1994

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Sandra S. Klein

Notre Dame Law School, klein.26@nd.edu

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The Right to Die as an Issue of Privacy: A Selective Bibliography

Sandra S. Klein

ABSTRACT. The issue of whether or not an individual has the right to choose when he or she will die, is a very controversial one for many reasons. Further complicating the issue is the question of who, if anyone, has the right to decide for those who are unable to choose for themselves. The bibliography which follows includes articles which discuss this topic from a right to privacy perspective, and should prove useful to those researchers who are new to the subject, as well as to those who are already familiar with the many complex issues involved.

INTRODUCTION

While it is certainly fair to say that many contemporary privacy issues are of increasing importance to the general public, the questions surrounding the right to die issue are becoming both more a part of the public consciousness, and more controversial, than many commentators would have thought until recently. Current news media discussion of "assisted" suicide follows not long after scholars and politically responsive legislators debated the social and ethical consequences of a perceived "right" to die.

Debate in this area appears largely concerned with several key questions, many stemming from a basic uncertainty as to whether such a "right" truly exists, and if so, to what extent it might be based in constitu-
tional reality (see, for example, Robert M. Bratton’s article, “The Right to Die: A Constitutional One?”).

Obviously related to the constitutional issue is the question of general privacy rights serving as an intellectual umbrella for the proposed right to die. It is noted, for example, in Vincent Borst’s analysis (“The Right to Die: An Extension of the Right to Privacy”) that individuals do possess a right to purposively choose death because such an option follows from the constitutionally-protected right of privacy. Based in an examination of case law, Borst contends that such an option clearly rests under the Supreme Court’s “penumbra” concept, a doctrine that expands on rights explicitly granted by the Constitution.

The discussion of this issue appears unavoidably complicated by its relationship to other privacy issues. As concerns such as the right to abortion, or even the very specific right to privacy regarding personal communications, are often considered with an awareness of political, religious, or social perspectives, the right to die is a matter that has not, and no doubt will not, be considered in a vacuum.

Further complicating the discussion is a subordinate dichotomy, competence vs incompetence: If such a right exists for those in control of their mental faculties, to what extent does it exist (and to what degree should it be monitored) where the individual involved is legally incompetent? Nowhere has this question been more important than in the area of terminally ill patients who are no longer capable of making reasoned decisions. Elizabeth Evola and Denise Yegge consider this difficult issue in their article, “Until Death Do Us Part: The Decision-making Process For the Terminally Ill.” Here, the authors note the balancing process that courts go through in order to consider the patient’s right to privacy (i.e., to choose death) and the state’s duty to preserve life.

The *Cruzan* case is a particularly cogent example of this need to balance the rights of the individual against the perceived duties of the state. Thomas Hafemeister, in “Charting the Course Between Life and Death: The Supreme Court Takes its First Cautious Steps in *Cruzan,*” examines the rights of individuals to make decisions regarding life-sustaining medical treatment. He notes that the Court refused to recognize a constitutional right to privacy in this limited context. This proves important if lower courts are to find legal means by which to find a viable association between privacy and right to die issues. Both Tucker Ronzetti, “Constituting Family and Death Through the Struggle With State Power: *Cruzan v. Director, Missouri Department of Health,*” and Desiree Watson, “*Cruzan* and the Right to Die: A Perspective on Privacy Interests,” et al., consider this case from varying points of view.
Several other articles examine related matters including: the need for uniform legislation (Bernard Freamon, "Death With Dignity Laws: A Plea for Uniform Legislation"); the role of government in decision-making (Stanley Cox, "Government as Arbiter, not Custodian: Relational Privacy as Foundation for a Right to Refuse Medical Treatment Prolonging Incompetent's Lives"). Similarly, articles dealing with religious and moral issues are included as illustrative of the need to review the issue from an other-than-legal point of view. (See, for example, David Richards article, "Constitutional Privacy, the Right to Die and the Meaning of Life: A Moral Analysis," and Tom Stacy, "Death, Privacy, and the Free Exercise of Religion.")

Underscoring the inherent difficulties in seeking some socially reasonable and legally supportable equilibrium between individual and governmental rights regarding the right to die issue, the bibliography which follows includes articles which, nonetheless, add to our understanding of this complex matter. The time period covered is from 1980-1992, and the articles listed here should serve as both an introduction to this area of concern for those new to this topic, as well as providing a springboard for additional research for those scholars who are well-versed on the topic.

**RIGHT TO DIE MONOGRAPHS**


PERIODICALS


Brill, Alida. "Part Four: Last Rights." In Nobody's Business: Paradoxes of Privacy. Reading, Mass.: Addison-Wesley Publishing Company, 1990. pp. 145-186. Discusses the fact that death and dying used to occur privately and in the home, while it is now a much more public affair. We cannot choose how or when we will die without contending with public/legal issues.

Borst, Vincent T. "The Right to Die: An Extension of the Right to Privacy." John Marshall Law Review 18:4(Summer 1985): 895-914. Primarily a survey of federal and state case law regarding the right of an individual to die, this article supports the idea that such a right is "encompassed within the constitutionally protected right to privacy." Also considered is the association between procreation, abortion, and the right to die as extensions of the rights to privacy developed under the "penumbra" concept applied to the Bill of Rights by the Supreme Court. The final elements considered are proposed "guidelines for the application of constitutional principles in right to die cases."


Cox, Stanley E. "Government as Arbiter, not Custodian: Relational Privacy as Foundation for a Right to Refuse Medical Treatment Pro-


Evola, Elizabeth Muraca, and Denise L. Yegge. “‘Until Death do us Part’ The Decision-Making Process for the Terminally Ill.” *Adelphia Law Journal* 4 (1985-86): 143-167. The question of if and when to purposely end the life of a terminally ill patient is a problematic one for the medical staff, family, and society at large. This article examines both the individual’s right to privacy (i.e., termination of support), and the state’s interest in preserving life, and notes that the courts have generally balanced these interests against each other in making their decisions. Several parties to the decision-making process are identified by the author: the medical personnel involved, the family, ethics committees, and the courts. Finally, the “living will” is evaluated, as is an “expanded ethics committee” concept as an alternative to simple court intervention.


Hafemeister, Thomas L. “Charting the Course Between Life and Death: The Supreme Court Takes its First Cautious Steps in Cruzan.” *Probate Law Journal* 10:2 (1990): 113-140. In *Cruzan v Director, Missouri Department of Health* (110 S Ct 2841, 1990), the Court dealt with the right of individuals to make decisions regarding life-sustaining medical treatment. The article examines the case history in detail, noting that the courts’ review was substantially limited to the specific facts of the particular situation at hand, and noting further that the decision was, therefore, of limited generalizability as precedence. In terms of a privacy rights analysis, “the Courts’ refusal to recognize a federal constitutional right to privacy in this context will limit the ability of future
courts to draw upon the 'privacy' line of cases to flesh out the bounds of the right to refuse" such life-sustaining medical treatment.


Patterson, Elizabeth G. "Health Care Choice and the Constitution: Reconciling Privacy and Public Health." *Rutgers Law Review* 42(Fall 1989): 1-91. Discusses the question of whether or not "the constitutional right to privacy is broad enough to encompass the decision whether to accept or refuse life-sustaining medical treatment."


Riga, Peter J. "Euthanasia, The Right to Die and Privacy: Observations on Some Recent Cases." *Lincoln Law Review* 11:2(1980): 109-165. Discusses the need to address the concerns of all parties involved (i.e., doctors, hospitals, patients, etc.), examines the context of the argument, and presents concrete cases.


Volzer, Harvey J. "Laetrile and the Privacy Right in Decisional Responsibility." *Medical Trial Technique Quarterly* 26(Spring 1980): 395-429. Laetrile is a drug that is used in the treatment of terminally ill cancer patients. The question of its use arose because the drug has not been approved for use in this country by the Food and Drug Administration. The author argues that "the choice of Laetrile is essentially individual, a quality of life decision for which only the decision-maker is ultimately responsible." His review of the issue leads him to the conclusion that "at the point where the individual invokes the privacy right in decisional responsibility, the State no longer has any compelling reason for interference."


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