University of Miami Law Review

Volume 35 | Number 2 Article 9

1-1-1981

Satz v. Perlmutter: A Constitutional Right to Die?

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an encroachment by "Big Brother—or perhaps in this case Big Sister."[36] He further contended that the majority opinion would reinforce the fear expressed by opponents of the Equal Rights Amendment of "extreme applications bordering on the ridiculous when no meaningful discrimination exists."[37]

For all its shortcomings, the *Bundy* decision represents a courageous attempt by a court to resolve some of the sexual inequities in a female employee's work environment. Some commentators may criticize *Bundy* for dealing with a complex human issue under the guise of Title VII. *Bundy*, however, did not depart from precedent; it merely extended precedent to achieve a laudable result for the Sandra Bundys of the world. The ultimate question is whether the legal principle set forth in *Bundy* runs too far ahead of the nation's social conscience.

Satz v. Perlmutter: A Constitutional Right to Die?

Abe Perlmutter was a seventy-three year old patient, terminally ill. He sought judicial approval of his decision to discontinue extraordinary, life-sustaining medical treatment.[1] Perlmutter suffered from amytrophic lateral sclerosis,[2] an incurable disease for which the normal life expectancy following diagnosis is two years. In his case, the disease had progressed to the point where he had only a few months to live and could not breathe without the aid of a mechanical respirator. Every movement caused him excruciating

36. *Id.* at 1033.
37. *Id.* at 1038.

1. Satz v. Perlmutter, 362 So. 2d 160 (Fla. 4th DCA 1978), *aff'd*, 379 So. 2d 359 (Fla. 1980). Extraordinary treatment is commonly defined as "all medicines, treatments and operations which can't be obtained or used without excessive expense, pain or other inconvenience, or which if used, would not offer a reasonable hope of benefit." Louisell, *Euthanasia and Biathanasia: On Dying and Killing*, 20 CATH. U.L. REV. 723, 736 (1973); *see In re* Quinlan, 70 N.J. 10, 21, 355 A.2d 647, 668 (1976), in which the court noted that "one would have to think that the use of the same respirator or life-support could be considered 'ordinary' in the context of the possibly curable patient but 'extraordinary' in the context of . . . an irreversibly doomed patient."

2. Amytrophic lateral sclerosis, commonly known as Lou Gehrig's disease, is a degenerative disease of the neurological system, characterized by increasing paralysis. It inevitably results in death within three years. *See generally* HARRISON'S PRINCIPLES OF INTERNAL MEDICINE 1834, 1845 (7th ed. 1974).

pain, and he could speak only with extreme effort and discomfort. Despite his deteriorated physical condition, Perlmutter was "competent and mentally aware of the nature and consequences of his [actions]."[3] Fully aware that removal of the respirator would reduce his already limited life expectancy to less than one hour,[4] Perlmutter sought, with full approval from his adult family, to have the mechanical respirator removed from his trachea.

The attending physicians, fearing possible civil and criminal liability, refused to accede to Perlmutter's request that they discontinue medical treatment. Following their refusal, Perlmutter filed a complaint in the Broward County Circuit Court, naming as defendants the hospital, two doctors, and the state attorney. He asked the court to allow him to determine whether to continue his life with the mechanical respirator or to terminate it by natural means.[5]

The trial court concluded that the interests of the state and the medical profession did not outweigh Perlmutter's right to decline further treatment. Accordingly, the court entered a final judgment restraining the defendants from interfering with his decision to remove the respirator.[6] On appeal, the District Court of Appeal, Fourth District, affirmed the judgment of the trial court.[7] On certiorari, the Supreme Court of Florida affirmed, expressly adopting the district court's holding that a competent adult patient who suffers from a terminal illness and has no minor dependents has the constitutional right to refuse or discontinue extraordinary medical treatment when all affected family members consent.[8]

Recent advances in medical technology have raised serious questions concerning the rights of terminally ill patients to refuse medical treatment.[9] With the development of sophisticated, life-sustaining equipment, physicians have a greater measure of control in artifically prolonging life. Prolonging life, however, may not al-

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3. Perlmutter v. Florida Medical Center, 47 Fla. Supp. 190, 191 (Broward County Cir. Ct. 1978).

4. Satz v. Perlmutter, 362 So. 2d 160, 161 (Fla. 4th DCA 1978).

5. 47 Fla. Supp. at 190.

6. *Id.* at 193.

7. 362 So. 2d at 160.

8. 379 So. 2d at 360.

9. *See* Superintendent of Belchertown v. Saikewicz, 370 N.E.2d 417 (Mass. 1977); *In re* Quinlan, 70 N.J. 10, 355 A.2d 647 (1976); Cantor, *A Patient's Decision to Decline Life-Saving Medical Treatment: Bodily Integrity v. the Preservation of Life*, 20 RUTGERS L. REV. 228 (1973); Claypool, *The Family Deals with Death*, 27 BAYLOR L. REV. 34 (1975); Dworkin, *Death in Context*, 48 IND. L.J. 623 (1973); Foreman, *The Physician's Criminal Liability for the Practice of Euthanasia*, 27 BAYLOR L. REV. 54 (1975).

ways be in the best interest of the patient. In some cases, the use of extraordinary measures to avoid imminent death results in useless personal suffering by the patient and emotional and financial burdens on the family.

Doctors with terminally ill patients who refuse to accept or to continue extraordinary medical treatment face a Hobson's choice. On the one hand, if they accede to the patient's wishes and withhold or discontinue life-sustaining services, they may violate prevailing medical ethical standards and expose themselves to potential civil and criminal liability. The doctors could face civil liability under theories of medical malpractice, wrongful death, abandonment, and intentional infliction of emotional distress; their criminal liability could arise under the theory that the withholding or discontinuing of treatment constitutes an unlawful killing of a human being under the state's manslaughter[10] or murder statutes.[11] On the other hand, if the physician's treatment is contrary to the patient's wishes, the patient might sue the doctor for not withholding treatment. Under the tort doctrine of "informed consent,"[12] the patient might recover for the expenses incurred in prolonging his life, or for pain and suffering under such theories as assault and battery, negligence, malpractice, intentional infliction of emotional distress, breach of contract, or invasion of the patient's constitutional right to privacy.[13] Faced with this dilemma, many doctors and hospitals have turned to the courts for guidance in determining when they may withhold or discontinue life-sustaining treatment at a patient's request.

In *Satz v. Perlmutter*,[14] the Supreme Court of Florida considered for the first time the question whether a mentally competent, terminally ill adult has a constitutional right to refuse medical treatment. Answering the question in the affirmative, the supreme

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10. FLA. STAT. § 782.07 (1979).

11. FLA. STAT. § 782.07 (1979). A doctor who accedes to his patient's request to discontinue essential health care may also be criminally liable for assisting self-murder under FLA. STAT. § 782.08 (1979). *See* Akers, *The Living Will: Already a Practical Alternative*, 55 TEX. L. REV. 665, 670, 684 (1977).

12. Under the doctrine of informed consent, a physician may administer treatment to a patient only if the physician gives the patient information about the material risks involved in the treatment and the patient consents to have the treatment administered. The consent must be competent, understanding, and voluntary; absent consent, the physician is liable, even if the treatment is skillfully performed and benefits the patient. *See* MEDICAL MALPRACTICE: REPORT OF THE SECRETARY'S COMMISSION ON MEDICAL MALPRACTICE 29 (DHEW Pub. No. (OS) 73-88, Jan. 16, 1973).

13. Akers, *supra* note 11, at 677.

14. 379 So. 2d 359 (Fla. 1980).

court agreed with decisions of other state courts holding that the constitutional right to privacy[15] is broad enough to encompass a patient's decision to refuse or discontinue extraordinary medical treatment.[16] The supreme court, however, expressly confined its decision to the particular facts of the *Perlmutter* case, noting that the complex medical issues presented were more appropriate for legislative action.[17] Since the opinion of the Fourth District touched on these issues and clarified the state interests involved in a patient's right to die, the supreme court adopted that opinion as its own.[18] To understand the *Perlmutter* decision, then, one must examine the Fourth District's opinion.

Following the rationale of the Massachusetts case of *Superintendent of Belchertown v. Saikewicz*,[19] the Fourth District carefully outlined the state's interests in preserving life, preventing suicide, protecting third parties from the adverse effects of a patient's death, and maintaining the integrity of the medical profession. The court concluded that these interests did not outweigh Perlmutter's right to refuse treatment. In discussing the interest of the state in opposing an individual's decision to refuse extraordinary medical treatment, the Fourth District agreed with the *Saikewicz* court that "there is a substantial distinction in the State's insistence that human life be saved where the affliction is curable, as opposed to the State interest, where, as here, the issue is not whether, but when, for how long and at what cost to the individual [his] life may be briefly extended."[20] In Perlmutter's case, his terminal disease left him only a few months to live, even if he were kept on the respirator. His constitutional right to privacy, and the corresponding right of self-determination, far outweighed the state's interest in preserving life.[21]

Closely related to the state's interest in preserving life is its

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15. *See* cases cited note 9 *supra*. Although the Constitution does not explicitly mention a right to privacy, several Supreme Court decisions have suggested that the constitutional right to privacy exists in the penumbra of specific guarantees of the Bill of Rights, emanating from those guarantees and giving them life and substance. Griswold v. Connecticut, 381 U.S. 479, 484 (1965). *See also* Roe v. Wade, 410 U.S. 113 (1973); Eisenstadt v. Baird, 405 U.S. 438 (1972); Stanley v. Georgia, 394 U.S. 557 (1969).

16. Superintendent of Belchertown v. Saikewicz, 370 N.E.2d 417 (Mass. 1977); *In re* Quinlan, 70 N.J. 10, 355 A.2d 647 (1976); *In re* Osborne, 294 A.2d 372 (D.C. App. 1972).

17. 379 So. 2d at 360.

18. *Id.*

19. 370 N.E.2d 417 (Mass. 1977).

20. 362 So. 2d at 162 (quoting Superintendent of Belchertown v. Saikewicz, 370 N.E.2d at 425-26) (brackets used by Fourth District in *Satz v. Perlmutter*).

21. *Id.* at 163.

interest in preventing suicide—the irrational destruction of life.[22] To a large extent, this social goal merely reaffirms the state's interest in preserving life. But the Fourth District reasoned that Perlmutter's "basic wish to live, plus the fact that he did not self-induce his horrible affliction, precludes his further refusal of treatment being classified as attempted suicide."[23] In reaching this conclusion, the district court relied on analagous situations involving cancer-ridden patients who decline surgery or chemotherapy necessary for their temporary survival. Although Perlmutter's predicament appeared more drastic because disconnection of the respirator required an affirmative act, the principle was the same as when a patient refuses to institute life-saving treatment at the outset of an illness. In both situations, the patient chooses not to suffer an expensive course of medical treatment that may keep him alive without restoring his health.The Fourth District reasoned that because Perlmutter had the right to refuse treatment in the first instance, he had a concomitant right to discontinue it, and his exercise of that right was not an attempted suicide.[24]

Although a state may have a valid interest in protecting third parties, particularly minor children, from the emotional and financial impact of a refusal to accept treatment, that interest usually arises in the context of religious objections to blood transfusions.[25] In that situation, a patient's refusal to accept life-saving blood might have the effect of abandoning the patient's minor children, making them wards of the state. The Fourth District concluded that, in Perlmutter's case, the state interest in protecting minors was inapplicable since all his children were adults who concurred in his decision to disconnect the respirator.[26] Arguably, the state's interest in protecting third parties has little application to a terminally ill patient whose death is imminent, regardless of life-saving treatment. The principal rationale behind the state interest loses its significance when medical treatment provides only brief respite before the patient dies, leaving his children or other third persons in the same position as if treatment had been withheld. The only real difference between administering and withholding

22. 370 N.E.2d at 426 n.11.

23. 362 So. 2d at 163.

24. *Id.*

25. *In re* President of Georgetown College, Inc., 331 F.2d 1000, *rehearing en banc denied*, 331 F.2d 1010 (D.C. Cir.), *cert. denied*, 377 U.S. 978 (1964); United States v. George, 239 F. Supp. 752 (D. Conn. 1965) (adopting the rationale of *In re* President of Georgetown College, Inc., 331 F.2d 1000).

26. 362 So. 2d at 162.

treatment is that the patient forced to undergo treatment must spend more money merely to prolong his life, money that could have helped to provide for his minor children.

Finally, the Fourth District discussed the state's interest in preserving the integrity of the medical profession. In our society, physicians bear the responsibility of determining the nature, extent, and duration of medical treatment.[27] Prevailing medical practices, standards, and ethics guide their conduct in this regard. The recent development of extraordinary life-sustaining techniques has caused considerable controversy within the medical profession about the proper role of the health care professional in cases of terminal illness.[28] Before the development of such techniques, physicians considered it their duty to make every conceivable effort to prolong life.[29] But advanced technology brought with it the realization that the effect of prolonging life is often to "prolong suffering, isolate the family from their loved ones . . . or result in economic ruin for the family."[30] Many physicians began to see the distinction between curing the ill and comforting the dying. For example, one medical commentator stated that:

> we should not use *extraordinary* means of prolonging life or its semblance when, after careful consideration, consultation and the application of the most well-conceived therapy, it becomes apparent that there is no hope for the recovery of the patient. Recovery should not be defined simply as the ability to remain alive; it should mean life without intolerable suffering.[31]

In *Perlmutter*, the Fourth District adopted the language of *Saikewicz*, noting that the interest of doctors and hospitals in using all available means to combat disease is mitigated by modern ethical standards:

> Prevailing medical ethical practice does not, without exception, demand that all efforts towards life prolongation be made . . . . Rather, . . . the prevailing ethical practice seems to be to recognize that the dying are more often in need of comfort than treatment. Recognition of the right to refuse necessary treatment in appropriate circumstances is consistent with existing medical mores; such a doctrine does not threaten either the integrity of

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27. *In re* Quinlan, 70 N.J. 10, 46-47, 355 A.2d 647, 667 (1976).

28. *See In re* Quinlan, 70 N.J. 46-47 n.8, 355 A.2d at 667 n.8 and articles cited therein.

29. Superintendent of Belchertown v. Saikewicz, 370 N.E.2d at 423.

30. *Id.* (quoting Lewis, *Machine Medicine and Its Relation to the Fatally Ill*, 206 J.A.M.A. 387 (1968)).

31. *Id.* (quoting Lewis, *supra* note 30, at 391).

> the medical profession, the proper role of hospitals in caring for such patients or the State's interest in protecting the same.[32]

Since the doctrines of informed consent and the constitutional right of privacy[33] derive from the individual's right of bodily integrity and self-determination, they outweigh any institutional considerations that favor prolonging life through the exhaustive use of medical technology.[34]

The Fourth District concluded that no state interest or combination of interests was great enough to overcome the right of the terminally ill patient to refuse life-sustaining treatment.[35] The court noted that although it was "very convenient"[36] to insist on continuing Perlmutter's life to avoid any question of misconduct, or civil or criminal liability, or any affront to medical standards, to do so against Perlmutter's will and at great expense and pain to him, would impermissibly violate his constitutional rights.

The impact of *Satz v. Perlmutter*[37] on the law of Florida is still uncertain. Although the supreme court recognized that the constitutional right to privacy encompasses a patient's decision to refuse or discontinue medical treatment in appropriate circumstances, it expressly limited its holding to the facts before it.[38] Thus, despite "over a dozen legislative failures in this state to adopt suitable legislation in this field,"[39] the supreme court ignored impassioned pleas from counsel for the decedent and the physicians that the issue was one that cried "out for judicial resolution in a comprehensive manner so that physicians, public officials, hospitals and other citizens of the state may be guided in their future conduct."[40]

In expressly refusing to resolve the conflict, the court noted that

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32. 362 So. 2d at 163, 370 N.E.2d at 426-27 (quoting *Saikewicz*).

33. *See* notes 12 & 15 *supra*.

34. 362 So. 2d at 163-64.

35. *Id.* at 163.

36. *Id.* at 164.

37. 362 So. 2d 160 (Fla. 4th DCA 1978), *aff'd*, 379 So. 2d 359 (Fla. 1980).

38. 379 So. 2d at 361.

39. 362 So. 2d at 164. The most recent failure of the legislature to adopt suitable legislation in this field occurred during the 1980 session of the Florida Legislature, several months after the court announced its decision in *Satz v. Perlmutter*. The "death with dignity" bill that failed to pass the Legislature during the 1980 session should not be confused with FLA. STAT. § 382.085 (Supp. 1980), which provides a non-exclusive definition of death: "the irreversible cessation of the functioning of the entire brain, including the brain stem."

40. 379 So. 2d at 360.

> the issue . . . is fraught with complexity and encompasses the interests of law, both civil and criminal, medical ethics and social morality, [and] it is not one which is well suited for resolution in an adversary judicial proceeding. It is the type [of] issue which is more suitably addressed in the legislative forum, where fact finding can be less confined and the viewpoint of all interested institutions and discipline can be presented and synthesized.[41]

Although it may be correct to conclude that the issue is appropriate for legislative resolution, the supreme court itself has noted elsewhere that "in the absence of appropriate legislative action [to provide the ways and means of enforcing constitutional rights] it is the responsibility of the courts to do so."[42] Thus, in light of the failure of the Florida Legislature to enact right-to-die legislation, the supreme court could have and should have promulgated guidelines for physicians and hospitals to follow in future situations like Perlmutter's. A judicial rule, rather than a case-by-case approach, would have avoided the practical effect of *Perlmutter* which will require physicians and hospitals to seek judicial approval each time a patient refuses to continue life-saving treatment—or face potential civil and criminal liability if the decendent's estate or the state attorney later disagrees with the physician's response to his patient's request.

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The Right to Counsel in Child Dependency Proceedings: Conflict Between Florida and the Fifth Circuit

The United States Court of Appeals for the Fifth Circuit recently handed down a decision in direct conflict with a decision made by the Supreme Court of Florida only ten months earlier. In *Davis v. Page*[1] the Fifth Circuit held that indigent parents have an

41. *Id.*

42. Dade County Classroom Teachers Ass'n. v. Legislature, 269 So. 2d 684, 686 (Fla. 1972).

1. No. 78-2063 (5th Cir. Mar. 23, 1980). Davis filed a petition for a writ of habeas corpus in the Supreme Court of Florida to regain custody of her child from the State De-