

KRISCHER V. MCIVER: AVOIDING THE DANGERS OF ASSISTED SUICIDE

*There is no man who is master of the breath of life so as to retain it, and none has mastery of the day of death.*¹

I. INTRODUCTION

“[B]roadly construing the privacy amendment² to include the right to assisted suicide” might “run the risk of arrogating to [the court] those powers to make social policy that as a constitutional matter belong only to the legislature.”³ For this reason, courts addressing this issue consistently hold that constitutional provisions do not protect a “right to die” by physician assisted suicide.⁴ Although courts have not

¹ *Ecclesiastes* 8:8. Suicide is a complex moral issue which impacts various aspects of society and religion. Darrel W. Amansden, *The Ninth Circuit Courts Treatment of the History of Suicide by Ancient Jews and Christians in Compassion in Dying v. State of Washington: Historical Naiveté or Special Pleading?*, 13 ISSUES L. & MED. 365, 365 (1998). Although courts have relied on the historical, biblical, and religious treatment of suicide in making decisions on assisted suicide, the issue “is so historically and conceptually muddled” that it may not be a reliable basis for arguments when debating the status of this particular method of death. *Id.*

² FLA. CONST. art. I, §23 Right of privacy provides:

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 section shall not be construed to limit the public’s right of access to public records and meetings as provided by law.

³ *Krischer v. McIver*, 697 So. 2d 97, 104 (Fla. 1997). “The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.” FLA. CONST. art. II, §3. This court did not want a judicial decision on moral issues to be the deciding factor on assisted suicide. *Krischer*, 697 So. 2d at 104.

⁴ *Krischer*, So. 2d at 99-100 (holding that the Florida prohibition of assisted suicide does not violate the Equal Protection or Due Process clauses of the Fourteenth Amendment or the Privacy Clause of the Florida Constitution); *Washington v. Glucksberg*, 117 S. Ct. 2258, 2261 (1997) (holding that Washington’s statute banning assisted suicide did not violate the Due Process Clause of the Fourteenth Amendment); *Vacco v. Quill*, 117 S. Ct. 2293, 2296 (1997) (holding that New York’s prohibition of assisted suicide does not violate the Equal Protection Clause of the Fourteenth Amendment); *Kevorkian v. Thompson*, 947 F.Supp. 1152 (E. D. Mich. 1997) (holding that prohibition of assisted suicide does not violate Federal Due Process or the Michigan Savings Clause); *People v. Kevorkian*, 527 N.W.2d 714 (Mich. 1994), *cert. denied*, 514 U.S. 1083 (1995) (finding that the U.S. Constitution does not prohibit criminal penalties for one who assists a person in committing suicide and that the Michigan statute does not violate the Title-Object Clause of the Michigan Constitution).

precluded legalization, policy driven opinions leave the question to the state legislatures for final decision.⁵

In *Krischer v. McIver*, the Florida Supreme Court upheld⁶ the constitutionality of Florida's statute prohibiting assisted suicide⁷ under both the Florida privacy amendment⁸ and the U.S. Constitution.⁹ After *Krischer* Florida residents cannot rely on their privacy rights to protect from prosecution a person who assists them in committing suicide.¹⁰ While this decision promotes the policy arguments against assisted suicide,¹¹ it also limits the previously broad construction of Florida's right of

⁵ See, e.g., Editorial, *When 'Suicide' Is Homicide*, N.Y. DAILY NEWS, October 16, 1998, at 52 (“[T]he U.S. Supreme Court decided that laws . . . banning physician assisted suicide were not in conflict with the [U.S.] Constitution. But it also left the door open for states to permit the practice.”); Linda L. Emanuel, *Facing Requests for Physician Assisted Suicide: Toward a Practical and Principled Clinical Skill Set*, 280 JAMA, 643, 643 (1998) (“The [U.S.] Supreme Court’s unanimous decision to uphold the rights of states to prohibit [physician assisted suicide] nevertheless allows that states might also permit it.”); Charles E. Hall, *No Longer an Option for One AIDS Patient and His Doctor*, MED. ECON., Sept. 8, 1997, at 28 (asserting that both the U.S. Supreme Court and the Florida Supreme Court have left “wobble room” for the state legislatures); see also Melvin I. Urofsky, *Leaving the Door Ajar: The Supreme Court and Assisted Suicide*, 32 U. RICH. L. REV. 313 (1998) (discussing that the United States Supreme Court decisions give states the room to legislate to allow assisted suicide).

⁶ See *Krischer v. McIver*, 697 So. 2d 97, 104 (Fla. 1997).

⁷ FLA. STAT. ANN §782.08 (1995). “Every person deliberately assisting another in the commission of self-murder shall be guilty of manslaughter, a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s.775.084.” *Id.*; see also FLA. STAT. ANN §765.309. Mercy killing or euthanasia not authorized; suicide distinguished

(1) Nothing in this chapter shall be construed to condone, authorize, or approve mercy killing or euthanasia, or to permit any affirmative or deliberate act or omission to end life other than to permit the natural process of dying.

(2) The withholding or withdrawal of life-prolonging procedures from a patient in accordance with any provision of this chapter does not, for any purpose, constitute a suicide.

Id.

⁸ For text of the privacy amendment, see *supra* note 2.

⁹ The statute was challenged based on the federal Equal Protection and Due Process Clauses. *Krischer v. McIver*, 697 So. 2d 97, 99 (Fla. 1997). The relevant portion of the Fourteenth Amendment states:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV.

¹⁰ *Krischer*, 697 So. 2d at 102.

¹¹ *Id.* at 100. To justify an intrusion on individual’s privacy right, the court needed to establish compelling state interests. *Id.* This court relied heavily on the major policy

privacy.¹² However, while denying constitutional protection, the court stated that the legislature could enact laws allowing assisted suicide.¹³ With this, the court effectively and purposefully left this question open for continued public debate.¹⁴

Generally, this Casenote analyzes the *Krischer* court's decision to deny a broad constitutional protection of the "right to die" by assisted suicide and some of the ramifications arising therefrom.¹⁵ Part II presents a brief history of the debate concerning the right to assisted suicide and the prevailing judicial approach to the issue.¹⁶ Part III discusses the facts of the case, procedural history and holding of the majority.¹⁷ Finally, Part IV examines the *Krischer* court's analysis of the constitutional rights implicated in the assisted suicide debate, and the decision to deny protection for assisted suicide under the privacy amendment based on policy reasons.¹⁸ Additionally, this Note weighs the policy arguments about assisted suicide in light of legislative action.¹⁹

II. BACKGROUND

As health care and technology developed, there came a realization that even given physicians' best efforts, some patients would continue to suffer or would remain in a

arguments against assisted suicide. *Id.*

¹² See Shannon Brewer, Comment, *Constitutional Law: Ending the Expansion of the Florida Privacy Amendment*, 49 FLA. L. REV. 821, 824-26 (1997):

Refusing to expand protection for the right of privacy, the *Krischer* court departed from the direction the Supreme Court of Florida previously had been taking. The instant court suggested the absence of a reasonable expectation of privacy in this case of personal decision making - a situation where a privacy right has almost always attached before. The instant court held that it would not construe the privacy amendment to include a right to assisted suicide and sought to narrow the interpretation of the privacy amendment's reach.

Id.

¹³ *Krischer*, 697 So. 2d at 103.

¹⁴ *Id.* at 104 ("We do not hold that a carefully crafted statute authorizing assisted suicide would be unconstitutional"); see also *Washington v. Glucksberg*, 117 S. Ct. 2258, 2275 (1997) ("Throughout the Nation, Americans are engaged in an earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide. Our holding permits this debate to continue"); *Id.* at 2292 (Souter, J. concurring) ("The court should accordingly stay its hand to allow reasonable legislative consideration").

¹⁵ See *infra* notes 20-119, and accompanying text.

¹⁶ See *infra* notes 20-38, and accompanying text.

¹⁷ See *infra* notes 39-63, and accompanying text.

¹⁸ See *infra* notes 64-98, and accompanying text.

¹⁹ See *infra* notes 99-114, and accompanying text.

comatose state for a long time.²⁰ Out of this arose a debate concerning a “right to die.”²¹ In the U.S., the issue has been discussed for over one hundred years.²² The first major cases in this country centered on removing life-support systems from comatose patients.²³ In such cases, courts protected a patient’s refusal of treatment with constitutional provisions.²⁴

²⁰ With modern technology the lives of individuals with degenerative diseases like cancer can be prolonged indefinitely. MICHAEL DECOURCY-HINDS, AT DEATH’S DOOR WHAT ARE THE CHOICES?, NATIONAL ISSUES FORUMS 3-4 (1998). However, in some cases death becomes “a science experiment” wherein patients are not afforded the opportunity for “a peaceful and comfortable parting with families in familiar surroundings.” *Id.* at 4.

²¹ The “right to die” arose as courts responded to patients who wanted more control in making decisions regarding their own medical treatment. Note, *Physician Assisted Suicide and the Right to Die with Assistance*, 105 HARV. L. REV. 2021, 2021-22 (1992). Commentators on the subject suggest that the right to die was an extension of the doctrine of informed consent rather than constitutional rights. Tricia Jonas Hackleman, Comment, *Violation of an Individual’s Right to Die: The Need for a Wrongful Living Cause of Action*, 64 U. CIN. L. REV. 1355, 1359-60 (1996); see also Edward A. Lyon, Comment, *The Right to Die: An Exercise of Informed Consent, Not an Extension of the Constitutional Right to Privacy*, 58 U. CIN. L. REV. 1367 (1990) (asserting that privacy rights should not protect a right to die).

²² DECOURCY-HINDS, *supra* note 20, at 4. A timeline synthesizes the history of the debate. 1870’s – First major debate about physician assisted suicide in the U.S. 1906 – Ohio legislature rejects bill to legalize assisted suicide. 1938 – National Society for the Legalization of Euthanasia is formed. 1941—New York legislature rejects bill to legalize assisted suicide. 1973 – American Hospital Association issues a “Patient Bill of Rights,” which says patients should have the right to refuse life-sustaining treatment. 1976 – New Jersey Supreme Court permits the parents of comatose Karen Ann Quinlan to disconnect her respirator. 1988 – Unitarian-Universalists become the first religious body to approve of assisted suicide for the terminally ill. 1990 – Dr. Jack Kevorkian, a retired pathologist in Michigan, begins his crusade to legalize physician-assisted suicide by helping a woman with Alzheimer’s disease end her life. In its first right-to-die decision, the Nancy Cruzan case, U.S. Supreme Court rules that competent people have a constitutional right to refuse treatment, and that legal guardians can make that decision for incompetent patients. 1991—Voters in Washington narrowly reject a ballot initiative to legalize physician-assisted suicide. 1992 – California voters reject a similar measure. 1994 – Voters in Oregon approve a ballot initiative to legalize physician-assisted suicide, but the law is stayed pending judicial review. 1996 – Two federal appellate courts, in overturning state bans on assisted suicide, rule that terminally ill patients have a constitutional right to physician assisted suicide. 1997 – U.S. Supreme Court throws out lower court decisions, ruling that there is no constitutional right to assisted suicide. But the court leaves open the possibility that some limited right to die could be claimed in the future.

Id.

²³ In the Matter of Cruzan v. Director, Missouri Department of Health, 497 U.S. 261 (1990) (discussing whether parents of woman left incompetent by severe injuries sustained in an

Historically, suicide carried an extremely negative connotation,²⁵ but in the past decade, *physician assisted suicide* forcefully entered the right to die debates after Dr. Jack Kevorkian first used his “suicide machine.”²⁶ While this incident started the most

automobile accident could order the removal of her artificial hydration and feeding systems); *Quinlan*, 355 A.2d 647 (N.J. 1976), *cert. denied sub nom. Garger v. New Jersey*, 429 U.S. 922 (1976) (deciding whether the father of a 22 year old woman in a continuous vegetative state could, as guardian, decide to discontinue her life support treatment); *Bouvia v. Superior Court*, 225 Cal. Rptr. 297 (Cal. App. 1986) (addressing whether a patient could have a life sustaining feeding tube removed).

²⁴ *Cruzan*, 497 U.S. at 278 (holding that a competent person has a right to refuse medical treatment); *Quinlan*, 355 A.2d at 663 (holding that privacy rights encompass a patient’s right to decline medical treatment in certain circumstances); *Bouvia*, 225 Cal. Rptr. at 300 (holding that a patient can refuse life-sustaining treatment as a matter of right).

²⁵ From ancient times suicide was a disfavored practice. BRIAN P. JOHNSTON, *DEATH AS A SALESMAN: WHAT’S WRONG WITH ASSISTED SUICIDE* 85-97 (New Regency Publishing 1997). For example,

[T]he ancient laws of Athens and Thebes punished a man who committed suicide by denying him a conventional burial and confiscating his property. And since you cannot “prosecute” a corpse, in symbolic rejection, the Greeks would bury the body of a suicide outside of the city limits with its hand cut off.

Id. In the thirteenth century St. Thomas Aquinas wrote that suicide was a violation of the 6th Commandment which orders “Thou shalt not kill.” Craig Peyton Gaumer & Paul R. Griffith, Article, *Whose Life Is It Anyway?: An Analysis and Commentary on the Law of Physician Assisted Suicide*, 42 S.D. L. REV. 357, 360-61 (1996-1997). In this country suicide was a criminal act. *Washington v. Glucksberg*, 117 S. Ct. 2258, 2263 (1997). When an individual took his own life, his family lost claims to his estate. *Id.* These laws were repealed, essentially to stop punishing the family of the person who committed suicide. *Id.* at 2263-64.

²⁶ Kevorkian “packaged his own death machines in handy portable house call sizes.” Jonathan Gromer, *Machines of Death: Effectiveness and Humaneness of Execution Equipment*, POPULAR MECHANICS, Jan. 1998, at 56. The machines are of two types: (1) a carbon monoxide canister wherein the patient pulls a handle to start the flow of the deadly gas and (2) an i.v. wherein the patient pulls a string to begin the flow of a deadly chemical. *Id.*; see also CATHLEEN DESIMONE, *DEATH ON DEMAND: PHYSICIAN-ASSISTED SUICIDE IN THE UNITED STATES* 15 (1996) (describing Kevorkian’s suicide machine as an IV tube which with the touch of a button the patient can change the flow from saline to potassium chloride). Between 1990 and 1997, Kevorkian assisted with 50 suicides. JOHNSTON, *supra* note 25, at 57-59. So far, Kevorkian has not been convicted for any assisted suicide acts in Michigan. Kelly Lyn Mitchell, Note, *Physician Assisted Suicide: A Survey of the Issues Surrounding Legalization*, 74 N.D. L. REV. 341, 353 (1998); see also *Kevorkian v. Arnett*, 136 F.3d 1360 (9th Cir. 1998); *Kevorkian v. Thompson*, 947 F.Supp. 1152 (E.D. Mich. 1997); *People v. Kevorkian*, 527 N.W.2d 714 (Mich. 1994). However, on March 26, 1999, Kevorkian was found guilty of second-degree murder in the death of Thomas Youk. *Jack Kevorkian; Sister Ann R. Key; Freda Alexander; Roland Dumas*, U.S. NEWS & WORLD REPORT, Apr. 5, 1999, at 14. This

recent public debate on the issue,²⁷ states had contemplated the discussion. Forty-five states and the District of Columbia disapprove of assisted suicide in their laws,²⁸ and it is a crime in thirty-six states.²⁹

incident is very different from Kevorkian's previous acts of assisting suicide. *Id.* Kevorkian himself injected Youk, who suffered from Lou Gehrig's disease, with lethal potassium chloride. *Id.* A tape of Youk's death aired on CBS's *60 Minutes*. *Id.* Kevorkian's act in this case has been described as "a step so brazen that most assisted suicide backers distanced themselves from the man dubbed Dr. Death." *Id.* It appears that in this case, Kevorkian may have crossed over the fine line many draw between assisted suicide and euthanasia. *Cf. id.*

²⁷ In 1938, a Unitarian Minister began the Euthanasia Society which was the first pro-euthanasia group in the U.S. Gaumer & Griffith, *supra* note 25, at 364. The movement in favor of legalized physician assisted suicide was initiated by Derek Humphrey, the founder of the Hemlock Society. George J. Annas, Conference Proceedings: Science and the Law, *The "Right to Die" in America: Sloganeering from Quinlan and Cruzan to Quill and Kevorkian*, 34 DUQ. L. REV. 875, 890 (1996). The Hemlock Society and Humphrey gained notoriety with his book *Jean's Way* which detailed the assisted suicide of Humphrey's first wife. JOHNSTON, *supra* note 25, at 2.

²⁸ The following states disapprove of assisted suicide in laws regarding living wills: Alabama, ALA. CODE § 22-8A-10 (1990); Alaska, ALASKA STAT. § 18.12.080(f) (1994); Arizona, ARIZ. REV. STAT. ANN. § 36-3210 (1993); Arkansas, ARK. CODE ANN. § 20-17-210(g) (Michie 1991); California, CAL. HEALTH & SAFETY CODE § 7191.5(g) (West Supp. 1995); Colorado, COLO. REV. STAT. § 15-18-112(1) (1987); Washington, D.C., D.C. CODE ANN. § 6-2430 (1989); Florida, FLA. STAT. ANN. § 765.309(1) (West Supp. 1995); Georgia, GA. CODE ANN. § 88-4111(b) (Supp. 1994); Hawaii, HAW. REV. STAT. § 327D-13 (Supp. 1992); Illinois, ILL. ANN. STAT. ch. 755, para. 35/9(f) (Smith-Hurd 1992); Indiana, IND. CODE ANN. § 16-36-4-19 (Burns 1993); Iowa, IOWA CODE ANN. § 144A11.6 (West 1989); Kansas, KAN. STAT. ANN. § 65-28, 109 (1992); Kentucky, KY. REV. STAT. ANN. § 311.639 (Michie/Bobbs - Merrill Supp. 1994); Louisiana, LA. REV. STAT. ANN. § 40:1299.58.10.A (West 1992); Maine, ME. REV. STAT. ANN. tit. 18A, § 5-711(g) (West Supp. 1994); Maryland, MD. CODE ANN., Health-Gen. § 5-611(c) (1994); Minnesota, MINN. STAT. ANN. § 145B.14 (West Supp. 1995); Mississippi, MISS. CODE ANN. § 41-41-117(2) (1993); Missouri, MO. ANN. STAT. § 459.055(5) (Vernon 1992); Montana, MONT. CODE ANN. § 50-9-205(7) (1993); Nebraska, NEB. REV. STAT. § 20-412(7) (Supp. 1994); Nevada, NEV. REV. STAT. ANN. § 449.670(2) (Michie 1991); New Hampshire, N.H. REV. STAT. ANN. § 137-H:13 (Supp. 1994); North Carolina, N.C. GEN. STAT. § 90-320(b) (1993); North Dakota, N.D. CENT. CODE § 23-06.4-01(1991); Ohio, OHIO REV. CODE ANN. § 2133.12(D) (Anderson 1994); Oklahoma, OKLA. STAT. ANN. tit. 63, § 3101.12(G) (West Supp. 1995); Pennsylvania, 20 PA. CONS. STAT. ANN. § 5402(b) (Supp. 1994); Rhode Island, R.I. GEN. LAWS § 23-4.11-10(f) (Supp. 1994); South Carolina, S.C. CODE ANN. § 44-77-130 (Law. Co-op. Supp. 1994); South Dakota, S.D. CODIFIED LAWS ANN. § 34-12D-20 (1994); Tennessee, TE. HEALTH & SAFETY CODE ANN. § 672.020 (West 1992); Utah, UTAH CODE ANN. § 75-2-1118(1993); Virginia, VA. CODE ANN. § 54.1-2990 (Michie 1994); Washington, WASH. REV. CODE ANN. § 70.122.100 (Supp. 1995); West Virginia, W.VA. CODE § 16-30-10 (1995); Wisconsin, WIS. STAT. ANN. § 154.11(6) (West 1989); Wyoming, WYO. STAT. § 35-22-109 (1994).

²⁹ Alaska, ALASKA STAT. § 11.41.120(a)(2) (1978); Arizona, ARIZ. REV. STAT. ANN. § 13-1103(A)(3) (1989); Arkansas, ARK. CODE ANN. § 5-10-104(a)(2) (1987); California, CAL. PENAL

The debate finally reached the United States Supreme Court in 1997 in *Washington v. Glucksberg*³⁰ and *Vacco v. Quill*.³¹ In *Glucksberg*, the Court held that Washington's prohibition of assisted suicide³² did not violate the Fourteenth Amendment.³³ The Court concluded "that the asserted 'right' to assistance in committing suicide is not a fundamental liberty interest protected by the Due Process Clause."³⁴ At the same time, the Court decided in *Vacco* that New York's ban of assisted suicide³⁵ does not violate the Equal Protection Clause of the Fourteenth

CODE § 401 (1998); Colorado, COLO. REV. STAT. § 18-3-104(1)(b) (1990); Florida, FLA. STAT. ANN. § 782.08 (1992); Georgia, GA. CODE ANN. § 16-5-5(b) (1994); Hawaii, HAW. REV. STAT. § 707-702(1)(b) (1988); Illinois, ILL. COMP. STAT. ANN. 5/12-31(1992); Indiana, IND. STAT. ANN. § 35-42-1-2 (1998); Iowa, IOWA CODE ANN. § 707A.2, 707A.3 (1996); Kansas, KAN. STAT. ANN. § 31-3406 (1992); Kentucky, KY. REV. STAT. ANN. § 216:302 (1994); Maine, ME. REV. STAT. ANN. tit. 17A, § 204 (1983); Michigan, Act of December 15, 1992, 1992 P.A. 270; Minnesota, MINN. STAT. ANN. § 609.215 (1998); Mississippi, MISS. CODE ANN. § 97-3-49 (1994); Missouri, MO. ANN. STAT. § 565.023 (1983); Montana, MONT. CODE ANN. § 45-5-105 (1981); Nebraska, NEB. REV. STAT. § 28-307 (Supp. 1977); New Hampshire, N.H. STAT. ANN. § 630:4 (1997); New Jersey, N.J. STAT. ANN. § 2C:11-6 (1995); New Mexico, N.M. STAT. ANN. § 30-2-4(1978); New York, N.Y. PENAL LAW § 120.30 (McKinney 1997); North Dakota, N.D. CENT. CODE § 12.1-16-04 (1991); Oklahoma, OKLA. STAT. ANN. tit. 21, §818 (1983) (only effective until July 1, 1999); Pennsylvania, 18 PA. CONS. STAT. ANN. § 2505 (1998); Rhode Island, R.I. GEN. LAWS § 11-60-1, 11-60-3 (1996); South Dakota, S.D. CODIFIED LAWS ANN. § 22-16-37 (1998); Tennessee, TE. HEALTH & SAFETY CODE ANN. § 672.020 (West 1992); Texas, TEX. PENAL CODE ANN § 22.08 (1994); Washington, WASH. REV. CODE ANN. § 9a.36.060 (1998); Wisconsin, WIS. STAT. ANN. § 154.11(6) (1998); *see also* MODEL PENAL CODE § 210.5.

³⁰ 117 S. Ct. 2258 (1997). Washington physicians who treat terminally ill patients sought a declaratory judgment that the state statute prohibiting assisted suicide was unconstitutional. These physicians asserted that they would help certain gravely ill patients commit suicide, but refrained because of the statute. *Id.*

³¹ 117 S. Ct. 2293 (1997). New York physicians claimed that they would assist "mentally competent, terminally ill patients" with suicide if they were not deterred by the state's statute prohibiting assisted suicide. *Id.*

³² "A person is guilty of promoting a suicide attempt when he knowingly causes or aids another person to attempt suicide." WASH. REV. CODE § 9a.36.060(1) (1994).

³³ *Glucksberg*, 117 S. Ct. at 2261.

³⁴ *Id.* at 2271. The Court relied on the historical treatment of suicide and listed four major policy reasons which indicate the state's compelling interests in not allowing assisted suicide: (1) "an unqualified interest in the preservation of human life;" (2) "an interest in protecting the integrity and ethics of the medical profession;" (3) "an interest in protecting vulnerable groups—including the poor, the elderly, and disabled persons—from abuse, neglect, and mistakes" and; (4) "the state may fear that permitting assisted suicide will start it down the path to voluntary and perhaps even involuntary euthanasia." *Id.* at 2272-74.

³⁵ "A person is guilty of manslaughter in the second degree when . . . (3) He intentionally causes or aids another person to commit suicide." N.Y. PENAL LAW §125.15 (McKinney 1987).

Amendment.³⁶ Although the Court disposed of both cases by denying constitutional protection of this “right to die,” the decision to legalize assisted suicide was left open for the state legislatures to address.³⁷ These decisions promulgated guidelines for all future assisted suicide cases arising under constitutional provisions.³⁸

“A person is guilty of promoting a suicide attempt when he intentionally causes or aids another person to attempt suicide.” N.Y. PENAL LAW §120.30.

³⁶ *Vacco*, 117 S. Ct. at 2296. The court in *Vacco* explained that there is a valid distinction between assisted suicide, which the Court defined as “making a patient die,” and refusing life saving treatment, which the Court defined as “letting a patient die.” *Id.* at 2301.

³⁷ *See supra* note 5. Both the majority and the concurring opinions made it clear that the states could enact legislation and that the court would address the issue again. *See also* Urofsky, *supra* note 5, at 313.

³⁸ After *Glucksberg* and *Vacco* “a state supreme court could thus find a limited right to assistance in suicide in the state’s constitution but nonetheless uphold laws prohibiting assisted suicide because the state’s interest in avoiding a slide from assisted suicide to euthanasia is compelling.” George J. Annas, *The Bell Tolls for a Constitutional Right to Physician-Assisted Suicide*, NEW ENG. J. MED., Oct. 9, 1997, at 1201. The author argues that this is exactly what the Florida Supreme Court did in *Krischer*. *Id.*

III. STATEMENT OF THE CASE

A. *Facts*

Charles Hall suffered from Acquired Immune Deficiency Syndrome (AIDS) related illnesses³⁹ and doctors considered him to be in terminal condition.⁴⁰ Hall wanted to choose the time and place of his death,⁴¹ but feared a failed suicide attempt would leave him with greater suffering.⁴² Dr. Cecil McIver⁴³ was willing to help Hall in this endeavor, but potential prosecution under the Florida statute deterred him from helping Hall.⁴⁴

B. *Procedural History*

Hall and McIver⁴⁵ sought a declaratory judgment regarding the constitutionality of the Florida prohibition of assisted suicide⁴⁶ and an injunction to prevent the state from prosecuting McIver.⁴⁷ The trial court ruled in favor of Hall and McIver.⁴⁸ The Fourth District Court of Appeals affirmed⁴⁹ and the Florida Supreme Court reversed.⁵⁰

³⁹ Hall contracted AIDS from a blood transfusion. *Krischer v. McIver*, 697 So. 2d 97, 99 (Fla. 1997). Hall was frequently hospitalized for a variety of illnesses including AIDS, Reiter's Syndrome, cytomegalovirus, Hepatitis B virus, Herpes Simplex types 1 and 2, H.Pylori, and Epstein-Barr virus. In addition, Hall was legally blind and suffered from sores on various parts of his body and stomach pains. Hall relied on morphine in attempting to relieve his pain. *McIver v. Krischer*, 1997 WL 225878, *1-2 (Fla. Cir. Ct. 1997), *rev. granted*, 689 So. 2d 1070 (1997), *rev'd.*, *Krischer v. McIver*, 697 So. 2d 97 (1997).

⁴⁰ *McIver*, 1997 WL 225878 at *2.

⁴¹ *Id.* The mode of death would be "by administering a substance which will induce immediate loss of consciousness and certain death shortly thereafter." *Id.*

⁴² Hall requested assistance in committing suicide when his suffering reached "the point where he will no longer feel the comfort and assurance of knowing that his agony will be followed by a period of acceptably renewed health." *Id.* He consulted with physicians in the hopes of obtaining a lethal prescription. *Id.*

⁴³ *Id.* Although McIver was not Hall's primary or treating physician, McIver had observed Hall's deteriorating condition and reviewed his medical records. *Id.*

⁴⁴ *Id.* at 3.

⁴⁵ Two original plaintiffs, C.B. Castonguay and Robert G. Cron died prior to trial; both were dismissed as parties. *McIver*, 1997 WL 225878 at *1-2.

⁴⁶ *See supra* note 7.

⁴⁷ *McIver*, 1997 WL 225878 at *1.

⁴⁸ The court decided that although Hall did not have a substantive due process right to physician assisted suicide, he did have a right to assistance under the Equal Protection Clause and the state Privacy Amendment. *Id.* at *5-10. In deciding the privacy issue, the trial court only considered the facts before it. *Id.* at *5-6. It weighed *Hall's* right to make his own

C. Reasoning of the Florida Supreme Court

1. Federal Constitutional Issues

The United States Supreme Court issued the *Glucksberg* and *Vacco* opinions before *Krischer* reached the Florida Supreme Court.⁵¹ *Glucksberg* and *Vacco* disposed of the federal questions for the *Krischer* court.⁵²

2. The Florida Privacy Amendment

In reversing, the Florida Supreme Court relied on essentially the same policy reasons elucidated in the lower court decision: “(1) the preservation of life,⁵³ (2) the prevention of suicide,⁵⁴ (3) the protection of innocent third parties,⁵⁵ and (4) the

medical decision against the state’s interests in preserving life and preventing suicide, protecting innocent third parties, and maintaining the ethical integrity of the medical profession. *Id.* at *7-8. After balancing all of these factors, the court decided that they were “insufficient to overcome the privacy interests asserted by Mr. Hall in this case.” *Id.* at *8. The trial court issued a declaratory judgment stating that Hall had a constitutional right to have his physician assist his suicide. *Id.* at *10. The court also gave an injunction precluding the state from prosecuting McIver for assisting Hall with his suicide. *Id.* at *11. Hall’s competence was important to the court in this decision. *Id.* at *3. Competence can be determined by a three part test: (1) possession of a set of values and goals, (2) the ability to communicate and understand information, and (3) the ability to reason and deliberate about one’s choices. Steven Miles et al., *Considerations of Safeguards Proposed in Laws and Guidelines to Legalize Assisted Suicide*, in *PHYSICIAN ASSISTED SUICIDE* 213 (1997).

⁴⁹ The appeals court certified a question to the Supreme Court of Florida: whether a competent, terminally ill adult has a constitutional right to physician assisted suicide. *Krischer v. McIver*, 697 So. 2d 97, 99 (Fla. 1997).

⁵⁰ *Id.* at 104.

⁵¹ Both cases were decided June 26, 1997. *See* *Washington v. Guckberg*, 117 S. Ct. 2258 (1997); *Vacco v. Quill*, 117 S. Ct. 2293 (1997). The immediate case was decided July 17, 1997. *See* *Krischer v. McIver*, 697 So. 2d at 97 (Fla. 1997).

⁵² *See supra* notes 30-31, 33-34.

⁵³ *Krischer*, 697 So. 2d at 102. This unqualified interest in preserving life is reflected in the commitment to homicide laws across the country. *Glucksberg*, 117 S. Ct. at 2272. Two main tenets underlie the preservation of life principle: (1) “the absolute inviolability of human life,” and (2) “the equal value of all human life.” Matthew P. Previn, Note, *Assisted Suicide and Religion: Conflicting Conceptions of the Sanctity of Human Life*, 847 *GEO. L.J.* 589, 592-93 (1996). This concept is entrenched in religious and historical ideals and is arguably the most important of the state’s interests. *Id.*

⁵⁴ *Krischer*, 697 So. 2d at 102. One commentator argued that the prevention of suicide is an outgrowth from the principle that life should always be preserved. Previn, *supra* note 53, at 93. This interest is based in the fear that allowing assisted suicide will lead down a

maintenance of the ethical integrity of the medical profession.”⁵⁶ The court held that “three of the four recognized state interests are so compelling as to clearly outweigh Mr. Hall’s desire for assistance in committing suicide.”⁵⁷

In addition, the court reexamined the distinction between the right to assisted suicide and the right to refuse treatment under the privacy amendment.⁵⁸ To deny

dangerous path to voluntary or involuntary euthanasia. *Glucksberg*, 117 S. Ct. at 2274. “If suicide is protected as a matter of right, it is argued, every man and woman in the U.S. must enjoy it.” *Id.* Some of the major fears are for patients who may be coerced into ending their lives; patients who may opt for physician assisted suicide without having received all palliative care interventions; patients ending their lives for economic reasons; and nonconsenting patients having their lives ended. Ezekiel J. Emanuel, *The Future of Euthanasia and Physician-Assisted Suicide: Beyond Rights Talk to Informed Public Policy*, 82 MINN. L. REV. 983, 1007 (1998).

⁵⁵ *Krischer*, 697 So. 2d at 102. This interest is typically asserted when minor children might be abandoned after their parent exercises his/her right to die. *Public Health Trust of Dade County v. Wons*, 541 So. 2d 96, 97 (Fla. 1989); *see also* *Fosmire v. Nicoleau*, 551 N.E. 2d 77, 83 (N.Y. 1990) (holding that there is no restriction upon right to refuse medical treatment when patient has minor dependents).

⁵⁶ *Krischer*, 697 So. 2d at 102. When a physician takes the Hippocratic Oath he promises: “I will neither give a deadly drug to any one if asked for it nor will I make a suggestion to this effect.” Physician assisted suicide directly conflicts with this basic tenet of the medical profession. *Washington v. Glucksberg*, 117 S. Ct. 2258, 2273 (1997). Today, the American Medical Association, in keeping with the doctrine of the Hippocratic Oath, is opposed to physician assisted suicide. *AMA Starts ‘End of Life’ Programs in Hospice Care*, CHI. SUN TIMES, October 18, 1998, at 27. *But see* Previn, *supra* note 53, at 594 (explaining that when the Hippocratic Oath was adopted by the Pythagoreans it expressed their view on the sanctity of life which was not necessarily the prevailing view in medical ethics at the time and that Christianity was the catalyst for the spread of the oath). But, some argue that it is a doctor’s duty to relieve suffering and in some cases assisted suicide is the only way to accomplish this goal. *See, e.g.*, Pamela R. Ferguson, *Causing Death or Allowing to Die? Developments in the Law*, 23 JAMA 368, 369 (1997) (“If the first purpose of medicine- the restoration of health can no longer be achieved, there is still much for a doctor to do, and he is entitled to do all that is proper and necessary to relieve pain and suffering, even if measures he takes may incidentally shorten life”).

⁵⁷ *Krischer*, 697 So. 2d at 102. Since no evidence presented the effect of Hall’s suicide on innocent third parties, the court relied on the state’s interests in preserving life, preventing suicide and maintaining the integrity of the medical profession. *Id.* at 102-3. The court also relied heavily on the 1984 New York State Task Force on Life and the Law’s recommendations against assisted suicide. *Id.* at 101-02

⁵⁸ *Id.* The court reasoned that the help requested in physician assisted cases is not treatment in the normal sense of the term. *Id.* at 102. The major factor in this distinction is that if life-support is removed, the patient basically dies of natural causes. *Id.* The difference is whether death is caused by the disease or a lethal dose of medication. *Id.* This distinction

privacy protection, the court classified assisted suicide as an affirmative act that directly causes the death of the patient.⁵⁹ Other acts, which are protected by the privacy amendment either do not cause death⁶⁰ or involve withholding treatment, which leads to death from natural causes.⁶¹

Finally, the court addressed the possibility that the legislature could devise a statute to legalize assisted suicide.⁶² The court's position is that making a final conclusion on this issue is part of the legislature's function to consider public policy and moral arguments in making law.⁶³

is essentially a legal question of causation. See Ferguson, *supra* note 56, at 371. However, some argue that the distinction is moral; it centers on intent of the doctor and not the choice of the patient. Fiona Randall, *Why Causing Death Is Not Necessarily Morally Equivalent to Allowing to Die - a Response to Ferguson*, 23 J. MED. ETHICS 373, 373 (1997). Doctors do not intend to cause death when withdrawing life support because death occurs from the underlying condition, while the doctors intent when assisting with suicide is to cause death. *Id.* at 374. *But see Krischer*, 697 So. 2d at 110 (Harding, concurring).

[T]he majority's 'sharp' distinction between active and passive dying may cause substantial mischief. The price could be, on one hand, agony forced upon dying patients by physicians who simply do not know what else they can lawfully do, or on the other hand, a legally questionable medical hypocrisy that distorts the 'active' versus 'passive' distinction in an effort to be humane.

Id.; George C. Garbesi, J.S.D., *The Law of Assisted Suicide*, 3 ISSUES L. & MED. 93, 94 (1987) (stating that "[n]ormally, a distinction cannot be made between positive and negative acts for legal purposes, when discussing the developing law of assisted suicide in reference to cases where life support treatment was withheld").

⁵⁹ *Krischer*, 697 So. 2d at 102.

⁶⁰ See, e.g., *In re T.W.*, 551 So. 2d 1186, 1194 (Fla. 1989) (permitting pregnant minor to obtain an abortion without her parent's consent). The U.S. Supreme Court and other courts in this country have granted similar protection to affirmative acts. See, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833, 845-46 (1992) (holding that the state's interest in the life of a fetus before viability do not justify an intrusion on a woman's privacy right to an abortion); *American Academy of Pediatrics v. Lungren*, 940 P.2d 797 (Cal. 1997) (holding that statute requiring minor to obtain parental consent before obtaining an abortion violates privacy rights). *But see* Sylvia A. Law, *Birth and Death: Doctor Control vs. Patient Choice*, 82 MINN. L. REV. 1045 (1998) (arguing that a distinction between childbirth related decisions and death decisions is valid based on inherent differences between the two processes).

⁶¹ See, e.g., *In re Dubreuil*, 629 So. 2d 819 (Fla. 1993) (finding that the privacy amendment protected an individual who wanted to refuse a blood transfusion due to religious beliefs); *In re Guardianship of Browning*, 568 So. 2d 4 (Fla. 1990) (allowing surrogate to assert rights of woman who was vegetative but not terminally ill to remove nasogastric feeding tube); *Satz v. Perlmutter*, 379 So. 2d 359 (Fla. 1980) (addressing whether individual suffering from Lou Gehrig's disease could remove artificial respirator needed to keep him alive).

⁶² *Krischer*, 697 So. 2d at 104.

⁶³ *Id.*

IV. ANALYSIS

A. *The Florida Privacy Amendment*⁶⁴

Despite granting relatively broad protection for privacy rights,⁶⁵ Florida courts have refused to interpret the right as absolute.⁶⁶ The analysis of an individual's rights under the privacy amendment involves a balance between the state's interests and the hindrance of personal rights⁶⁷ using a compelling state's interest standard.⁶⁸

⁶⁴ See *supra* note 2.

⁶⁵ The Florida right to privacy was intended to extend farther to protect more rights than are guaranteed by the federal constitution. In *re* T.W., 551 So. 2d 1186, 1191 (Fla. 1989); see also, e.g., *American Academy of Pediatrics v. Lungren*, 940 P.2d 797 (Cal. 1997) (indicating that the California privacy right has been construed more broadly than the federal right).

⁶⁶ *Shaktman v. State*, 553 So. 2d 148, 151 (Fla. 1989). If the privacy interest asserted conflicts with a regulation which serves a compelling state interest there will be an intrusion on the privacy rights. *Id.*

⁶⁷ *Florida Bd. of Bar Examiners Re: Applicant*, 443 So. 2d 71, 76 (Fla. 1983). A threshold issue in the analysis is whether the asserted rights fall within a protected zone of privacy. *Id.* The state asserts that it will only protect rights which are "fundamental or implicit in the concept of ordered liberty." *Id.* Examples of protected areas are marriage, procreation, contraception, family relationships, child rearing, and education. *Id.* "The means to carry out such compelling state interest must be narrowly tailored in the least intrusive manner possible to safeguard the rights of the individual." In *re* Browning, 568 So. 2d 4, 14 (Fla. 1990). See also, e.g., *In the Matter of Quinlan*, 355 A.2d 647 (N.J. 1976) (finding that privacy protection extends to patient's refusal of medical treatment); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (recognizing that individuals have the right to be free from intrusion on matters which affect a woman's decision whether to have a child); *Satz v. Perlmutter*, 379 So. 2d 359 (1980) (affirming lower court decision which allowed a terminally ill patient to refuse medical treatment); *In re Dubreuil*, 629 So. 2d 819 (Fla. 1993) (holding that patient can refuse a potentially life-saving blood transfusion); *Fosmire v. Nicoleau*, 551 N.E.2d 77 (N.Y. 1990) (arguing that state does not have superior interest when patient wants to decline blood transfusions); *In re T.W.*, 551 So. 2d 1186 (Fla. 1989) (holding that the right to privacy encompasses a woman's right to an abortion). But see *Winfield v. Division of Pari-Mutual Wagering*, 477 So. 2d 544 (Fla. 1985) (finding that state's interest in effective investigations of the pari-mutual industry outweighs an individual's expectation of privacy in financial records); *State v. Cunningham*, 712 So. 2d 1221 (Fla. App. Ct. 1998) (holding that there is a compelling state interest in protecting minors from harmful or exploitative sexual conduct by adults).

⁶⁸ "This test shifts the burden of proof to the state to justify an intrusion on privacy. The burden can be met by demonstrating that the challenged regulation serves a compelling state interest and accomplishes its goal through the use of the least intrusive means." *Winfield*, 477 So. 2d at 546.

The *Krischer* court justified an intrusion of privacy rights based on compelling state interests.⁶⁹ In contrast to the lower court, the Florida Supreme Court looked to the implications that *Krischer* might have beyond Hall's death.⁷⁰ Essentially, the opinion strayed from established principles of privacy in order to accomplish a broader policy goal.⁷¹

1. Privacy Principles

In prior cases, privacy rights protected a range of rights, including a right to die by refusing life-saving or life-sustaining treatment.⁷² These cases relied on the principle that "the issue is not whether, but when, for how long, and at what cost to the individual . . . life may be extended."⁷³ The rationale behind the variety of situations where privacy protected an individual's medical decisions does not seem to support the *Krischer* court's decision.⁷⁴

For example, *In re Dubreuil*⁷⁵ held that a patient had a right under the Privacy Amendment to refuse a life saving blood transfusion.⁷⁶ In *Dubreuil*, the Florida

⁶⁹ The court held that the state's interests in preserving life, preventing suicide and maintaining the ethical integrity of the medical profession outweighed Hall's interest in having a physician assist with his suicide. *Krischer v. McIver*, 697 So. 2d 97,102-04 (Fla. 1997).

⁷⁰ The trial court held that "[t]he state's legitimate concern cannot override Mr. Hall's interest in foreshortening his existence by mere days." *Krischer*, 1997 WL 225878 at *7. The court essentially only looked to the effect the decision would have on Hall. *Id.* The supreme court, however, considered the statewide implications of Florida residents facing "the slippery slope of determining the relative value of life." *Krischer*, 697 So. 2d at 101.

⁷¹ See generally Yale Kamisar, *Against Assisted Suicide – Even A Very Limited Form*, U. DET. MERCY L. REV. 735, 739 (1995) (discussing policy arguments against legalized assisted suicide); see also M. Cathleen Kaveny, Propter Honoris Respectum, *Managed Care, Assisted Suicide, and Vulnerable Populations*, 73 NOTRE DAME L. REV. 1275, 1299-1307 (1998) (explaining the dangers of legalizing assisted suicide, especially in light of the current state of health care).

⁷² See *supra* note 61 for examples.

⁷³ *In re Guardianship of Browning*, 568 So. 2d at 14 (citing *Satz v. Perlmutter*, 362 So. 2d 160, 162 (Fla. 4th DCA 1978) (quoting *Superintendent of Belchertown State Sch. v. Saikewicz*, 370 N.E.2d 417, 425-26 (Mass. 1977)).

⁷⁴ The Florida Supreme Court had previously used privacy to protect a right to die for a terminal patient whose life would only be temporarily and artificially extended by medical procedures. *Satz v. Perlmutter*, 362 So. 2d 160 (Fla. Dist. Ct. App. 1978); see also *John F. Kennedy Mem'l Hosp., Inc. v. Bludworth*, 452 So. 2d 921, 924 (Fla. 1984) ("The issue in these cases is not whether a life should be saved. Rather, it is how long and at what cost the dying process should be prolonged").

⁷⁵ 629 So. 2d 819 (Fla. 1993)

⁷⁶ Patricia Dubreuil was a Jehovah's Witness. *Id.* at 820. Because of her religious beliefs,

Supreme Court decided that the patient's right to make choices regarding her medical care outweighed the state's interests.⁷⁷ In another case, *In re T.W.*,⁷⁸ the court used the Privacy Amendment to allow a minor to obtain an abortion without parental consent.⁷⁹ The court found that "a substantial invasion of a pregnant female's privacy by the state . . . is not necessary" to promote compelling state interests.⁸⁰

Krischer must be reconciled with these and other privacy decisions. In contrast to *Dubreuil* and *In re T.W.*, the *Krischer* court distinguished between right to die cases using a means based test rather than contemplating only the individual's right to make medical decisions.⁸¹ The means based test distinguishes between the cause of death: in assisted suicide, death is caused by an affirmative act, while in the other circumstances an omission of treatment results in death.⁸² While the means based test avoids precedents like *Dubreuil*,⁸³ in some situations, such as *In re T.W.*, courts protected

Dubreuil refused to consent to a life-saving blood transfusion after her child was delivered by a Cesarean section. *Id.* at 821. The hospital petitioned the court to issue an immediate declaratory judgment to override the patient's refusal of the transfusions. *Id.* The trial court held for the hospital and authorized the transfusion. *Id.* at 821. The Florida Supreme Court reversed. *Id.* at 820.

⁷⁷ In this case, Dubreuil's death would leave her two minor children abandoned. *Dubreuil*, 629 So. 2d at 826. The court held that this was not sufficient to justify an intrusion of her privacy. *Id.*

⁷⁸ 551 So. 2d 1186 (Fla. 1989).

⁷⁹ *Id.* at 1194. A teenager desired to have an abortion without informing her mother. *Id.* at 1189. However, the parental consent statute set out a procedure a minor must follow before receiving an abortion; part of the procedure was parental authorization. *Id.* at 1188-89. The teenager challenged the statute through a guardian *ad litem*. *Id.* The statute was found to be unconstitutional because it encroached on the minor's privacy rights from the time of conception until birth. *Id.* at 1194. An intrusion of this magnitude was not necessary to promote the state's interests. *Id.* at 1194.

⁸⁰ *Id.*

⁸¹ *Krischer v. McIver*, 697 So. 2d 97, 102 (Fla. 1997). The means based test looks at the action of the physician which leads to death and makes a distinction between affirmative and negative acts. *Id.* Affirmative acts (such as assisted suicide) which cause death are prohibited while negative acts (such as withdrawing or withholding treatment) which leads to death are permitted. *Id.*

⁸² See *supra* notes 57-60.

⁸³ The distinction between affirmative and negative acts differentiates between these types of cases. *C.f.* Kamisar, *supra* note 71, at 754-55.

There are significant moral and legal distinctions between letting die . . . and killing. In letting die, the cause of death is seen as the underlying disease process or trauma. In assisted suicide/euthanasia, the cause of death is seen as the inherently lethal action itself There must be an underlying fatal pathology if allowing to die is even possible. Killing . . . provides its own fatal pathology. Nothing but the action of the doctor giving the lethal injection is necessary to bring about death.

affirmative acts on a person's body.⁸⁴ The means based test ignores the fact that in some cases "there is no question death must occur, and must occur painfully."⁸⁵ Considering the balancing test⁸⁶ used in prior decisions, in these instances it seems that what is left of the individual's life should be determinative and not the way life ends.⁸⁷

2. Public Policy

Id.

⁸⁴ *In re T.W.*, 551 So. 2d 1186 (Fla. 1989) (approving the right to terminate a pregnancy); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (holding that the right of choice to have a child is protected). *But see Bouvia v. Superior Court*, 225 Cal. Rptr. 297, 306 (Cal. App. 2d. 1986). The court discussed the affirmative/negative act distinction. *Id.* "[I]t is significant that the instances and the means there discussed all involved affirmative, assertive, proximate, direct conduct such as furnishing a gun, poison, knife, or other instrumentality or usable means which another could physically and immediately inflict some death producing injury upon himself." *Id.* "Such situations are far different than the mere presence of a doctor during the exercise of his patient's constitutional rights." *Id.*

⁸⁵ *Krischer v. McIver*, 697 So. 2d 97, 111 (Fla. 1997) (Kogan, J. dissenting). The dissent in *Krischer* argued that privacy principles should be particularly applicable when the individual reaches the death bed. *Id.* The state has no articulable interest in saving a life which only consists of "a final convulsion of agony." *Id.* Further, when a physician withholds treatment, the patient will die, which means the doctor is assisting with the patient's death. Julia Pugliese, *Don't Ask – Don't Tell: The Secret Practice of Physician Assisted Suicide*, 44 HASTINGS L.J. 1291, 1313 (1993). Those patients who do not require treatment to stay alive must suffer through their illness which will end in a painful death at an undetermined time. *Id.* Sometimes death by the disease is more painful and cruel than a physician assisting suicide or performing euthanasia. *Id.* *But see Kamisar*, *supra* note 71, at 756.

Although it closes an 'avenue of escape', a ban on assisted suicide does not totally occupy a person's life or make affirmative use of his body. However, to deny a person the right to be disconnected from artificial life-support is to force one into a particular, all-consuming, totally dependent, and indeed rigidly standardized life: the life of one confined to a hospital bed, attached to medical machinery, and tended to by medical professionals. It is a life almost totally occupied. The person's body is, moreover, so far expropriated from his own will, supposing that he seeks to die, that the most elemental acts of existence – such as breathing, digesting, and circulating blood – are forced upon him by an external agency.

Id.

⁸⁶ *See supra* note 67-68 and accompanying text.

⁸⁷ "We think that the State's interest *Contra* weakens and the individual's right to privacy grows as the degree of bodily invasion increases and the *prognosis dims*. Ultimately there comes a point at which the individual's rights overcome the State interest." In the Matter of *Quinlan*, 355 A.2d 647, 664 (N.J. 1976). *But see Cruzan v. Director*, 497 U.S. 61, 82 (1990) ("[W]e think a State may properly decline to make judgments about the "quality" of life that a particular individual may enjoy, and simply assert an unqualified interest in the preservation of human life to be weighed against the constitutionally protected interests of the individual").

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Since, in many cases, constitutional rights are amorphous and ambiguous,⁸⁸ recognizing a right to assisted suicide without limitations could lead to disastrous results.⁸⁹ Although the decision in *Krischer* may seem contrary to established privacy principles,⁹⁰ the ramifications from constitutionally protected assisted suicide are more frightening than the scenarios presented in prior cases.⁹¹ By adopting the United States Supreme Court's position and not permitting assisted suicide,⁹² the *Krischer* court illustrated a concern for the potential dangers stemming from a broad constitutional protection.⁹³

⁸⁸ This is especially true for the right of privacy. Lyon, *supra* note 21, at 1368. Privacy does not appear in the constitution. *Id.* “[I]t appears and disappears in the penumbras and emanations of specific guarantees in the bill of rights. . . .” *Id.* Thus, no concise definition of privacy exists. *Id.*

⁸⁹ Since the right to refuse treatment is not limited to the terminally ill, neither would a right to assisted suicide. *Krischer v. McIver*, 697 So. 2d 97, 109 (Fla. 1997) (Harding, concurring); *see also, e.g.*, Michael McGonnigal, *This Is Who Will Die When Doctors Are Allowed to Kill Their Patients*, 31 J. MARSHALL L. REV. 95 (providing an in depth discussion of the potential victims of assisted suicide). *See also* Symposium, *Physician-Assisted Suicide: Facing Death After Glucksberg and Quill, Empowering and Protecting Patients: Lessons for Physician-Assisted Suicide from the African American Experience*, 82 MINN. L. REV. 1015 (1998) (discussing that stigmatized minority groups are often forgotten when analyzing the dangers associated with assisted suicide).

⁹⁰ *See generally* Brewer, *supra* note 12, at 824 (discussing the *Krischer* court's departure from a trend which broadened the scope of the privacy amendment).

⁹¹ For example, some argue that physicians who assist suicide are just implements of a society which refuses to care for the dying. Yale Kamisar, Opinion, *Opposition to assisted Suicide Involves More Than Morality*, DET. NEWS, Oct. 15, 1998, at A12. In contrast to the withdrawal of treatment and abortion cases, assisted suicide does not have to be limited to terminally ill. Kamisar, *supra* note 71, at 749-50. Giving or not giving an abortion, in most instances does not cause the death of the woman. *Id.* at 750. The withdrawal of treatment will only lead to the death of an already dying person. *Id.* Assisted suicide, however, can be a death option for anyone. *Id.* The practice can also spread to active euthanasia for those who cannot complete the act for themselves, and would otherwise live. *Id.*; *see also supra* note 89.

⁹² *Krischer*, 697 So. 2d at 100. The opinions strongly support a ban of assisted suicide. Symposium, *Physician-Assisted Suicide: Facing Death After Glucksberg and Quill, On the Meaning and Impact of the Physician-Assisted Suicide Cases*, 82 MINN. L. REV. 895, 900 (1998). “Now that the Supreme Court has rejected their main constitutional arguments . . . proponents of PAS [physician assisted suicide] are in a weaker position than they were before these lawsuits commenced,” because the state legislatures are not likely to accept arguments which were unsuccessful in the U.S. Supreme Court. *Id.*

⁹³ “[A]uthorization of assisted suicide by the courts would actually cause more problems than it would solve for the terminally ill.” *Krischer*, 697 So. 2d at 106 (Justice Overton, concurring opinion).

One major worry is for individuals who may be victimized by assisted suicide.⁹⁴

In addition, some fear that the slide down the slippery slope towards involuntary euthanasia would begin almost immediately after assisted suicide is given constitutional protection.⁹⁵ Exacerbating the problem are the emotional issues which often underlie a

⁹⁴ Many groups are at risk of becoming victims of assisted suicide. McGonnigal, *supra* note 89, at 109. First, are patients whose physicians are unsuccessful at treating their pain. *Id.* at 109-110. Statistics also show that individuals who request assisted suicide suffer from some type of depression. *Id.* at 111-12. Next, some people who are unhappy with life may use a terminal diagnosis as an excuse to commit suicide. *Id.* at 115. Another fear is that physicians might influence some patients to opt for assisted suicide. *Id.* at 115-16. In addition, people who are abandoned might choose assisted suicide instead of facing life alone. *Id.* at 116-17. Some fear that those who are victims of fashion might begin to weigh their quality of life and decide that if it is not up to a certain standard that it is not worth living. *Id.* at 117-18. Additionally, a patient might receive an incorrect diagnosis or a faulty prognosis and make a rash decision before the mistake is discovered. *Id.* at 118-19. Also, some might not consider the pain that suicide would cause loved-ones; these people might choose to live if these consequences were contemplated. *Id.* at 119. Other people might fear their last days so much that they decide on assisted suicide before the suffering even starts. *Id.* at 120. Further, some may want to stop the emotional and financial burdens placed on their families by the dying process. *Id.* at 132-135. Finally, other ill patients may be pushed into assisted suicide by greedy heirs. *Id.* at 135-36; *see also* Mark E. Chopko, Michigan State Medical Society Mackinac Island Conference on Bioethics: A Deliberation on Ethics in Medicine, *Responsible Public Policy at the End of Life*, 75 U. DET. MERCY L. REV. 557, 589 (1998) (“Even for ‘non-vulnerable’ populations, legalization of assisted suicide will substantially alter medical practice for all. Allowing assisted suicide would exacerbate current adverse trends in delivery of health services. The pressure to save money is already great. Every operational assumption about assisted suicide is that it is cost effective”); Raanan Gillon, Michigan State Medical Society Mackinac Island Conference on Bioethics: A Deliberation on Ethics in Medicine: *Physician Assisted Suicide - Sympathy and Skepticism*, 75 U. DET. MERCY L. REV. 499, 509 (1998) (“[O]pponents of euthanasia foresee . . . coercion of people into volunteering for euthanasia . . . [O]ne has the vision of a little old lady who is coming towards the end of her life who now feels . . . I ought to have physician assisted suicide now because I am becoming a burden either on the state . . . or on my family or whoever”); John Keown, Article, *The Legal Revolution: From “Sanctity of Life” to “Quality of Life” and “Autonomy”*, 14 J. CONTEMP. HEALTH L. & POL’Y 253, 260 (1998) (“[V]aluation of human life grounds the principle that, because certain lives are not worth living, it is right to intentionally terminate those lives, whether by act or omission”).

⁹⁵ The Netherlands provide the only real empirical evidence of legalized physician assisted suicide. DECOURCY, *supra* note 20, at 19. The practice became acceptable in 1973 when a court allowed assisted suicide for terminally ill patients in severe pain. *Id.* In 1984, the practice expanded to allow doctors to give anyone with an incurable disease a lethal dose of drugs. *Id.* A year later, a court decided that the patient does not have to be terminal. Physicians can help the chronically ill or babies with severe birth defects die. *Id.* In 1993,

decision to commit suicide,⁹⁶ because a focus on death ignores these problems which may prompt suicidal feelings;⁹⁷ the option of assisted suicide as a matter of right may reduce physicians' incentive to address mental issues which could change the patient's mind about suicide.⁹⁸

*B. Legislative Action*⁹⁹

Sadly, there are some patients for whom palliative care¹⁰⁰ fails.¹⁰¹ Can morals justify competent individuals suffering needless pain during their last days?¹⁰² Courts

assisted suicide was approved for psychological pain. *Id.* A 1990 study revealed that in over 1000 (0.8% of the total deaths in the Netherlands) cases each year, Dutch physicians actively caused the patient's death without consent. Herbert Hendin et al., *Physician-Assisted Suicide and Euthanasia in the Netherlands*, 227 JAMA 1720, 1721 (1997). In a 1995 study, this figure declined to 0.7% (some critics disagree with the accuracy of the 1995 survey). *Id.* Regardless of the reliability of the study, doctors are terminating lives without express consent. *Id.* Even more shocking is that in 48% of these cases, there was never a request for assisted suicide; patients only made reference to a desire not to suffer. *Id.* Some Dutch physicians try to explain this by insisting that the patients were competent. *Id.* However, in 1990, 37% of these patients whose lives were terminated without express consent were competent, and in 1995 only 21% were competent. *Id.* Both studies revealed that 59% of Dutch physicians do not even report their assisted suicide and euthanasia cases, while 50% will freely suggest either or both of these options to their patients. *Id.* at 1722.

⁹⁶ A suicidal individual often has more than just physical pain. Chopko, *supra* note 94, at 573. "When patients do seek assisted suicide, it is usually because untreated depression or inadequate pain relief drives them." Susan M. Wolf, *Pragmatism in the Face of Death: The Role of Facts in the Assisted Suicide Debate*, 82 U. MINN. L. REV. 1063, 1100 (1998). Studies reveal that patients requesting suicide suffer from depression. Thomas R. Reardon, Michigan State Medical Society, Mackinac Island Conference on Bioethics: A Deliberation on Ethics in Medicine, Speech, *American Medical Association Perspective on Physician Assisted Suicide*, 75 U. DET. MERCY L. REV. 515, 519 (1998). Research indicates that many suicidal individuals change their minds when depression or other mental disorders are treated. Chopko, *supra* note 94, at 573.

⁹⁷ The request for assisted suicide may be a cry for help because the physician is not adequately treating pain. Reardon, *supra* note 96, at 519.

⁹⁸ Cf. Chopko *supra* note 94, at 573. "[L]egal assisted suicide could make it more difficult for the State to protect depressed or mentally ill persons, or those who are suffering from untreated pain, from suicidal impulses." *Id.*

⁹⁹ For an excellent discussion of the issues surrounding legislative action and a proposed model assisted suicide statute, see Charles H. Baron et al., *A Model State Act to Authorize and Regulate Physician Assisted Suicide*, 33 HARV. J. ON LEGIS. 1,7 (1996).

¹⁰⁰ "Palliative care is the standard of care for people who are dying." Timothy Quill, Michigan State Medical Society, Mackinac Island Conference on Bioethics: A Deliberation on Ethics in Medicine, *Physician Assisted Death: After the U.S. Supreme Court Ruling*, 75 U. DET. MERCY L. REV. 481, 488 (1998).

¹⁰¹ See, e.g., *id.*

addressing the issue acknowledge that legalization would actually benefit these people.¹⁰³ However there must be safeguards to ensure that this option is not abused.¹⁰⁴

The fact is, if we allow assisted suicide in the United States, legislative action is probably the safest means.¹⁰⁵ “[S]tringent and effective” rules might be able to prevent abuse of an assisted suicide option,¹⁰⁶ but the potential for abuse cannot be eliminated.¹⁰⁷ Even so, the courts are just not the best implement for the necessary limitations.¹⁰⁸ Judges are apprehensive about guaranteeing a right which may usurp the legislative function.¹⁰⁹ Moreover, the decision to legalize assisted suicide requires a

¹⁰² *Id.* “[W]e have an obligation to respond to those for whom good palliative care, applied without restraint, fails.” *Id.*

¹⁰³ Emanuel, *supra* note 54, at 1003. “[S]ome terminally ill patients who want to end their lives suffer needlessly. Some other people would find reassurance just from having the option of PAS (physician assisted suicide) and euthanasia even if they never actually used the procedures. *Legalization would certainly benefit these people*” (emphasis added). *Id.*

¹⁰⁴ Four safeguards used in the Netherlands have been placed in U.S. proposals for legalized assisted suicide: “(1) the patient must be terminally ill; (2) the patient must be competent and initiate and repeatedly request euthanasia or PAS; (3) the patient must be experiencing severe pain and/or suffering; and (4) the patient must be evaluated by another physician, who may be a psychiatrist.” Ezekiel J. Emanuel et al., *The Practice of Euthanasia and Physician-Assisted Suicide in the United States: Adherence to Proposed Safeguards and Effects on Physicians*, 280 JAMA 507, 507 (1998). Secondary safeguards are also proposed: “(1) optimal pain and palliative care services have been provided to the patient; (2) the physician and patient have a long-standing relationship; and the patients family has been informed and supports the decision.” *Id.*

¹⁰⁵ The legislature is probably the best institution to deal with this issue at this time. *Washington v. Glucksberg*, 117 S. Ct. 2258, 2293 (1997) (Souter, J. concurring).

¹⁰⁶ Urofsky, *supra* note 5, at 404.

The law . . . must protect people who think it would be appalling to be killed, even if they had only painful minutes to live. But the law must also protect those with the opposite conviction: that it would be appalling not to be offered an easier, calmer death with the help of doctors they trust.

Id.

¹⁰⁷ *But see* Hendin, *supra* note 95, at 1722. “[T]he Dutch experience indicates that these practices defy adequate regulation. Given legal sanction, euthanasia, intended originally for the exceptional case, has become an accepted way of dealing with serious or terminal illness” *Id.* The potential for abuse cannot be totally eliminated. Emanuel, *supra* note 54, at 1003.

¹⁰⁸ *Glucksberg*, 117 S. Ct. at 2293 (Souter, J. concurring); *see also* Kamisar, *supra* note 71, at 749 (doubting that a court can make the decision on assisted suicide in one case because of all the policy arguments requiring consideration).

¹⁰⁹ *Glucksberg*, 117 S. Ct. at 2293.

An unenumerated right should not therefore be recognized, with the effect of

careful analysis of all the underlying facts and policies.¹¹⁰ The legislature is best suited for this task.¹¹¹

Oregon was the first state to legalize assisted suicide.¹¹² Now that the statute is finally in effect, the entire country is watching what is likely to be the model for other states' assisted suicide laws.¹¹³ After the *Krischer*, *Glucksberg and Vacco* decisions,

displacing the legislative ordering of things, without the assurance that its recognition would prove as durable as the recognition of those other rights differently derived. To recognize a right of lesser promise would simply create a constitutional regime too uncertain to bring with it the expectation of finality that is one of this Court's central obligations in making constitutional decisions.

Id.

¹¹⁰ *Id.*; see also Baron, *supra* note 99, at 7. The best way to address the issue in society is through legislative action. *Id.* at 8. First, because physicians fear prosecution under ambiguous rules, the dying are denied assistance. *Id.* The fear of prosecution also leads to secret assisted suicides. *Id.* Next, a statute would place accountability on physicians for their actions. *Id.* at 9. Further, without physician assistance many patients will attempt suicide on their own and fail, increasing their suffering. *Id.* Additionally, some may choose to end their lives in anticipation of suffering which might never materialize. *Id.* Finally, without physician assistance, patients may choose to end their lives alone without reassurance of a doctor and the comfort of family. *Id.*

¹¹¹ *Id.* Justice Overton in his concurring opinion in *Krischer* best stated these concerns:

[T]his Court may never be able to find an exception for an as-applied challenge to the statute until extensive evaluation of the problems involved in this issue occurs and the many difficult questions are answered. The public would be much better served if the legislature, with significant input from the medical and scientific community, would craft appropriate exceptions to the general prohibition of assisted suicide, which would include suitable standards, definitions, and procedures ensuring that the use of assisted suicide would truly be used to assist only those individuals who suffer unbearable pain in the face of certain death.

Krischer v. McIver, 697 So. 2d 97,107 (Fla. 1997). *But see* Laura L. Hirschfeld, *Moral Dilemmas for the Judiciary at the Millennium: Partial Birth Abortions and Physician-Assisted Suicide*, 19 CARDOZO L. REV. 1061, 1065 (1997) ("We should be concerned about handing over that kind of power over human life to a bureaucracy, whether it is a corporate bureaucracy... or worse, the government.").

¹¹² Oregon passed an initiative allowing physician assisted suicide in November 1994. Baron, *supra* note 99, at 14. The constitutionality of the "Death with Dignity" act was immediately challenged. *Id.*; see also *Lee v. Oregon*, 107 F.3d 1382 (9th Cir. 1997), *cert. denied*, 118 S. Ct 328 (1997) (reversing lower court decision that the Death with Dignity Act was unconstitutional); *Hamilton v. Myers*, 943 P.2d 214 (Ore. 1997) (*en banc*) (upholding constitutionality of Death with Dignity Act).

¹¹³ *Cf.* Baron, *supra* note 99, at 14-15. The first official figures on deaths after the act became effective indicate that ten people have been given lethal prescriptions. Linda O. Prager, *Details Emerge on Oregon's First Assisted Suicides*, AM. MED. NEWS, Sept. 7, 1998, at 9. Physicians in Oregon have stated that all the patients so far have been competent and

state legislatures rather than the courts, will be the focus in the public debate on assisted suicide.¹¹⁴

V. CONCLUSION

For now, there is no way out for terminally ill patients who want to end their suffering¹¹⁵ because U.S. courts are protecting all lives in anticipation of state legislative action.¹¹⁶ Constitutional and privacy rights do not protect patients who want to commit suicide and the physicians who want to help.¹¹⁷

So, what are the options? They are “not to give carte blanche to take a life simply because that life is unbearable. To allow that would be letting any Tom, Dick or Harry to hang out a Grim Reaper shingle.”¹¹⁸ Currently, the only legal options are withdrawing unwanted life support systems, and providing the best pain relief methods available while waiting for legislative action.¹¹⁹

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requested the lethal prescriptions with the approval of their families. *Id.* Critics suggest that these reports are inaccurate because they have been sanitized. *Id.* at 10.

¹¹⁴ See *supra* notes 38-39, 99-113 and accompanying text.

¹¹⁵ See, e.g., *id.*

¹¹⁶ See, e.g., *Washington v. Glucksberg*, 117 S. Ct. 2258, 2275 (1997).

¹¹⁷ See *Krischer v. McIver*, 697 So. 2d 97, 104 (Fla. 1997).

¹¹⁸ Editorial, *supra* note 5, at 52.

¹¹⁹ Wolf, *supra* note 96, at 1100.