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## COMMENT

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# PRIVACY AND THE ALASKA CONSTITUTION: FAILING TO FULFILL THE PROMISE

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*In this Comment, the Author examines two recent Alaska Supreme Court decisions regarding privacy rights and contends that the Alaska Supreme Court failed to protect the greater privacy rights granted under the Alaska Constitution. The Comment considers the issues confronted by the Alaska Supreme Court and compares the decisions with United States Supreme Court decisions examining similar issues. The Author concludes by considering the implication of these decisions as well as urging the Alaska Supreme Court to aggressively uphold the protections of privacy granted in the Alaska Constitution.*

### I. INTRODUCTION

Most Americans would be surprised to learn that there is no right to privacy granted in the United States Constitution. The Fourth Amendment protects privacy in limiting police searches and arrests,<sup>1</sup> but privacy in terms of autonomy and the right to be let alone by the government is not mentioned in the text of the Constitution. Unfortunately, the first United States Supreme Court deci-

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1. “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” U.S. CONST. Amend IV.

sion to speak expressly of privacy, in the sense of personal autonomy, has a shaky foundation. In *Griswold v. Connecticut*,<sup>2</sup> the Supreme Court declared unconstitutional a state law prohibiting the use of contraceptives.<sup>3</sup> Justice Douglas, writing for the Court, found the right to privacy in the “penumbra” of the First, Third, Fourth, and Fifth Amendments.<sup>4</sup> As one commentator described it, Justice Douglas “skipped through the Bill of Rights like a cheerleader - ‘Give me a P . . . give me an R . . . an I . . .,’ and so on, and found P-R-I-V-A-C-Y as a derivative or penumbral right.”<sup>5</sup>

In sharp contrast, the Alaska Constitution expressly safeguards privacy rights. Article I, section 22 states that the “right of the people to privacy is recognized and shall not be infringed.”<sup>6</sup> Similarly, article I, section 1 of the Alaska Constitution provides that “all persons have a natural right to life, liberty, [and] the pursuit of happiness.”<sup>7</sup> The Supreme Court of Alaska furthered this concept when it stated that “at the core of this concept [of liberty] is the notion of total personal immunity from governmental control: the right ‘to be let alone.’”<sup>8</sup>

Alaska constitutional law is clear that greater rights can be protected under the Alaska Constitution than are recognized under the United States Constitution.<sup>9</sup> As the Alaska Supreme Court declared in *Roberts v. State*, “We are not bound in expounding the Alaska Constitution’s Declaration of Rights by the decisions of the United States Supreme Court, past or future, which expound identical or closely similar provisions of the United States Constitution.”<sup>10</sup> Indeed, the first Alaska Supreme Court decision interpreting the privacy clause of the Alaska Constitution—added by voter initiative in 1972—upheld the constitutional right of individuals to use marijuana in their homes.<sup>11</sup> Justice Rabinowitz, writing for the court, stated that residents of Alaska “have a basic right to privacy in their homes under Alaska’s Constitution . . . .

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2. 381 U.S. 479 (1965).

3. *Id.* at 485.

4. *Id.* at 484-85.

5. Robert G. Dixon, *The “New” Substantive Due Process and the Democratic Ethic: A Prolegomenon*, 1976 BYU L. REV. 43, 84 (1976).

6. ALASKA CONST., art. 1, § 22.

7. *Id.* art. 1, § 1.

8. *Breese v. Smith*, 501 P.2d 159, 168 (Alaska 1972).

9. *Roberts v. State*, 458 P.2d 340, 342 (Alaska 1969).

10. *Id.* For an excellent defense of the protection of greater rights under the Alaska Constitution, see Ronald L. Nelson, *Welcome to the “Last Frontier,” Professor Gardner: Alaska’s Independent Approach to State Constitutional Interpretation*, 12 ALASKA L. REV. 1 (1995).

11. *Ravin v. State*, 537 P.2d 494, 511 (Alaska 1975).

[This right] would encompass the possession and ingestion of substances such as marijuana in a purely personal, non-commercial context . . . .”<sup>12</sup>

The Alaska Supreme Court continues, at times, to provide greater protection for privacy rights under the Alaska Constitution than under the United States Constitution. For example, in *Alaska Department of Health & Social Services v. Planned Parenthood*,<sup>13</sup> the Alaska Supreme Court declared unconstitutional a state law that prohibited Medicaid funding of abortions unless the pregnant woman is at risk of dying from her pregnancy or the pregnancy results from rape or incest.<sup>14</sup> The court found that the denial of Medicaid assistance to poor women who medically require abortions violates equal protection under the Alaska Constitution,<sup>15</sup> even though the United States Supreme Court has concluded that the failure to fund abortions does not violate the United States Constitution.<sup>16</sup> Similarly, in *State v. Planned Parenthood*,<sup>17</sup> the Alaska Supreme Court held that the State could require parental consent for an unmarried minor’s abortion only if it proved a compelling interest in enforcing the parental consent statute and that the statute was properly tailored to promote the State’s interest.<sup>18</sup> The United States Supreme Court, in contrast, has consistently upheld parental notice and/or consent requirements so long as there is an alternative procedure whereby a minor can obtain an abortion if doing so would be in her best interest or if she is mature enough to decide for herself.<sup>19</sup>

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12. *Id.* at 504; *see also* *Rollins v. Ulmer*, 15 P.3d 749, 754 (Alaska 2001) (upholding a registration requirement for medical use of marijuana); *Walker v. State*, 991 P.2d 799, 803 (Alaska 1999) (upholding the prohibition of possession of more than eight ounces of marijuana as possession with intent to sell).

13. 28 P.3d 904 (Alaska 2001).

14. *Id.* at 915.

15. *Id.*

16. *See, e.g.*, *Harris v. McRae*, 448 U.S. 297, 326-27 (1980) (holding that a state was not required to pay for abortions when it would not be reimbursed by the federal government); *Maher v. Roe*, 432 U.S. 464, 469 (1977) (upholding the constitutionality of denying funding for abortions).

17. 35 P.3d 30 (Alaska 2001).

18. *Id.* at 46.

19. *See* *Bellotti v. Baird*, 443 U.S. 622, 643-44 (1979); *see also* *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 510-13 (1990) (finding an Ohio judicial bypass statute to be constitutional because the statute allowed the minor to show she had the maturity to make the decision or that the abortion was in her best interest, preserved the minor’s anonymity, and set appropriate time limits on judicial action); *Hodgson v. Minnesota*, 497 U.S. 417, 422-23 (1990) (upholding

Against this backdrop, several recent decisions of the Alaska Supreme Court are troubling in their rejection of privacy claims under the Alaska Constitution. In this Comment, I examine two recent decisions denying protection of privacy under the Alaska Constitution. In *Sampson v. State*,<sup>20</sup> the Alaska Supreme Court refused to find protection for a right to physician-assisted suicide,<sup>21</sup> and in *Anchorage Police Department Employees Ass'n v. Anchorage*,<sup>22</sup> the court upheld a drug testing policy for police and fire department employees, without individualized suspicion, when individuals applied for employment, promotion, or transfer.<sup>23</sup>

These decisions should be of concern because they reject a right of privacy in areas of particular importance and may signal a retreat from more extensive protection of privacy under the Alaska Constitution. At the very least, these rulings fail to live up to the broad interpretation of privacy under the Alaska Constitution articulated by Justice Rabinowitz in his early opinions.<sup>24</sup>

Part II of this Comment examines the *Sampson* ruling, in which the court rejected the right to physician-assisted suicide. Part III analyzes *Anchorage Police Department* and the allowance of drug testing without individual suspicion for certain municipal employees. Finally, the Comment concludes by considering the potential implications of these decisions and argues for aggressive protection of privacy under the Alaska Constitution.

## II. PRIVACY AND PHYSICIAN-ASSISTED SUICIDE

### A. The United States Supreme Court's Rejection of a Right to Physician-Assisted Suicide

Few Supreme Court decisions have the possibility of touching as many lives, directly or indirectly, as those holding that there is no constitutional right to physician-assisted suicide. *Washington v. Glucksberg*<sup>25</sup> and *Vacco v. Quill*<sup>26</sup> effectively uphold laws in forty-

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requirements for parental notice and/or consent for unmarried minors' abortions so long as there is an adequate judicial bypass procedure).

20. 31 P.3d 88 (Alaska 2001).

21. *Id.* at 100.

22. 24 P.3d 547 (Alaska 2001).

23. *Id.* at 556-57.

24. *See, e.g.,* *Ravin v. State*, 537 P.2d 494, 511 (Alaska 1975) (recognizing a privacy interest for "possession of marijuana by adults at home for personal use").

25. 521 U.S. 702, 705-06 (1997) (holding that laws prohibiting physician-assisted suicide do not violate a protected liberty interest under the Fourteenth Amendment).

nine states that prohibit aiding another in committing suicide. However, although the decisions were rendered without a single dissent, they leave open the possibility of legal protection for such a right at the state level, either under state constitutions, such as Alaska's, or state statutes, such as Oregon's "Death With Dignity Act."<sup>27</sup>

In *Glucksberg* and *Quill*, the Court had before it two court of appeals decisions that found a constitutional right to physician-assisted suicide. The Ninth Circuit, in an *en banc* decision, found that terminally ill individuals have a fundamental liberty interest to physician-assisted suicide, protected under the Due Process Clause of the Fourteenth Amendment.<sup>28</sup> The court declared unconstitutional a Washington law stipulating that "[a] person is guilty of promoting a suicide attempt when he knowingly causes *or aids* another person to commit suicide."<sup>29</sup> The court then concluded that "the Constitution encompasses a Due Process liberty interest in controlling the time and manner of one's death—that there is, in short, a constitutionally recognized 'right to die.'"<sup>30</sup>

Just a few weeks after the Ninth Circuit's ruling, the Second Circuit declared unconstitutional a New York law that prohibited

26. 521 U.S. 793, 796-97 (1997) (holding that laws prohibiting physician-assisted suicide do not violate the Equal Protection clause of the Fourteenth Amendment).

27. ORE. REV. STAT. §127.800 (1996) (specifically allowing physician-assisted suicide).

Attorney General John Ashcroft issued a directive in November 2001 challenging Oregon's act. The directive declares that:

- controlled substances may not be dispensed to assist suicide, thus reversing the position taken by his predecessor, Attorney General Janet Reno, in June 1998.
- assisting suicide is not a "legitimate medical purpose" and that prescribing, dispensing, or administering federally controlled substances violates the [Controlled Substance Act].
- prescribing, dispensing, or administering federally controlled substances to assist suicide may "render [a physician's] registration . . . inconsistent with the public interest" and therefore subject to possible suspension or revocation . . .

Oregon v. Ashcroft, 192 F. Supp. 2d 1077, 1078-79 (D. Ore. 2002) (quoting 66 FR 56608 (Nov. 9, 2002)). The State of Oregon sought declaratory and injunctive relief to prevent enforcement of the directive. *Id.* at 1084. The district court entered a permanent injunction "enjoining the defendants from enforcing, applying, or otherwise giving any legal effect to the Ashcroft directive." *Id.* at 1080.

28. *Compassion in Dying v. Washington*, 79 F.3d 790, 793-94 (9th Cir. 1996) (*en banc*) (emphasis in original), *rev'd sub nom. Glucksberg*, 521 U.S. 702 (1997).

29. *Id.* at 794 (quoting WASH. REV. CODE § 9A.36.060 (2000)) (emphasis in original).

30. *Id.* at 816.

aiding another in committing suicide.<sup>31</sup> Several physicians and gravely ill patients challenged the New York statute, which stated that “[a] person is guilty of manslaughter in the second degree when . . . [h]e intentionally causes or aids another person to commit suicide.”<sup>32</sup> The Second Circuit found that the New York law violated the Equal Protection Clause of the Fourteenth Amendment.<sup>33</sup> The court reasoned that competent patients on artificial life support already have the right to physician-assisted suicide based on their right to terminate life support equipment.<sup>34</sup> In *Cruzan v. Director, Missouri Department of Health*,<sup>35</sup> the Supreme Court ruled that competent adults have the right to refuse even life-sustaining medical treatment.<sup>36</sup> The Second Circuit said that in light of this decision, those not receiving artificial life support are discriminated against because they do not have a right to physician-assisted suicide.<sup>37</sup> The court concluded that this latter group is denied equal protection.<sup>38</sup>

The United States Supreme Court reversed both of these court of appeals decisions. Chief Justice Rehnquist wrote for the majority in each case. In *Washington v. Glucksberg*, the Court rejected the claim that the Washington law prohibiting assisted suicide violated a fundamental right protected under the Due Process Clause.<sup>39</sup> Rehnquist’s opinion began by observing that a right is protected as fundamental under the Due Process Clause when supported by history or tradition.<sup>40</sup> Rehnquist then stated that “for over 700 years, the Anglo-American common-law tradition has punished or otherwise disapproved of both suicide and attempting suicide.”<sup>41</sup>

Rehnquist noted that “[i]n almost every State—indeed, in almost every western democracy—it is a crime to assist a suicide.”<sup>42</sup> After reviewing the history of laws prohibiting suicide and assis-

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31. *Quill*, 80 F.3d at 731.

32. *Id.* at 719 (quoting N.Y. PENAL LAW § 125.15 (McKinney 1987)).

33. *Id.* at 731.

34. *Id.* at 727-28. The pre-existing right the court spoke about was the right to termination of life support equipment, which is not necessarily equivalent to physician-assisted suicide.

35. 497 U.S. 261 (1990).

36. *Id.* at 261.

37. *Quill*, 80 F.3d at 729.

38. *Id.* at 731.

39. *Washington v. Glucksberg*, 521 U.S. 702, 735 (1997).

40. *Id.* at 710 (stating that history is where the analysis of whether a right is a protected right should begin).

41. *Id.* at 711.

42. *Id.* at 710.

tance of suicide, Rehnquist wrote, “Despite changes in medical technology and notwithstanding an increased emphasis on the importance of end-of-life decisionmaking, we have not retreated from this prohibition [of assisting suicide].”<sup>43</sup> The Court thus concluded that “[t]o hold for respondents, we would have to reverse centuries of legal doctrine and practice, and strike down the considered policy choice of almost every state.”<sup>44</sup>

Because the Court determined that “the asserted ‘right’ to assistance in committing suicide is not a fundamental liberty interest protected by the Due Process clause,” the Washington law was to be upheld so long as it met a rational basis test.<sup>45</sup> The Court found that the law reasonably served many legitimate interests, including the preservation of life, protecting the integrity and ethics of the medical profession, protecting vulnerable groups, and stopping the path to voluntary and even involuntary euthanasia.<sup>46</sup>

Similarly, in *Quill*, the Supreme Court held that a New York law prohibiting physician-assisted suicide did not violate the Equal Protection Clause.<sup>47</sup> Chief Justice Rehnquist, again writing for the majority, initially noted that the prohibition of assisted suicide in this particular statute neither discriminated against a suspect class (such as a racial minority) nor violated a fundamental right since *Glucksberg* had expressly repudiated those contentions.<sup>48</sup> Under equal protection analysis, this meant that the law should be upheld so long as it met a rational basis test.<sup>49</sup>

Moreover, the Court rejected the claim that New York’s law discriminated against anyone.<sup>50</sup> In its decision, the Court noted that New York’s law treated everyone equally, that all people have the right to refuse medical care, and that all people are prohibited from assisting another person in committing suicide.<sup>51</sup> The Court specifically disagreed with the Second Circuit’s conclusion that those not on artificial life support are discriminated against as compared with those who can receive physician-assisted suicide by demanding the termination of a respirator or artificial nutrition or hydration, calling it a “distinction [which] comports with funda-

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43. *Id.* at 719.

44. *Id.* at 723.

45. *Id.* at 728.

46. *Id.* at 728, 731-32.

47. *Vacco v. Quill*, 521 U.S. 793, 809 (1997).

48. *Id.* at 799.

49. *Id.*

50. *Id.* at 800.

51. *Id.*

mental legal principles of causation and intent.”<sup>52</sup> The Court explained that “when a patient refuses life-sustaining medical treatment, he dies from an underlying fatal disease or pathology; but if a patient ingests lethal medication prescribed by a physician, he is killed by that medication.”<sup>53</sup>

The Supreme Court’s refusal to find a right to physician-assisted suicide under the United States Constitution does not prohibit *states* from protecting such a right.<sup>54</sup> The Court has emphasized the general absence of constitutional limits on state-assisted suicide laws.<sup>55</sup> In other words, the issue of whether there is a right to die is left to the political process and state constitutions; states may prohibit or allow physician-assisted suicide largely unconstrained by the Constitution. For example, in 1994, Oregon enacted through a ballot initiative a “Death With Dignity Act,” which legalized physician-assisted suicide for competent, terminally ill adults.<sup>56</sup>

#### B. The Alaska Supreme Court Rejects a Right to Physician-Assisted Suicide

Despite the enumeration of a right to privacy under the Alaska Constitution, the Alaska Supreme Court in *Sampson v. State*<sup>57</sup> also rejected a constitutional right to physician-assisted suicide.<sup>58</sup> Kevin Sampson and Jane Doe were mentally competent, terminally ill patients who sought a court order that they had a right to physician-assisted suicide under the Alaska Constitution and thus that their physicians should be exempt from prosecution for aiding their suicides.<sup>59</sup> Specifically, Sampson and Doe contended that “the guarantees of privacy and liberty in article I of the

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52. *Id.* at 801.

53. *Id.*

54. *See* *Washington v. Glucksberg*, 521 U.S. 702, 716-19 (1997) (discussing the recent development of movements in some states to rethink the ban on physician-assisted suicide, all of which, save Oregon, have ended with no change in the ban).

55. *See id.* at 716 (noting that states have reexamined and reaffirmed bans on assisted-suicide).

56. Oregon Rev. Stat. §127.800 *et seq.* The statute reads: “An adult who is capable, is a resident of Oregon, and has been determined by the attending physician and consulting physician to be suffering from a terminal illness, and who has voluntarily expressed his or her wish to die, may make a written request for medication for the purpose of ending his or her life in a humane and dignified manner . . . .” § 127.805 § 2.01(1).

57. 31 P.3d 88 (Alaska 2001).

58. *Id.* at 90.

59. *Id.*

Alaska Constitution protect their right to control the timing and manner of their deaths.”<sup>60</sup>

The Alaska Supreme Court began by observing that since Alaska became a state there had always been a law prohibiting assisted suicide.<sup>61</sup> The court noted that the Alaska legislature had considered a bill, closely resembling Oregon’s law, to allow physician-assisted suicide, but that it failed to pass.<sup>62</sup> The court then reviewed the Alaska cases concerning the right to privacy and concluded that “[a]ll of these cases address situations involving personal autonomy to control our appearance or to direct the course of our lives; none even remotely hints at any historical or legal support for the proposition that the general right of personal autonomy incorporates a right to physician-assisted suicide.”<sup>63</sup>

The court thus expressly rejected the claim that there is a fundamental right to physician-assisted suicide under the Alaska Constitution.<sup>64</sup> The court then proceeded to apply mere rational basis review and, not surprisingly, found that this deferential standard was met.<sup>65</sup> Like the United States Supreme Court in *Glucksberg*<sup>66</sup> and *Quill*,<sup>67</sup> the Alaska Supreme Court concluded that the State has a “strong interest in protecting potentially vulnerable Alaskans, including terminally ill persons, from undue influence.”<sup>68</sup> The court also expressed concern over how “mental competence” would be defined or determined, as the plaintiffs sought a right to physician-assisted suicide only for such individuals.<sup>69</sup> Similarly, the court said that it would be difficult to limit such a right to “terminally ill patients.”<sup>70</sup>

The court said that these problems might be dealt with, but “because . . . suicide is so firmly rooted in questions of social policy,

60. *Id.* at 91 (citation and quotations omitted).

61. *Id.* at 92. Currently under Alaska law, “[a] person commits the crime of manslaughter if the person . . . intentionally aids another person to commit suicide.” ALASKA STAT. § 11.41.120(a)(2) (Michie 2002); *see also id.* § 11.15.150 (repealed 1978).

62. *Sampson*, 31 P.3d at 93.

63. *Id.* at 94.

64. *Id.* at 95 (“[W]e reject Sampson and Doe’s contention that physician-assisted suicide is a fundamental right within the core meaning of the Alaska Constitution’s privacy and liberty clauses.”).

65. *See id.* at 95-96.

66. *Washington v. Glucksberg*, 521 U.S. 702 (1997).

67. *Vacco v. Quill*, 521 U.S. 793 (1997).

68. *Sampson*, 31 P.3d at 96.

69. *Id.* at 97.

70. *Id.*

rather than constitutional tradition, it is a quintessentially legislative matter.”<sup>71</sup> The court thus concluded

[a]ccordingly, we hold that the right to physician-assisted suicide is not implicit in text, context, or history of the Alaska Constitution’s liberty and privacy clauses. While these guarantees encompass a broad range of autonomy, they do not require an exemption to Alaska’s manslaughter statute that would provide for physician-assisted suicide.<sup>72</sup>

### C. The Alaska Supreme Court’s Failure

Ultimately, the key question in appraising the Alaska Supreme Court’s decision is whether terminally ill, competent adults should have a right to physician-assisted suicide. None of us can answer this question without reference to the experiences of our own families and fears. Justice O’Connor recognized this in beginning her concurring opinion in *Glucksberg* by observing that “[d]eath will be different for each of us. For many, the last days will be spent in physical pain and perhaps the despair that accompanies physical deterioration and a loss of control of basic bodily and mental functions.”<sup>73</sup>

Ten years ago, as my father was dying of lung cancer, he asked his doctor for medication to end his life. He was far too weak to get out of his hospital bed, let alone act to end his own life. He either was in great pain or sedated into constant sleep. When he awoke, he was lucid but obviously in enormous discomfort. A few days before he died, he simply wanted it over. His doctor brushed aside his request by ignoring it, though it was repeated several times.

I cannot consider the constitutional issue of a right to physician-assisted suicide without having in mind the searing image of my father in his hospital bed, gasping for each breath, and wanting to end his pain. I cannot imagine any interest that the State had in keeping my father alive for several additional days. If liberty means anything, I think it must include a right, for those like my father, to die with dignity.

The Alaska Supreme Court erred in several ways in failing to recognize this right. First, the court was wrong to determine whether there is a fundamental right solely based on history and tradition. Other privacy rights have been protected under the

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71. *Id.* at 98.

72. *Id.*

73. *Washington v. Glucksberg*, 521 U.S. 702, 736 (1997) (O’Connor, J., concurring).

Alaska Constitution—such as the right to use marijuana<sup>74</sup> and abortion rights<sup>75</sup>—even though there was no history or tradition of safeguarding these liberties. History and tradition can describe what has been the practice; they cannot disclose what the Constitution should mean.

Second, the Alaska Supreme Court failed to recognize the profound importance of a right to physician-assisted suicide to the right of privacy. As described earlier, the Alaska Supreme Court previously had said that the very core of liberty “is the notion of total personal immunity from government control: the right to be let alone.”<sup>76</sup> Few, if any decisions, are more deeply personal or more important than whether to end one’s life. Professor Tribe expressed this well when he wrote:

Of all decisions a person makes about his or her body, the most profound and intimate relate to two sets of ultimate questions: first, whether, when, and how one’s body is to become the vehicle for another human being’s creation; second, when and how—this time there is no question of “whether”—one’s body is to terminate its organic life.<sup>77</sup>

Third, the Alaska Supreme Court overstated the problems of recognizing a right to physician-assisted suicide. To be sure, the court raised important concerns: protecting vulnerable individuals, defining who is mentally competent, and determining who is terminally ill.<sup>78</sup> Yet, these problems do not justify the failure to recognize a right. Oregon has dealt with these concerns in its “Death With Dignity” law allowing physician-assisted suicide, as have foreign countries such as the Netherlands.<sup>79</sup> If the Alaska Supreme Court had recognized such a right to physician-assisted suicide, then the legislature almost certainly would have responded with necessary statutes to regulate the practice.

The fundamental flaw in the Alaska Supreme Court decision was in leaving the issue of physician-assisted suicide solely to the legislative process. The Alaska Constitution’s express protection of privacy gives the Alaska judiciary a key role in ensuring that ba-

74. *E.g.*, *Ravin v. State*, 537 P.2d 494, 511 (Alaska 1975).

75. *E.g.*, *State, Dep’t of Health and Social Servs. v. Planned Parenthood of Alaska, Inc.*, 28 P.3d 904, 906 (Alaska 2001).

76. *Breese v. Smith*, 501 P.2d 159, 168 (Alaska 1972) (internal citation omitted).

77. LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1337-38 (2d ed. 1988).

78. *Sampson v. State*, 31 P.3d 88, 96 (Alaska 2001).

79. *See Washington v. Glucksberg*, 521 U.S. 702, 711 n.8 (1997) (citing *Rodriguez v. British Columbia (Attorney General)*, 107 D.L.R. (4th) 342, 404 (Can. 1993)) (noting that in most western democracies it is a crime to assist suicide).

sic aspects of privacy are protected from legislative intrusion. The Alaska Supreme Court failed to answer the fundamental question: why should the State force a terminally ill patient to continue to live against his or her will? The Alaska Supreme Court should have found that the law prohibiting physician-assisted suicide violates the most fundamental aspect of privacy: the right of a person to choose whether to live or die.

### III. DRUG TESTING

#### A. The United States Supreme Court's Willingness to Allow Drug Testing

Almost without exception, the Supreme Court has approved government drug testing and refused to find that it violates the Fourth Amendment despite the fact that the Court has clearly recognized that drug testing—examining a person's blood or urine for signs of drug use—is a search within the meaning of the Fourth Amendment.<sup>80</sup> The latter conclusion seems obvious, as drug testing involves compelling a person to produce bodily fluids that are then examined by the government to learn information about the individual.

As with any search, the government can require drug testing if there is sufficient probable cause.<sup>81</sup> The question is whether the government can mandate drug testing based on less than probable cause and, potentially, without any individualized suspicion whatsoever. Alarming, in several cases, the Supreme Court has approved warrantless, suspicionless drug testing.

In *Skinner v. Railway Labor Executives' Ass'n*,<sup>82</sup> the Court approved a federal law authorizing drug testing for railway workers after an accident occurred.<sup>83</sup> The law also authorized drug testing when there was reasonable suspicion that an employee was intoxicated or drug impaired and when there was a violation of safety rules.<sup>84</sup> *Skinner* therefore did not involve entirely suspicionless searches. The Supreme Court upheld the testing and emphasized

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80. *E.g.*, *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 617 (1989) (holding that collection and analysis of urine constitutes a search).

81. *E.g.*, *id.* at 619 (citing *Payton v. New York*, 445 U.S. 573, 586 (1980); *Mincey v. Arizona*, 437 U.S. 385, 390 (1978)).

82. 489 U.S. 602 (1989).

83. *Id.* at 634.

84. *Id.* at 611.

that it was warranted by the government's compelling interest in railroad safety.<sup>85</sup>

A more troubling case from a privacy perspective is *National Treasury Employees Union v. Von Raab*,<sup>86</sup> in which the Supreme Court approved suspicionless drug testing for customs workers who were applying for promotions.<sup>87</sup> The testing program was limited to those who would be involved in the interdiction of drugs or who would be carrying a firearm.<sup>88</sup> The government did not claim that there was any history of drug or alcohol abuse among customs workers.<sup>89</sup> Nevertheless, the Court concluded that the government's interest in ensuring that customs workers who were responsible for drug interdiction or were required to carry a firearm did not use drugs warranted the invasion of privacy.<sup>90</sup> The Court noted that customs workers had access to contraband and could become targets for bribes.<sup>91</sup> This decision is troubling because the Court did not require the government to demonstrate that testing based on individualized suspicion would be inadequate to serve the government's interest.

The Court also upheld *random* drug testing in two cases involving students. In *Vernonia School District 47J v. Acton*,<sup>92</sup> the Court deemed constitutional a school's random drug testing of students participating in interscholastic athletics.<sup>93</sup> Justice Scalia, writing for the Court in a 5-4 decision, stressed the danger of sports and the risk that a drug-impaired student could be injured.<sup>94</sup> The Court also said that the invasion of privacy was minimal since students already had to undergo physical exams and had to use public locker rooms before and after an athletic practice or event.<sup>95</sup> The Court concluded that the invasion of privacy was justified because of the school's interest in preventing and detecting drug use among its student athletes.<sup>96</sup>

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85. *Id.* at 633.

86. 489 U.S. 656 (1989).

87. *Id.* at 679.

88. *Id.* at 661.

89. *Id.* at 673-74.

90. *Id.* at 679.

91. *Id.* at 669.

92. 515 U.S. 646 (1995).

93. *Id.* at 664-66.

94. *Id.* at 662.

95. *Id.* at 656-57.

96. *Id.* at 661-63.

Then last year, in *Board of Education of Independent School Dist. No. 92 of Pottowotomie County v. Earls*,<sup>97</sup> the Court upheld a school district's policy of requiring random drug testing as a condition for participation in extracurricular activities.<sup>98</sup> This case was quite different from *Vernonia* in a number of respects. The drug testing program in *Vernonia* was limited to student athletes; *Earls* involved drug testing of all students participating in extracurricular activities. In fact, the challenger in *Earls* was a student who wanted to sing in the school choir.<sup>99</sup> There is obviously far less danger of injury from singing than in athletic events. Also, there is not the same diminished expectation of privacy in the choir as in the high school locker room, which the Court stressed in *Vernonia*. Most important, according to the court of appeals, the school district in *Earls* did not claim or prove a significant drug problem among students participating in extracurricular activities.<sup>100</sup> Rather, it said that its goal was to prevent one from developing.<sup>101</sup>

Nonetheless, the Supreme Court upheld the random drug testing in another 5-4 decision. Justice Thomas, writing for the Court, emphasized the school's important interest in preventing drug use and reasoned that this justified the invasion of privacy.<sup>102</sup> Justice Thomas said that random testing had the benefit of not requiring schools to accuse particular students of drug use in order to justify testing.<sup>103</sup> This opinion is particularly troubling because it would seemingly allow any school to require drug testing of any student.

There are, however, two decisions in which the Supreme Court rejected drug-testing requirements. In *Chandler v. Miller*,<sup>104</sup> the Court declared unconstitutional a Georgia statute which required that a candidate, in order to qualify for nomination or election to a state office, submit to and pass a drug test.<sup>105</sup> The Court found that there was no proof of a drug problem in Georgia among its elected officials.<sup>106</sup> Additionally, the Court found that there was no special need for the drug testing of candidates for state office, unlike the

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97. 536 U.S. 822 (2002), 122 S.Ct. 2559 (2002).

98. 122 S.Ct. at 2562.

99. *Id.* at 2563.

100. *Earls v. Bd. of Educ.*, 242 F.3d 1264, 1272-74 (10th Cir. 2001), *rev'd*, 122 S.Ct. 2559.

101. 122 S.Ct. at 2567-68.

102. *Id.* at 2567.

103. *Id.* at 2568-69.

104. 520 U.S. 305 (1997).

105. *Id.* at 309.

106. *Id.* at 319.

case of railroad workers involved in accidents or customs workers involved in drug interdiction.<sup>107</sup> Nor could candidates for elected office be analogized to students where schools have greater responsibility and authority.<sup>108</sup> The Court noted that the Georgia program was likely to be only symbolic because the candidate could schedule the test whenever he or she wanted.<sup>109</sup>

*Ferguson v. City of Charleston*<sup>110</sup> involved a public hospital's program of drug testing pregnant women suspected of abusing drugs based on specific criteria from a profile generated by the government.<sup>111</sup> In a 6-3 decision, the Court declared this unconstitutional.<sup>112</sup> The record showed that positive drug test results were turned over to law enforcement and presumably used as the basis for criminal prosecutions of the women,<sup>113</sup> and that women were being arrested just hours after giving birth, often while still in their hospital gowns and bleeding heavily.<sup>114</sup> Thus, the Court concluded that drug testing for law enforcement purposes must meet the requirements of the Fourth Amendment.<sup>115</sup>

Overall, the Supreme Court has been very supportive of drug testing, particularly in the context of employment and education. In these areas, the Court has been quite willing to find that the interest in deterring drug use outweighs the invasions of privacy.

#### B. The Alaska Supreme Court Approves Random Drug Testing

Some commentators have predicted that the greater protection of privacy under the Alaska Constitution would mean greater limits on drug testing in Alaska.<sup>116</sup> But in its recent decision in *Alaska Police Department Employees Ass'n v. Municipality of Anchorage*,<sup>117</sup> the Alaska Supreme Court approved suspicionless drug

107. *Id.* at 314-16, 318.

108. *Id.* at 316, 319.

109. *Id.* at 319. Further, the Court found the statute to be symbolic because there was no evidence of drug abuse among elected officials. *Id.* at 321-22.

110. 532 U.S. 67 (2001).

111. *Id.* at 71. The program actually provided for suspicionless testing because it used a profile but not any individualized factors. *See id.* at 71 n.4.

112. *Id.* at 86.

113. *See id.* at 77 (emphasizing the lack of knowledge or consent of the patients).

114. *Ferguson v. City of Charleston*, 186 F.3d 469, 488 (4th Cir. 1999), *rev'd* 532 U.S. 67 (2001).

115. *Ferguson*, 532 U.S. at 84.

116. *See* Richard N. Cook, *Drug Testing of Public and Private Employees in Alaska*, 5 ALASKA L. REV. 133, 154 (1988) (“[W]hile the federal test focuses on the needs of the state, Alaska’s test is more concerned with the individual.”).

117. 24 P.3d 547 (Alaska 2001).

testing for police and firefighters applying for promotion or transfer, as well as those involved in vehicle accidents.<sup>118</sup> However, the court did declare unconstitutional the city's requirement for random drug testing of its police and firefighters.<sup>119</sup>

The Alaska Supreme Court began by noting that neither a warrant nor probable cause is required to test employees involved in such important positions. The court stated:

[O]ur case law expressly recognizes that neither the warrant requirement nor the requirement of probable cause invariably governs searches occurring in the context of a heavily regulated activity. And as the superior court properly recognized here, "special needs" findings are especially appropriate when employment occurs in a highly regulated, safety-essential field of work.<sup>120</sup>

Quite significantly, the court concluded that "[w]orkers employed in such fields necessarily expect reduced privacy in their job-related activities and implicitly agree to a diminished level of privacy when they accept employment."<sup>121</sup>

The court rejected the argument that the government must prove a drug problem in order to justify testing.<sup>122</sup> Since it found that drug testing was a relatively minimal invasion of privacy, and that the government's interest in preventing drug use among its police and firefighters was substantial, it is not surprising that the court upheld a substantial part of Anchorage's drug testing program. In agreeing with the lower court, the supreme court stated:

[T]he Municipality's interest in ensuring public safety is sufficiently compelling to outweigh the relatively modest—though admittedly not insignificant—intrusion on privacy that occurs under the disputed Municipality policy when Police Employees and Fire Fighters members are subjected to suspicionless urine

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118. *Id.* at 557. In an earlier decision, *Luedtke v. Nabors Alaska Drilling, Inc.*, 768 P.2d 1123 (Alaska 1989), the Alaska Supreme Court held that a private employer's drug testing program did not violate the state constitutional right to privacy and thus upheld the firing of two employees for failure to submit to drug testing. *Id.* at 1130. The court concluded that the Alaska Constitution's privacy provision did not apply to private, non-government conduct. *Id.* The court stated: "[t]he parties in the case at bar have failed to produce evidence that Alaska's constitutional right to privacy was intended to operate as a bar to private action . . . ." *Id.*

119. *Alaska Police Dep't Employees Ass'n*, 24 P.3d at 559.

120. *Id.* at 555 (citing *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 672 (1989)).

121. *Id.*

122. *Id.* at 556.

testing upon application for employment, upon promotion, demotion or transfer, or after a vehicular accident.<sup>123</sup>

However, the court was not willing to go so far as to approve completely random testing. It said that “random testing places increased demands on employees’ reasonable expectation of privacy.”<sup>124</sup> The court further noted that

random testing is more intrusive: it subjects employees to a greater degree of subjective intrusion. An unannounced test’s added element of “fear and surprise,” and its “unsettling show of authority,” make random testing qualitatively more intrusive than testing that is triggered by predictable, job-related occurrences such as promotion, demotion, and transfer.<sup>125</sup>

Thus, the court concluded that “the Municipality has failed to meet its burden of establishing a special need for its random testing provision.”<sup>126</sup>

### C. The Alaska Supreme Court’s Failure

Although the Alaska Supreme Court declared random drug testing unconstitutional, it upheld drug testing without individualized suspicion for police officers and firefighters applying for promotion or transfer or even being demoted.<sup>127</sup> In doing so it failed to provide significantly more protection under the Alaska Constitution than under the United States Constitution. In fact, the Alaska Supreme Court’s decision is remarkably similar to the United States Supreme Court’s ruling in *National Treasury Union v. Von Raab*,<sup>128</sup> which upheld suspicionless drug testing for customs workers applying for promotion or transfer.<sup>129</sup>

There are several problems with the Alaska Supreme Court’s analysis. First, the court failed to justify the need for *suspicionless* searches. The government can depart from the constitutional mandate that searches be based on individualized suspicion only by proving that a requirement for suspicion will undermine the effectiveness of its program. Yet the government made no such showing in *Alaska Police Department Employees Ass’n v. Municipality of Anchorage*.<sup>130</sup> Furthermore, the court did not even ask whether

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123. *Id.* at 556-57.

124. *Id.* at 557.

125. *Id.* at 558 (internal citations omitted).

126. *Id.*

127. *Id.* at 559.

128. 489 U.S. 656 (1989).

129. *Id.* at 679.

130. *See* 24 P.3d 547 (Alaska 2001).

suspicionless searches were needed to accomplish the government's purposes.<sup>131</sup>

Second, the Alaska Supreme Court failed to give sufficient weight to the well-established principle that the Alaska Constitution is given separate meaning, and often contains greater protections, than the United States Constitution.<sup>132</sup> The Alaska Supreme Court's decision seemed heavily influenced, if not based on, federal court decisions interpreting the Fourth Amendment to the United States Constitution. The court began its opinion with a lengthy examination of United States Supreme Court rulings concerning drug testing and the Fourth Amendment.<sup>133</sup> Then, throughout its opinion, the court referred to federal appellate court decisions upholding suspicionless testing regimes in comparable situations.<sup>134</sup> In fact, in declaring the random testing aspect of Anchorage's program unconstitutional, the court looked to federal law and "note[d] that the United States Supreme Court has never approved an open ended random-testing regime like the one at issue here."<sup>135</sup>

The consistent focus on the United States Constitution and federal court decisions is at odds with the tradition in Alaska, first stated in *Ravin v. State*,<sup>136</sup> of the separate meaning of Alaska constitutional provisions and the independent analysis they require.<sup>137</sup> Early in Alaska's statehood, the Alaska Supreme Court declared:

We are not bound in expounding the Alaska Constitution's Declaration of Rights by the decisions of the United States Supreme Court, past or future, which expound identical or closely similar provisions of the United States Constitution . . . . To look only to the United States Supreme Court for constitutional guidance would be an abdication by this court of its constitutional responsibilities.<sup>138</sup>

Independent interpretation and protection of rights is particularly important when the Alaska Constitution contains a provi-

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131. *Id.*

132. *Id.* at 550.

133. *Id.* at 551-55 (examining *Ferguson v. City of Charleston*, 532 U.S. 67 (2001); *Chandler v. Miller*, 520 U.S. 305 (1997); *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646 (1995); *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989); *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602 (1989)).

134. *Id.* at 557 & n.71.

135. *Id.* at 558 (citing *Von Raab*, 489 U.S. at 672, concerning the advance notification of drug testing).

136. 537 P.2d 494 (Alaska 1975).

137. *See id.* at 498, 500-01 (noting that Alaska employs a different test for rational basis scrutiny than the U.S. Supreme Court and that privacy is a specified right under the Alaska Constitution).

138. *Roberts v. State*, 458 P.2d 340, 342 (Alaska 1969).

sion with no analogue in the United States Constitution. In *Alaska Police Department Employees Ass'n v. Municipality of Anchorage*, the Alaska Supreme Court assumed that the privacy clause in the Alaska Constitution should be interpreted and applied under the principles used in the federal courts' Fourth Amendment analysis.<sup>139</sup> The court never even acknowledged the greater protection of privacy rights intended by the voter initiative that added privacy as an enumerated right to the Alaska Constitution.<sup>140</sup>

Finally, the Alaska Supreme Court's balancing of privacy interests and government interests is questionable. The court concluded that the government's interests outweigh the privacy interests implicated, but offered little analysis of this balancing.<sup>141</sup> On one side of the balance are the privacy interests of employees, but these are never explicated in the opinion. Drug testing invades privacy rights in many respects: it is a search; it requires employees to produce urine specimens in a manner that many find degrading and embarrassing; it gives employers knowledge of what employees are doing off the job, even when there is no showing of any relevance to job performance. There also is a real danger of false positives, meaning that employees can be subjected to adverse employment actions even though they have done nothing wrong.

On the other side of the balance is the government's interest in ensuring that police and firefighters never use drugs. Interestingly, the court implicitly rejected this interest as sufficient to support drug testing when it declared random testing unconstitutional.<sup>142</sup> Thus, the question is whether testing at the time of promotion, demotion, or transfer sufficiently serves the government's interest to warrant the invasion of privacy. This issue is not addressed by the Alaska Supreme Court and it is difficult to see why the government's interest at this stage outweighs the loss of privacy involved.

#### IV. CONCLUSION

For over a dozen years, I have had the tremendous pleasure of going to Alaska each spring to speak at the Alaska Bar Association's Annual Convention on recent developments in constitutional law. Over this time, I have had the opportunity to meet and speak with the Justices of the Alaska Supreme Court. I have developed enormous admiration and respect for these Justices. No state has a more impressive judiciary than does Alaska.

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139. 24 P.3d at 554.

140. *Id.* at 550.

141. *Id.* at 556-57.

142. *Id.* at 559.

I have also come to understand Alaska's deeply established tradition of giving separate meaning to the Alaska Constitution and often providing more protection for individual freedom than exists under the United States Constitution. I vividly recall my first trip to Alaska in 1990 and meeting Chief Justice Jay Rabinowitz, the visionary and architect of so much Alaska constitutional law, including the right to privacy,<sup>143</sup> and hearing him eloquently speak about Alaska's judicial history.

It is in this context that I find the recent decisions of the Alaska Supreme Court, rejecting a state constitutional right to physician-assisted suicide and upholding drug testing, to be troubling. These are important areas of privacy—whether to live or die, and privacy in the workplace—where the Alaska Supreme Court had the opportunity to be a national leader. These are areas where the Alaska Supreme Court could have found independent rights under the Alaska Constitution's privacy clause that are far more expansive than those guaranteed through the restrictive interpretations by the United States Supreme Court of the United States Constitution. But unfortunately this did not occur and the promise of the Alaska Constitution's privacy clause was not realized.

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143. *See, e.g.,* *Ravin v. State*, 537 P.2d 595 (Alaska 1975).