment on the medical profession. Implied in the court’s discussion was a conflict between the profession’s dedication to providing care and the role played by

423 Public Health Trust of Dade County v. Wons, 541 So. 2d 96, 97 (Fla. 1989).
424 Id. at 97-98.
425 Id. at 100 (Ehrlich, C.J., concurring).
426 See supra notes 369-373 and accompanying text.
427 In re Brown, 478 So. 2d 1033, 1040 (Miss. 1985).
professionals in disconnecting life support systems and facilitating death. In *Wons*, the court did not conceive of the conflict in such ethical terms. Instead, the majority and dissent focused narrowly on the inconvenience suffered by emergency medical personnel uncertain after *Wons* about when to accede to a patient’s request to forego treatment. The majority found that hospitals would have to tolerate the burden of seeking a court order on a case by case basis. The concurring opinion found that the state interest in preserving the integrity of the medical profession was the least compelling and standing alone could never override the right to refuse treatment. *Browning* confused the issue further because the *Browning* court applied a strengthened state interest in medical ethics when quality of life issues were involved.

The majority’s and dissent’s concerns about the impact of *Wons* on the medical profession did not directly involve ethical problems or professionalism. Instead, they involved insecurity and inconvenience, implying that the medical professional considerations were not strong ones. Such an approach differs little from that of the concurring opinion. The majority and dissent deal with professional concerns as if they lacked a compelling nature. Such an approach is not surprising because even the *Perlmutter* court found that the ethics of the medical profession were not endangered by the right to forego treatment. Having trivialized concerns about the medical profession to convenience and insecurity, the Florida courts could omit the integrity of the medical profession as a factor in deciding whether to allow patients to

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429. Public Health Trust of Dade County v. Wons, 541 So. 2d 96, 98 (Fla. 1989).
430. *Id.* at 104 (Overton, J., dissenting).
431. *Id.* at 98 (majority opinion).
432. *Id.* at 100-01 (Ehrlich, J., concurring).
434. *Wons*, 541 So.2d at 98.
435. *Id.* at 100 (Ehrlich, C.J., concurring).
refuse treatment. Instead, either the Florida courts should recognize, as the New Jersey courts have, that no conflict exists between professional values and the right of a patient to choose death or accept, as the California courts have, that where such a conflict exists, the rights of the patient to control his or her body almost invariably take precedence over the beliefs of medical professionals.

C. The Preservation of Life As a Countervailing Factor: A Weakening State Interest

The majority in Wons only mentioned the preservation of life as a countervailing factor without explaining its application to the circumstances of Wons. The dissent complained that the majority appeared to have accepted a shift made by the District Court of Appeals in Ramsey away from a sliding scale approach to determining when treatment may be refused. The dissent complained that the Perlmutter court had restricted the right to forego treatment to those who faced incurable and terminal diseases, and that the Wons majority had failed to recognize the distinction between treatment refusals by the terminally ill and the curable. The dissent's complaint about the majority's lack of rationale on such an important point was a valid one. The majority appeared implicitly to broaden the rule of Perlmutter to those patients who could be cured and live a normal life. Possibly the concurring opinion reflected the thinking of the majority. The concurring opinion conceded that "[t]he dissent may be correct that the state's interest in the preservation of life lessens where the prognosis is poor . . . ."

437. See supra notes 343-347 and accompanying text.
438. See supra notes 385-388 and accompanying text.
439. Wons, 541 So. 2d at 97.
440. Id. at 103 (Overton, J., dissenting).
441. Id. at 104.
442. Id. at 100 (Ehrlich, J., concurring).
concurring opinion continued by injecting quality of life into the sliding scale, finding the cost of accepting medical treatment may be too high for patients economically, emotionally, or spiritually.443 The Browning court emphasized the state interest in life when quality of life was a factor.444

The Florida Supreme Court appears uncertain about how to apply the state interest in the preservation of life.445 The court appears to have moved away from the classic Massachusetts approach of utilizing a sliding scale where the state interest weakens as the prognosis dims and treatment becomes more intrusive. Thus, the court may be moving toward the California approach. First, the recognition by the concurring opinion that quality of life is a critical factor in weighing whether to allow a patient to refuse treatment is similar to the California court in Bouvia.446 In Bouvia, the patient faced up to twenty years of unendurable suffering, and in Wons, the patient faced a lifetime of knowing that she sinned if she accepted a blood transfusion.447 In both Bouvia and the concurring opinion in Wons, the patient's subjective view of her quality of life was accorded great weight. Such an approach is unlike that taken by the Massachusetts and New Jersey courts which rejects quality of life as a factor in refusal of treatment decisions. Also, the concurring opinion discussed quality of life considerations in terms of costs of continuing treatment.448 The California court utilized a cost benefit analysis approach but not for quality of life considerations. Instead, the California courts substituted a cost-benefit analysis for a sliding scale analysis to determine whether the circumstances permitted treatment to be refused.449

443. Id.
445. See Wons, 541 So. 2d at 98-104.
446. See supra notes 379-384 and accompanying text.
447. Wons, 541 So. 2d at 100 (Ehrlich, J., concurring).
448. Id.
449. See supra notes 374-378 and accompanying text.
D. Suicide: The Nonsensical Factor

Neither the majority nor the dissent in Wons do more than briefly mention the factor of preventing suicide. Such an omission was surprising because the patient in Wons recovered with treatment, and therefore death was not an irrevocable prognosis. By refusing the blood transfusion, the patient chose the high likelihood that she would die and her choice could appear to be a decision to end her own life. The concurring opinion implicitly recognized that suicide might be involved in Wons when it briefly applied the state interest in preventing suicide to the case, focusing on the patient's intent, control, or lack of control over his or her disease, the same as the New Jersey court did in Farrell. Because the patient possessed no desire to die, suicide was not involved. However, both the New Jersey court and the concurring opinion in Wons, overlooked a conscious decision by a basically healthy individual to accept the likelihood of death. The dissent in Wons characterized such a choice as "a death which is totally unnecessary." Even the concurring opinion conceded that the patient chose not to live if to do so required receiving blood. The District Court of Appeals in Browning faced the suicide issue more directly than the Wons court. When quality of life becomes a consideration," the act intuitively seems closer to suicide." However, the court goes no further than recognizing a problem.

The Wons court and other out-of-state courts that have tackled or avoided the application of the interest in preventing

450. Wons, 541 So. 2d at 97.
451. Id.
452. Id. at 100 (Ehrlich, J., concurring).
454. Wons, 541 So. 2d at 105 (Overton, J., dissenting).
455. Id. at 100.
suicide have refused to face directly the issue. The best the concurring opinion in *Wons* could muster to explain away the dilemma created by allowing a patient to choose death was to latch onto the dichotomy between self-determined death and death by natural causes.\(^{457}\) If the patient in *Wons* refused a blood transfusion and died, her death would be caused by her disease and not by her decision to forego treatment. Such a distinction appears strained, at best, because her decision to forego treatment caused her death when the treatment would have prevented death.

Possibly, the best approach to suicide is to avoid it as a state interest. The Mississippi court in *Brown* avoided discrete state interests or criteria and focused on imminent public danger as a countervailing consideration to foregoing treatment.\(^{458}\) The Mississippi court accorded the right to choose treatment strong protection, finding that any limits on the right must exist within the rule that created the right or is part of "positive law" and not from extrinsic public interests.\(^{459}\) Such an approach focuses on the right to control one's body and not on societal impacts except in narrow circumstances. The California court in *Bouvia* espoused a similar position to that of the Mississippi court.\(^{460}\) The court asserted that "the fact that a desire to terminate one's life is probably the ultimate exercise of one's right to privacy...",\(^{461}\) but retreated from that position by finding that the patient in *Bouvia* possessed no specific intent to commit suicide. However, the *Bouvia* court then dismissed the existence of lack of intent to die as irrelevant by finding that if the right to forego treatment existed, the motive for exercising the right was irrelevant. The court stated, "[w]e find nothing in the law to

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457. *Wons*, 541 So. 2d at 100 (Ehrlich, J., concurring).
458. *In re Brown*, 478 So. 2d 1033, 1037 (Miss. 1985).
459. *Id.* at 1036.
461. *Id.*
suggest the right to refuse medical treatment may be exercised only if the patients’ motives meet someone else’s approval.\textsuperscript{462}

\textbf{E. Protecting Third Parties: Preventing Abandonment or Enhancing Family Life}

The \textit{Wons} court experienced its strongest split of opinions when applying the factor of protecting innocent third parties.\textsuperscript{463} The dissent advocated prioritizing what was optimal for the children of patients,\textsuperscript{464} arguing children should have two parents whenever possible, and the duty of a parent to support a child overcomes the right of a parent to forego treatment when treatment could improve the parent’s condition. Hence, a two parent family life in support of children took precedence over the right to privacy. The concurring opinion found that the state interest in protecting third parties only outweighed the right to forego treatment when a child was left with no support.\textsuperscript{465} Thus, abandonment became the standard and not optimal family life. So long as an alternative caretaker such as another parent or other family member existed, no abandonment occurred. It did not matter that the children would not be as well off as long as some care existed. The majority failed to indicate what standard applied where the state interest in protecting the patient’s children did not outweigh a patient’s right to forego blood transfusions. The majority found that two parents were not necessary, but also did not apply an abandonment criteria.\textsuperscript{466} Instead, the court implied that a determination would be made on a case by case basis stating in a subsequent discussion, "no blanket rule is feasible which could sufficiently cover all

\textsuperscript{462} \textit{Id.} (emphasis in original text).

\textsuperscript{463} Public Health Trust of Dade County v. Wons, 541 So. 2d 96, 98-99, 103-04 (Fla. 1989) (Overton, J., dissenting).

\textsuperscript{464} \textit{Id.} at 103-04 (Overton, J., dissenting).

\textsuperscript{465} \textit{Id.} at 99.

\textsuperscript{466} \textit{Id.} at 98.
occasions in which this situation will arise.\footnote{467} Possibly, such an approach comprises a middle ground between the optimal two parent family and abandonment.

The concurring opinion injected into the analysis of the impact foregoing treatment on a patient's children considerations about the impact of treatment on the children.\footnote{468} In Wons, the parent would be following her religious beliefs by rejecting the transfusion, and by doing so, she set a principled example for her children.\footnote{469} Her acceptance of treatment may have had a negative impact on the children's views toward their religion.\footnote{470} The concurring opinion was injecting considerations similar to those discussed by the New Jersey court in Farrell,\footnote{471} where a dying mother's continued treatment might have caused problems for her young children.\footnote{472} The impact of the trauma of treatment circumstances was accorded as much importance as the absence of the parent after death.\footnote{473} This approach seems advisable because the needs of the children do not occur in a vacuum. A parent's medical condition or the family's religious or philosophical commitments impact the welfare of children. The lives of patients' children are examined in more than just financial or emotional support contexts.

\section*{X. Conclusion}

The Florida Supreme Court evidences confusion in Wons concerning important aspects of right to die law and doctrine in Florida. The importance of the right to privacy in relation to state interests remains unclear. The Florida
courts appear to be moving away from their original doctrinal cases, Massachusetts and New Jersey law, by implicitly adopting the expansive doctrines of the California and Mississippi courts. Such a move may herald greater protections in the future for people suffering from chronic and debilitating illnesses. Also, individuals who object to medical care may have greater choices in the future, including the choice to refuse care even if death will occur when complete recovery is possible. Such people may be able to make such a decision on their own personal terms without reference to acceptable religious or philosophical beliefs.

The Florida Supreme Court's liberalizing re-direction of right to die law, albeit implicit, comes at a critical time because the United States Supreme Court will for the first time consider the federal constitutional privacy right to withdraw treatment in *Cruzan v. Harmon.*474 If the United States Supreme Court restricts the federal constitutional protection of medical choice, *Wons,* Florida, and out-of-state cases on which *Wons* builds become critical for continued protection of the right to die in Florida. The Florida Supreme Court will have to face the accumulated doctrine from Florida precedent, Massachusetts, New Jersey, California, Mississippi, and even other jurisdictions in the context of state constitutional and common law.475

474. *See supra* notes 23-25 and accompanying text.
475. *See supra* notes 3-7.