A Right to Privacy Tour de Force into Louisiana Medical Informed Consent

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COMMENTS

A RIGHT TO PRIVACY TOUR DE FORCE INTO LOUISIANA MEDICAL INFORMED CONSENT

I. Introduction

In 1975, the Louisiana legislature passed the Uniform Consent Law\textsuperscript{1} to define consent to medical treatment and otherwise generally and specifically provide for consent to medical treatment.\textsuperscript{2} The statute established the procedure whereby a physician could obtain written or oral\textsuperscript{3} informed consent from patients. Originally, the Louisiana Supreme Court interpreted the statute as providing the exclusive means for pursuing a cause of action for lack of informed consent, thereby superseding the jurisprudential rules which previously governed this area.\textsuperscript{4}

In 1988, the Louisiana Supreme Court reinterpreted the statute concluding that it provides only the legislative limits of medical consent.\textsuperscript{5} The court reinstated the pre-statutory jurisprudential rules to govern medical informed consent cases. The court based this interpretation, in part, on a federal and state constitutional right to privacy.\textsuperscript{6} The court recognized a patient's right to have before him all the information constitutionally necessary to make an informed and voluntary consent before undergoing treatment.

By limiting the Uniform Consent Law and reinstating the pre-statutory jurisprudential doctrine, the court rendered the statute totally ineffective as an independent force of law. By stripping the statute of all effect on the basis of the patient's federal and state constitutional right to privacy, the court in essence declared the statute unconstitutional.

This comment begins by tracing the history of medical informed consent in Louisiana. Next, this comment seeks to ascertain the federal and state constitutional right to privacy in the area of medical informed consent.

\textsuperscript{2} LaCaze v. Collier, 434 So. 2d 1039 n.3 (La. 1983).
\textsuperscript{4} LaCaze, 434 So. 2d at 1039.
\textsuperscript{5} Hondroulis v. Schuhmacher, 553 So. 2d 398 (La. 1988).
\textsuperscript{6} Id. at 414-15. The court, in addition, based its interpretation of the Uniform Consent Law on similar interpretations given by other states construing their informed consent statutes. Id. The court also based its interpretation on the fact that the statutory language only says "presumption" which is typically interpreted as a rebuttable presumption. Id. at 417.
consent on which the 1988 Louisiana Supreme Court based its authority in virtually overruling the Louisiana legislature. Finally, the comment evaluates alternative statutory constructions and the proper expansion of the constitutional right to privacy into medical informed consent.

II. THE JURISPRUDENTIAL AND STATUTORY DEVELOPMENT OF MEDICAL INFORMED CONSENT IN LOUISIANA

A. History

The general rule is that a physician must obtain his patient's consent, expressed or implied, to a medical procedure before performing a procedure. A patient's cause of action for lack of consent arises in intentional torts, i.e., battery, for the performance of procedures different from or in excess of those to which he has consented. A patient's cause of action for lack of informed consent, however, arises in negligence. In these situations, the physician performs the procedure to which his patient consented, but the physician fails to disclose to his patient certain risks and results involved in the procedure.

In 1917, the Louisiana Supreme Court in Theodore v. Ellis recognized a patient's cause of action against his physician for lack of informed consent to medical treatment. In Theodore, the plaintiff could

9. Hodge v. Lafayette Gen. Hosp., 399 So. 2d 744 (La. App. 3d Cir. 1981); Percle v. St. Paul Fire & Marine Ins. Co., 349 So. 2d 1289 (La. App. 1st Cir.), writ denied 350 So. 2d 1218 (1977). Louisiana has categorized a suit based on the lack of informed consent as a cause of action based in negligence and not assault and battery, i.e. an intentional tort, for several reasons. First, the act involved in these cases does not fit the traditional concepts of battery, i.e., an intentional touching or striking of another person. For example, a battery would occur from the unauthorized removal of an organ but no battery should occur from the failure to adequately advise a patient about a certain treatment. Second, the failure to inform a patient usually does not involve an intent by the physician to injure or a substantial certainty that injury is likely to result, which is essential for an intentional tort. Third, the lack of informed consent is not compatible with the traditional idea of "contact" or "touching" because in the typical situation the physician impeccably performs the procedure and the complaints involve the personal reactions to the procedure which are unanticipated by the patient. Fourth, the question arises as to whether or not a physician's malpractice insurance covers liability for arguably the criminal act of battery. Fifth, these cases do not fit the traditional mold of situations wherein punitive damages should be awarded. Following from these expressed reasons, Louisiana has adopted the approach that cases involving lack of medical informed consent will be handled as causes of action in negligence and not assault and battery. Percle, 349 So. 2d at 1298 (citing Trogun v. Fruchtman, 58 Wis.2d 569, 207 N.W.2d 297 (1973)).
10. 141 La. 709, 75 So. 655 (La. 1917).
not retain urine in his bladder at night. The physician performed an operation which opened and drained the patient’s bladder. The patient consented to the operation and the physician performed the operation within the proper medical standard of care. The physician performed a second operation which removed part of the prostate gland of the patient. The physician performed the operation under the proper medical standard of care but failed to explain to the patient the object of the second operation or the available alternative procedures. The court held that the patient had the right to know the purpose of the proposed operation and the alternative procedures available so the patient could decide whether to undergo the operation.11

Prior to the enactment of the Uniform Consent Law, the jurisprudence continued to develop the elements for a patient’s cause of action against a physician for lack of informed consent. This cause of action included the normal elements involved in a suit for negligence: duty, breach of duty, causation, and damages.12

11. Id. at 723, 75 So. at 660.

12. LaCaze v. Collier, 434 So. 2d 1039, 1044 (La. 1983). The physician owed a duty to the patient to inform him of his particular ailment, or condition, the general nature of the proposed treatment or procedure, the material risks involved in the proposed treatment or procedure, the prospects of success, the risks of failing or refusing to undergo the procedure or any procedure, and the risks and availability of alternative procedures. The doctor’s duty included the duty to disclose all risks which are “material.” A material risk was that to which a reasonable person, in what the doctor knows or should know to be the patient’s position, would attach significance in deciding whether or not to undergo or forego the proposed treatment. The determination of whether or not a risk was material was a two-step process. The first step required medical expert testimony to decide whether the risk was material taking into account the likelihood of the risk occurring and the severity of the risk. The second step of materiality was for the trier of fact, absent expert testimony, to determine whether the probability and severity of the risk occurring was a risk which a reasonable person would consider in undergoing or foregoing the treatment. The cause of action also required a causal connection between the doctor’s failure to disclose the material risk and damage to the patient. Louisiana had adopted an objective standard of causation: whether a reasonable patient in this plaintiff’s position would have consented to the treatment had the material information and risks been disclosed. Finally, damages must have actually occurred to the patient. The patient carried the burden of proof and persuasion regarding these elements of the cause of action.

As a defense, the physician had a privilege not to disclose material risks in two instances. First, the doctor did not have to disclose material risks when an emergency arose because the patient was unconscious or otherwise unable to consent, and harm from a failure to treat was imminent and outweighed the harm threatened by the proposed treatment. Second, the doctor had a therapeutic privilege not to disclose material risks when the doctor reasonably believed that disclosure would cause illness or emotional distress to the patient so as to prevent a patient from exercising a rational decision, to complicate or hinder treatment, or to pose psychological damage to the patient. The physician carried the burden of proof in establishing that the existence of the privilege not to disclose existed. See Hondroulis v. Schuhmacher, 553 So. 2d 398, 411-13 (La. 1988); Percle v. St. Paul Fire & Marine Ins. Co., 349 So. 2d 1289, 1299 (La. App. 1st Cir.), writ denied 350 So. 2d 1218 (1977).
In 1975, the Louisiana legislature enacted the Uniform Consent Law, which describes the procedure involved in consent to medical treatment. In LaCaze v. Collier, the Louisiana Supreme Court interpreted the Uniform Consent Law as providing the only valid, legal procedures for obtaining an informed consent.

In LaCaze, the patient suffered from inflammation of the tissues and organs in the pelvic area. The physician performed a hysterectomy. Following the operation, the patient lost bladder control and developed a vesico-vaginal fistula. The patient sued the physician for the physician’s failure to obtain the patient’s informed consent to the operation. The patient had signed two written consent forms prior to the operation. The written forms did not fulfill Subsection A of the Uniform Consent Law because the forms failed to provide any details of the operation.


A. Notwithstanding any other law to the contrary, written consent to medical treatment means a consent in writing to any medical or surgical procedure or course of procedures which (a) sets forth in general terms the nature and purpose of the procedure or procedures, together with the known risks, if any, of death, brain damage, quadriplegia, paraplegia, the loss or loss of function of any organ or limb, of disfiguring scars associated with such procedure or procedures, (b) acknowledges that such disclosure of information has been made and that all questions asked about the procedure or procedures have been answered in a satisfactory manner, and (c) is signed by the patient for whom the procedure is to be performed, or if the patient for any reason lacks legal capacity to consent by a person who has legal authority to consent on behalf of such patient in such circumstances. Such consent shall be presumed to be valid and effective, in the absence of proof that execution of the consent was induced by misrepresentation of material facts.

B. Except as provided in Subsection A of this Section, no evidence shall be admissible to modify or limit the authorization for performance of the procedure or procedures set forth in such a written consent.

C. Where consent to medical treatment from a patient, or from a person authorized by law to consent to medical treatment for such patient, is secured other than in accordance with Subsection A above, the explanation to the patient or to the person consenting for such a patient shall include the matters set forth in Paragraph (a) of Subsection A above, and an opportunity shall be afforded for asking questions concerning the procedures to be performed which shall be answered in a satisfactory manner. Such consent shall be valid and effective and is subject to proof according to the rules of evidence in ordinary cases.

13. 434 So. 2d 1039 (La. 1983).
14. Id. at 1041 n.2. A fistula is an abnormal opening between two organs of the body, in this case between the bladder and the vagina. The usual cause of a vesico-vaginal fistula forming is a stitch that may be inadvertently taken into the bladder during the closing of the vaginal cuff. In time, the stitch would pull through the bladder wall. Other possible causes are nicking the bladder with the knife or damaging the blood supply to a portion of the bladder wall with a blunt instrument or clamp. Vesico-vaginal fistulae typically measure only a few millimeters in size, and, once formed, retain their initial size until corrected.
or describe the related risks. The physician also failed to obtain an oral consent under Subsection C because he failed to disclose to the patient the known risk of loss of function of an organ. The known risk of the possible occurrence of a vesico-vaginal fistula is considered loss of function of the bladder. The physician, however, escaped liability because the patient failed to prove the causation element. The one in two hundred chance of the vesico-vaginal fistula occurring and the easy remedying of such a problem would not have prevented an objectively reasonable patient from undergoing the operation.  

Based on the statutory language "[n]otwithstanding any other law to the contrary . . .," the court concluded that the statute explicitly provided the exclusive methods for obtaining a valid medical informed consent. The statute expressly included the only legally valid informed consents—written consent pursuant to Subsection A and oral consent pursuant to Subsection C. A valid consent to medical treatment had to conform to the statute, regardless of the differences between the statute and the previously established jurisprudential rules. For example, prior to the statute, courts required the physician to discuss alternative treatments with the patient. The statute does not require such disclosure for a valid informed consent. The statute, on the other hand, is broader than the jurisprudence by requiring disclosure of all known risks, material or not, possible in the proposed treatment and listed in the statute. The jurisprudence required the disclosure of only the material risks, determined by the likelihood of the risks occurring, the severity of the risks, and the significance that a reasonable person would attach to the risks.  

The statute, therefore, superseded the former jurisprudential rules on medical informed consent. If the physician satisfied the statutory requirements, the patient's signature created a presumption of validity. No evidence was admissible to modify or limit the authorization provided in the written form, except evidence of misrepresentation.

16. Id. at 1046-49.
17. Id. at 1046.
18. Id.
19. Id.
20. Id.
21. Id. Since LaCaze, the Louisiana Fourth Circuit Court of Appeal has consistently held that when a patient gives written consent to medical treatment pursuant to the Uniform Consent Law, no other evidence is admissible to modify or limit the consent except by evidence proving that the consent was induced by misrepresentation. This court has adhered to the holding that a written consent which tracks the language of the statute constitutes informed consent, even if the written consent form only provides the general language of the statute as long as the occurring risk falls within those categories. The written consent form, also, is valid even if the patient did not read it as long as the patient signed it, in the absence of coercion or force. The only basis for overcoming the consent as established by the written consent form is to allege and prove misrepresentation.
In 1988, the Louisiana Supreme Court in *Hondroulis v. Schuhmacher* departed from its own decision in *LaCaze* interpreting the Uniform Consent Law. In *Hondroulis*, the patient experienced pain in her lower back which radiated down her right hip and leg. The physician performed a myelogram and lumbar laminectomy upon the patient. After the operation, the patient lost bladder control. The patient sued the physician for the physician’s failure to obtain the patient’s informed consent. Prior to the operation, the patient signed a written consent form tracking the language of the statute. The trial court and court of appeal, relying on the existing jurisprudence, granted summary judgment to the physician. These courts held that a written consent form tracking the language of the statute constituted a valid informed consent, rebuttable only by facts of misrepresentation of which none existed.

The Louisiana Supreme Court reversed the lower courts, concluding that the “informed consent doctrine is based on the principle that every human being of adult years and sound mind has a right to determine what shall be done to his or her own body.” The court cited the United States Supreme Court cases recognizing an individual’s right to privacy in various areas of a person’s life. Although the court recognized that the United States Supreme Court has not yet extended the right to privacy to an individual’s decision to obtain or reject medical treatment, the court held that the federal Constitution’s right to privacy includes such a decision. The court cited one lower federal court case and numerous state court cases in support of this contention.

The court, with little state authority, then incorporated Louisiana constitutional law into its decision. The court stated that article I, section by the physician to the patient. Although the cases do not define misrepresentation, the cases suggest that the physician must actually manifest an overt, false communication to the patient, which is supported by the general legal definition of misrepresentation. In this light, the physician must disclaim a known risk involved or assert some other false statement to the patient. In the absence of evidence of misrepresentation, the court will not consider nor admit other evidence into the court in opposition to the physician’s motion for directed verdict. See *Hondroulis v. Schuhmacher*, 521 So. 2d 534 (La. App. 4th Cir.), rev’d 553 So. 2d 398 (1988); *Leiva v. Nance* 506 So. 2d 131 (La. App. 4th Cir.), writ denied 512 So. 2d 1176 (1987); *Madere v. Ochsner Found. Hosp.*, 505 So. 2d 146 (La. App. 4th Cir. 1987); *Leonhard v. New Orleans East Orthopedic Clinic*, 485 So. 2d 1008 (La. App. 4th Cir.), writ denied 489 So. 2d 919 (1986).

22. *Hondroulis*, 553 So. 2d at 398.
23. *Hondroulis*, 521 So. 2d at 534.
24. *Hondroulis*, 553 So. 2d at 401. See also *Hondroulis*, 553 So. 2d at 411 (on reh’g).
26. *Hondroulis*, 553 So. 2d at 414.
27. Id.
5 of the Louisiana Constitution of 1974 expressly guarantees that "[e]very person shall be secure in his person . . . against unreasonable . . . invasions of privacy." Thus, the court concluded "that the Louisiana [C]onstitution's right to privacy also provides for a right to decide whether to obtain or reject medical treatment." 

The Hondroulis court held that the prior jurisprudence construing the statute to provide an irrebuttable presumption of informed consent absent misrepresentation when a physician traces the statute's language in a consent form and a patient signs that form was unconstitutional. The Hondroulis court stated that the LaCaze court's statutory interpretation was overly broad in view of the constitutional dimension of the informed consent doctrine. The Hondroulis court concluded that the LaCaze opinion would not be impaired by deleting the LaCaze interpretation of the statute, reducing the LaCaze statutory interpretation to dictum. The Hondroulis court held this prior statutory interpretation violative of the patient's federal and state constitutional right to make an intelligent and voluntary decision regarding medical treatment by limiting access to information essential to a meaningful decision regarding the proposed treatment. The prior statutory interpretation was unconstitutional and did not serve compelling state interests necessary to overcome the protected individual liberties involved. The court, in addition, recognized that other states had enacted similar legislation in this area at approximately the same time as Louisiana and that this interpretation of the Louisiana statute was more consistent with the interpretations which the other states gave to their informed consent statutes.

When a statute is susceptible of two interpretations, one of which will render it unconstitutional and the other of which will render it constitutional, the court will adopt the interpretation of the statute which, without doing violence to its language, will maintain its constitution-

29. Hondroulis, 553 So. 2d at 415.
30. Id. at 417.
31. Id. at 417-18.
32. Id. at 416.
33. The purported state interests include: (1) maintaining medical standards and protecting health, (2) decreasing the number of fraudulent medical claims by regulating the proof of informed consent, (3) reducing the cost of medical malpractice insurance, (4) attracting and retaining medical talent and the delivering of adequate medical services within the state, and (5) by providing certainty in the law in the area of medical informed consent by providing health care providers with guidelines. Id. See also Hondroulis v. Schuhmacher, 521 So. 2d 534, 536 (La. App. 4th Cir.), rev'd 553 So. 2d 398 (1988).
34. Hondroulis, 553 So. 2d at 416.
35. Id. at 418.
The court held that the constitutional interpretation of the statute provided a rebuttable presumption instead of an irrebuttable presumption. The court concluded that the legislature, by enacting the statute, did not intend to make substantial alterations in the informed consent doctrine developed by the jurisprudence. The statute was a limited, distinct consent doctrine which detailed the legislative limits of consent to medical treatment. The statute, furthermore, in no way encroached upon the jurisprudential informed consent doctrine which was still in effect and essential to an informed and intelligent decision regarding proposed medical treatment. Thus, a suit in Louisiana based on a cause of action for lack of informed consent now requires the pre-statutory elements of duty, breach of duty, causation, and damages.

B. Analysis

The difference between a statutory irrebuttable presumption of informed consent and a rebuttable presumption of consent is paramount to the independence and effectiveness of the statute. The legislature intended to provide a shield for health-care personnel from suits based on lack of informed consent and to reduce the number of awards insurance companies pay for physicians. Absent claims of unconstitutionality, the LaCaze court’s interpretation fulfills the legislative aims by construing the statute as a legislative doctrine on informed consent, replacing the prior jurisprudential rules.

In most negligence suits, the plaintiff must carry the burden of proof in establishing his claim in order to prevail. The defendant, therefore, is granted procedurally a presumption that he is free from fault because the plaintiff carries the burden of proof. If the Uniform Consent Law establishes only a rebuttable presumption which the patient can overcome by proving the jurisprudential elements, the statute does not provide the physician with any greater protection than that which usually flows to a defendant in a negligence suit. If the statute, on the other hand, provides an irrebuttable presumption absent misrepresentation, the physician is provided with greater protection. Under the Hondroulis interpretation, the statute provides nothing to the physician; therefore, the statute is totally forceless as an independent source of law. The LaCaze interpretation, on the other hand, gives the statute substantive effect.

36. Id. at 416-17.
37. Id. at 418.
38. Id. at 419.
The LaCaze interpretation would also permit a physician to move for summary judgment based on the fact that he obtained a statutory informed consent. A motion for summary judgment based upon an irrebuttable presumption requires only proof of the foundation facts for the establishment of the presumption. The court would award summary judgment in the case in which the physician obtained a statutory informed consent, usually evidenced by a written form. The patient, furthermore, could not admit any evidence, except evidence of misrepresentation, to contradict the written form.

The Hondroulis interpretation, however, does not provide the basis for summary judgment. This interpretation establishes only a rebuttable presumption of consent and permits the plaintiff to easily overcome the presumption by proving the old jurisprudential elements of informed consent. Under this theory, summary judgment is only available if there is no genuine issue of fact both as to whether the physician disclosed all material facts of the therapy to the patient and as to whether the patient was aware of the risk and assented to encounter it. Since the statutory consent is considered rebuttable, and not irrebuttable, the patient can frequently allege nondisclosure or unawareness to rebut the presumption. The plaintiff, in addition, can introduce evidence outside of the written form to support his allegations. Since the facts before the court are viewed in the light most favorable to the party opposing the motion, the allegations of nondisclosure and the admission of other evidence outside the written form will frequently prevent a finding of no genuine issue of fact. The plaintiff, therefore, will frequently overcome the rebuttable presumption and prevent the granting of summary judgment.

This interpretation of the statute by the Hondroulis court does not give any substance to the statute. Instead, this interpretation leaves the

41. See Madere v. Ochsner Found. Hosp., 505 So. 2d 146 (La. App. 4th Cir. 1987). A court will properly grant a motion for summary judgment when the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to material fact, and that mover is entitled to judgment as a matter of law. Since the mover carries the burden of establishing that no material factual issue exists, the inferences to be drawn from the facts contained in the material before the court must be viewed in a light most favorable to the party opposing the motion. When a motion for summary judgment is made and supported, the opposing party may not rest on the mere allegations of his pleadings but he must respond with specific facts showing that there is a genuine issue for trial. If he does not, summary judgment shall be rendered against him. See also La. Code Civ. P. art. 966 (B), 967; Hondroulis v. Schuhmacher, 553 So. 2d 398, 420 (La. 1988).
42. Hondroulis, 553 So. 2d at 420.
43. Stone Oil Corp., 448 So. 2d at 901.
statute skeletal by ignoring it and rendering it totally ineffectual by reinstating the prior jurisprudence to decide medical informed consent cases. The court based this interpretation of the statute on the recognized federal constitutional right to privacy and the Louisiana constitutional right to privacy provision found in article 1, section 5. In light of the court's interpretation and its effect on the statute, an analysis of the existence of a federal and state right to privacy in the area of medical informed consent is warranted.

III. THE CONSTITUTIONAL RIGHT TO PRIVACY

A. United States Constitution

Although the United States Constitution does not explicitly establish any right of privacy, the United States Supreme Court has recognized that one aspect of the "liberty" protected by the fourteenth amendment is "a right of personal privacy, or a guarantee of certain areas or zones of privacy." This constitutionally protected "zone of privacy" includes "the interest in independence in making certain kinds of important decisions." Although the Court has not marked the outer limits of this aspect of privacy, it is clear that an individual may make personal decisions without unjustified government interference pertaining to marriage, procreation, contraception, family relationships, and child rearing and education.

The right to privacy, however, is not absolute. The constitutionally recognized right to privacy does not automatically invalidate every state regulation which affects the particular liberty interest protected. Where certain fundamental rights to privacy are involved, regulations limiting

45. Whalen v. Roe, 429 U.S. 589, 599-600, 97 S. Ct. 869, 876 (1977); see also Carey, 431 U.S. at 684, 97 S. Ct. at 2016; Hondroulis, 553 So. 2d at 414.
52. Carey, 431 U.S. at 685-86, 97 S. Ct. at 2016; Hondroulis, 553 So. 2d at 415.
these rights may be justified only by compelling state interests and must be narrowly drawn to express only those interests.\textsuperscript{53}

Although one lower federal court\textsuperscript{54} and numerous state courts\textsuperscript{55} have held that the federal constitution contains a fundamental right to decide whether to obtain or reject medical treatment, the United States Supreme Court has not so held. In 1980, the United States District Court of the Southern District of Texas held in \textit{Andrews v. Ballard}\textsuperscript{56} that the provisions of the Texas Medical Practice Act, which contained regulations that operated to limit the practice of acupuncture to licensed physicians, impermissibly interfered with a patient's federal constitutional right to decide whether to obtain or reject medical treatment. The court found that the patients were unable to find any licensed physicians in the state who were skilled in the practice of acupuncture; therefore, the Texas regulations not only substantially limited the plaintiffs’ access to acupuncture treatment but virtually prohibited the decision entirely. The statute did promote compelling state interests in preventing against misdiagnosis, improperly administered acupuncture treatment, and delay in remedying any complications. These interests, however, were not drawn narrowly enough since other means were available to accomplish these interests without unduly burdening the individual's right to obtain acupuncture treatment.

In \textit{Cruzan v. Director, Missouri Department of Health},\textsuperscript{57} the United States Supreme Court recognized that it has never interpreted the federal Constitution to encompass the right to refuse medical treatment within

\textsuperscript{53} Roe v. Wade, 410 U.S. at 155, 93 S.Ct. at 728. See also \textit{Carey}, 431 U.S. at 686, 97 S. Ct. at 2016; \textit{Hondroulis}, 553 So. 2d at 415.


\textsuperscript{56} 498 F. Supp. 1038 (S.D. Tx. 1980).

\textsuperscript{57} 110 S. Ct. 2841 (1990).
the generalized right to privacy.58 Guardians of a patient, who was in a persistent vegetative state, sought termination of the artificial hydration and nutrition which was sustaining the patient. The Court did not acknowledge the existence of a federal constitutional right to privacy of an individual to refuse life-saving hydration and nutrition. The Court, for purposes of this case, did "assume" that the federal Constitution incorporated such a right in order that it could answer the more limited question brought before it.59 Since an incompetent person could not make an informed and voluntary choice to exercise this hypothetical right to refuse treatment, a surrogate or guardian could elect to have the hydration and nutrition withdrawn. The issue involved was whether the United States Constitution forbids the establishment of clear and convincing evidence of an incompetent's wishes to withdraw medical treatment before permitting the withdrawal. The Court held that it did not. The Supreme Court did not establish a federal constitutional right to privacy regarding a decision to obtain or refuse medical treatment, but decided the case on a narrower issue—procedural due process in permitting a guardian to withdraw medical treatment from a patient in a persistent vegetative state.60

The majority of cases determining the existence of a right to privacy focus on the right to obtain or reject medical treatment regarding a patient's desire to terminate life-sustaining treatment. The United States Sixth Circuit Court of Appeals in Rush v. Miller61 dealt directly with the informed consent issue and held that the United States Constitution does not contain a right to privacy in the area of medical informed consent.62 The plaintiff challenged the validity of the Tennessee medical informed consent statute63 because the statute failed to require disclosure of all hazards which might result from a proposed operation. The statute required only the disclosure of those hazards which would be disclosed in accordance with the community standards of others in the medical community concerned with the same or similar operations. The court sustained the constitutionality of the Tennessee statute because it failed to find any language in the United States Constitution or any medical malpractice case decided by the United States Supreme Court which established a general right to privacy in the area of medical informed consent.64

58. Id. at 2851 n.7.
59. Id. at 2852.
60. Id.
62. Id. at 1076.
64. Rush, 648 F.2d at 1076.
Incorporating a federal constitutional right to privacy in this area, many state courts have worked from the premise that the common law informed consent doctrine provides a patient with a jurisprudentially created right to be free from nonconsensual invasions of one's bodily integrity. These state cases are not typical informed consent cases like Hondroulis and LaCaze but instead involve situations in which a patient seeks the right to terminate his life by discontinuing life-sustaining treatment. These state courts hold that the common law right requires physicians to provide the material information relevant to the proposed medical treatment to the patient. Thus, the patient's right to give an informed refusal to medical treatment is a corollary of the right to give an informed consent to medical treatment. A patient's right to refuse medical treatment, even at the risk of personal injury or death, is primarily protected by the common law. Many states, in addition, have extended the protection of the federal constitutional right to privacy to a patient's decision to obtain or reject medical treatment in cases involving a patient's decision to terminate his life.

The United States Supreme Court has not incorporated this right to die privacy claim into the federal Constitution but recognizes its legitimacy based on the common law doctrine of informed consent. The state cases establishing this privacy right in the federal Constitution, therefore, carry little authority because the United States Supreme Court has not acknowledged such a right.

Assuming that a constitutional right to privacy does exist in the area of medical informed consent, the Uniform Consent Law should still withstand a constitutional challenge because it merely impinges upon rather than unduly burdens a constitutional right. A regulation that unduly burdens a constitutional right must be justified by a compelling state interest. A regulation which merely impinges upon a constitutional right without unduly burdening it, on the other hand, will withstand constitutional scrutiny if the regulation reasonably furthers a proper state purpose.

68. Id.
The Louisiana Uniform Consent Law does not deny to any individual the right to seek medical treatment. The patient can refuse treatment, can undergo treatment, or can seek other medical opinions. The statute only regulates the relationship between the patient and the physician. By enacting this statute, the legislature has pronounced a public policy to supplement the usual contract or tort relationship between the physician and patient. If a patient has a right to privacy, this right is not unduly burdened by the statute since the patient still retains the decision whether to submit himself to medical treatment. This right, on the other hand, is only impinged upon because the legislature has acted only to affect the relationship between the physician and the patient and not to deny the patient the ability to exercise his choice regarding medical treatment.

Since the patient's right to privacy is only impinged upon and not unduly burdened, the statute will withstand constitutional scrutiny if it reasonably relates to a rational state purpose. The state's interests in enacting the statute include: (1) maintaining medical standards and protecting the public health, (2) decreasing the number of frivolous and fraudulent medical claims, (3) reducing the cost of medical malpractice insurance, (4) attracting and retaining medical talent and the delivery of adequate medical services within the state, and (5) providing certainty in the law in the area of medical informed consent by providing health care providers with guidance on medical informed consent.

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18 with Carey, 431 U.S. at 705-06, 97 S. Ct. at 2026 (Powell, J., dissenting).

In several cases, the United States Supreme Court has held that government may validly choose to favor childbirth over abortion and a government may implement that choice by funding medical services relating to childbirth but not those relating to abortion. In Maher v. Roe, 432 U.S. 464, 97 S. Ct. 2376 (1977), the Supreme Court upheld a statute which provided financial support to individuals seeking childbirth services and denying such financial support for certain abortion procedures. The Court stated that "there is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy." Id. at 475, 97 S. Ct. at 2383. The Supreme Court in Harris v. McRae and Webster v. Reproductive Health Services also upheld governmental action which unequally subsidized abortion and other medical services, in favor of the latter. In these cases the Court recognized that the regulations in question may hamper or impede women in exercising their right of privacy in seeking abortions. The Court, however, concluded that these regulations encouraged alternative activity deemed in the public interest and placed no affirmative governmental obstacle in the path of women to obtain abortion services. The Court concluded that the practical effects of such regulations were constitutionally irrelevant.


care providers with guidelines. These state interests satisfy a rational state purpose, and the statute reasonably relates to the state interests. In this light, the statute should withstand federal constitutional scrutiny.

The United States Constitution has not been interpreted to guarantee a right to privacy in either right to die or medical informed consent cases. Most state decisions, however, simultaneously base the right to refuse medical treatment on a state constitutional right to privacy provision or recognized right. A state constitution can grant greater individual protections and liberties than those provided by the federal Constitution. The Louisiana State Constitution of 1974, therefore, may provide a right to privacy to individuals in medical informed consent cases.

B. Louisiana State Constitution

In 1974, Louisiana enacted a new state constitution which includes a right to privacy provision. Article 1, section 5 provides:

Section 5. Every person shall be secure in his person, property, communications, houses, papers, and effects against unreasonable searches, seizures, or invasions of privacy. No warrant shall issue without probable cause supported by oath or affirmation, and particularly describing the place to be searched, the persons or things to be seized, and the lawful purpose or reason for the search. Any person adversely affected by a search or seizure conducted in violation of this Section shall have standing to raise its illegality in the appropriate court. (Emphasis added).

Little concrete evidence exists supporting the premise that the Louisiana State Constitution provides a right to privacy in the field of medical informed consent. The best evidence is the literal wording of article 1, section 5 of the constitution which guarantees the right of every person to be secure against unreasonable invasions of privacy. The records of the constitutional convention, however, provide little insight into the extent of this right. The convention records regarding article 1, section 20, which provides that "no law shall subject any person to euthanasia," suggest that Louisiana does recognize an individual's right to decide whether to obtain or reject medical treatment.

Based on a purely statutory comparison of sister states' statutes, the Hondroulis court misinterpreted the Louisiana statute to reach an interpretation consistent, it felt, with the statutes of other states which passed similar legislation at approximately the same time. The greater

75. La. Const. art. I, § 5.
privacy right granted by the Louisiana constitution as compared to that granted by the other states' constitutions, however, provides more support for the Hondroulis court's interpretation of the Uniform Consent Law.

1. Language of the Provision

The change in the 1974 constitutional provision from its corollary provision in the Louisiana Constitution of 1921 is evidence of an expansion of the right to privacy into the civil arena. The 1921 provision contained the language "secure in their persons, houses, papers and effects against unreasonable searches and seizures" to which the 1974 provision adds protection of property and communications against unreasonable invasions of privacy. The 1974 provision explicitly incorporates into the Louisiana constitution the right to privacy established by the United States Supreme Court in Griswold v. Connecticut instead of relying on reasoning from other provisions for its establishment, which occurs with the federal Constitution. Although the provision explicitly recognizes a right to privacy in the field of civil law, the constitutional convention's intent to expand this right into the medical informed consent area is questionable.

2. Intent of the Constitutional Convention

The convention evidently intended to provide for a right to privacy both in the areas of criminal and civil law. In the criminal arena, the provision guarantees the traditional right to privacy against unreasonable searches and seizures as well as expanding those traditional rights. The convention records explain that the major difference between the 1921 provision and the 1974 provision is the addition of the last sentence to the new constitution. The last sentence added "[a]ny person adversely affected by a search or seizure conducted in violation of this Section shall have standing to raise its illegality in the appropriate court." Delegate Roy explained the provision as permitting anyone adversely affected by an unreasonable search to go to court before trial and

77. Id. at 21.
80. Id. at 20.
82. La. Const. art. 1, § 5.
attempt to suppress the illegally obtained evidence. Roy believed that this sentence did not cover civil law suits relating to an aggrieved person seeking relief from illegal police conduct. Delegate Schmitt believed the entire provision extended protection further than the federal Constitution to protect against illegal private conduct as well as illegal state conduct.

More important to the issue at hand, the convention may have sought to establish an affirmative right to privacy in non-criminal areas of the law. Delegate Ware, contrary to Delegate Roy, expressed his belief that the last sentence was intended to create a civil cause of action for citizens who were the victims of illegal police conduct, such as illegal searches and seizures. The records of the constitutional convention disclose little more about how broadly the delegates intended this right to privacy provision to extend.

Ironically, the medical community praised the breadth of the provision in protecting generally the patient-physician relationship. The Louisiana State Medical Society emphasized its patient-physician confidentiality as expressed in its Oath of Hippocrates and section 9 of the Principles of Medical Ethics. The medical community even sought to add specific wording to the provision which would protect explicitly the privacy of confidential communications and records between physicians and patients.

This section has provided a foundation for constitutional development regarding the right to privacy in tort law as well as non-criminal aspects of government operations. In *Jaubert v. Crowley Post-Signal, Inc.*, the Crowley Post-Signal published a photograph of the Jaubert home which appeared above the caption, "One of Crowley's stately homes, a bit weatherworn and unkempt . . . ." The Louisiana Supreme Court acknowledged the existence of a Louisiana constitutional civil right to privacy in article 1, section 5. The court, however, held that

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84. Id. at 1076.
85. Id.
86. Hargrave, supra note 76, at 20.
89. Id.
90. Id.
91. Hargrave, supra note 76, at 21.
92. 375 So. 2d 1386 (La. 1979).
93. Id. at 1387.
94. Id. at 1389 n.4.
the plaintiff had no right to privacy regarding the home and its condition. The court reasoned that the home was plainly visible from the public street and any passerby could see the same view of the property as that published by the defendant.\textsuperscript{95}

In \textit{Roshto v. Hebert},\textsuperscript{96} the supreme court again recognized the existence of the right to privacy in article 1, section 5 in a civil suit.\textsuperscript{97} The plaintiffs sued \textit{The Iberville South} newspaper for publishing a reproduction of a twenty-five year old article which described the details of the plaintiffs’ past criminal convictions. The reproduction was part of a regular feature of the newspaper which published the original front pages from randomly selected twenty-five year old editions of the newspaper. The court did not impose liability on the newspaper because the publication was truthful, accurate, and non-malicious.\textsuperscript{98}

Although the court has acknowledged the existence of the Louisiana constitutional right to privacy, the question remains as to the extent of this right. Because the convention records are silent regarding information relevant for purposes of this comment, an analysis into a related constitutional provision may provide a better understanding of the relationship between the state constitutional right to privacy and medical informed consent.

3. \textit{The Right to Die in Louisiana}

The Louisiana Constitution includes a prohibition against a law subjecting a person to euthanasia. article 1, section 20 provides “No law shall subject any person to \textit{euthanasia}, to torture, or to cruel, excessive, or unusual punishment. Full rights of citizenship shall be restored upon termination of state and federal supervision following conviction for any offense.”\textsuperscript{99}

This provision was intended to prevent the state legislature from ever passing a law which would allow a person or persons to determine whether another person should be allowed to die or be put to death.\textsuperscript{100} Delegate Fontenot wanted to exclude constitutionally power from the Louisiana legislature which the Florida legislature had in 1973 recently

\textsuperscript{95} Id. at 1391.
\textsuperscript{96} 439 So. 2d 428 (La. 1983).
\textsuperscript{97} Id. at 430 n.1.
\textsuperscript{98} Id. at 432.

See La. R.S. 40:1299.56 (1990). The legislature, however, does provide a mechanism, given the proper circumstances, by which patients may exercise a desire to terminate their lives.
exercised. The Florida legislature had passed a bill that not only allowed voluntary euthanasia but also allowed three physicians to decree and execute a death sentence with the approval of a circuit judge on anyone whose life had become meaningless as the bill expressed it. The delegates intended the Louisiana provision to prohibit the state from determining for a person whether his life was worth living. The convention did intend to allow each individual the right to determine for himself whether to reject medical treatment and choose to die.

The Louisiana Supreme Court in Hondroulis did not acknowledge the existence of this provision when concluding that the Louisiana constitution included a right to privacy which protects a patient’s decision whether to obtain or reject medical treatment. The right to accept or reject medical treatment, which usually includes the right to die, is a step away from the patient’s right regarding medical informed consent. The right to accept or reject medical treatment is a greater privacy right because the patient is deciding whether or not to undergo treatment at all, and this decision commonly involves a decision whether or not to terminate one’s own life. Medical informed consent involves those cases in which the patient has already consented to undergo the medical treatment and later sues for the failure of the physician to provide him with all the material information concerning the procedure, although the procedure was performed with the requisite degree of skill.

Article 1, section 20 incorporates the greater privacy right regarding euthanasia, or the right to die. The convention records on this section would lend support to a privacy right in the medical informed consent area. This section, however, does not provide a general privacy right as does section 5. The convention records on the euthanasia provision may provide evidence that the convention recognized a medical privacy right in the declaration of rights portion of the constitution as a whole. Thus, the convention may have contemplated the inclusion of such a medical privacy right into the general privacy provision of section 5.

4. Other Jurisdictions

When the Louisiana legislature passed the Uniform Consent Law in 1975, other state legislatures passed similar laws in an attempt to protect health-care providers from suits based on lack of informed consent and

102. Id.
104. Id.
thus reduce the number of awards insurance companies pay for physicians.\textsuperscript{106} The history of the jurisprudence and the literal wording of the statute in each state is important to the proper interpretation of each state's medical informed consent statute. Statutory interpretation, furthermore, is governed by each state's constitution. These state statutes fall typically into two categories.

The first category includes New York and Florida which have general statutes codifying the jurisprudential doctrine of informed consent.\textsuperscript{107} New York and Florida courts have properly interpreted their statutes as codifications of their prior jurisprudential medical informed consent principles. Louisiana, on the other hand, intended to provide a distinct legislative doctrine in this area, superseding its existing jurisprudence on medical informed consent. Although the \textit{Hondroulis} court acknowledged that the Louisiana statute does not codify the prior jurisprudence in Louisiana, the court, based on an individual's constitutional right, superseded the exclusive sphere of the legislature by reinstating the prior jurisprudence as taking precedence over the principles established in the statute. Since the language of the New York and Florida statutes does not mirror the language of the Louisiana statute, the interpretation of the New York and Florida statutes should not mirror the interpretation of the Louisiana statute.

The second category includes Ohio and Georgia which have more specific legislatively-developed doctrines of informed consent which overrule the prior jurisprudential doctrine in this area.\textsuperscript{108} Ohio and Georgia courts have interpreted their statutes as rejecting the prior jurisprudential medical informed consent doctrine and instituting a distinct, legislative doctrine in this field. The \textit{Hondroulis} court, however, retained the prior jurisprudential medical informed consent doctrine in Louisiana rather

\textsuperscript{106} Comment, Recent Medical Malpractice Legislation—A First Checkup, 50 Tul. L. Rev. 655, 676 (1976).

See \textit{Hondroulis}, 553 So. 2d at 407 (dissenting opinion in original hearing), 418 (on reh'g). Justice Dennis, in interpreting the Louisiana statute, emphasized the similarity of the statutes passed in other states at the same time as Louisiana passed its statute.


\textsuperscript{108} The Ohio and Georgia statutes, as written, are very analogous to the Louisiana statute. See Ohio Rev. Code Ann. § 2317.54 (Page 1975); Ga. Code Ann. § 31-9-6 (1971). They both create a presumption of validity, absent fraudulent misrepresentation, to a written consent obtained in compliance with the statutory criteria. All three statutes also require only a general description of the nature of the treatment. The Ohio and Louisiana statutes, in addition, require a general description of the known risks involved. Under the Ohio and Louisiana statutes, no evidence is admissible to alter the authorization given in the written consent form.

than interpreting the statute as providing an exclusive legislative doctrine in this area. Absent constitutional claims, these interpretations by the Ohio and Georgia courts, in contrast to the Hondroulis court, have respected their legislative pronouncements by construing their statutes according to their written words and intended purposes.

In 1975, the New York legislature enacted its statute dealing with "[l]imitation of medical malpractice action based on lack of informed consent." The New York statute provided:

1. Lack of informed consent means the failure of the person providing the professional treatment or diagnosis to disclose to the patient such alternatives thereto and the reasonably foreseeable risks and benefits involved as a reasonable medical practitioner under similar circumstances would have disclosed, in a manner permitting the patient to make a knowledgeable evaluation . . .

110. Id. The statute provides:

1. Lack of informed consent means the failure of the person providing the professional treatment or diagnosis to disclose to the patient such alternatives thereto and the reasonably foreseeable risks and benefits involved as a reasonable medical practitioner under similar circumstances would have disclosed, in a manner permitting the patient to make a knowledgeable evaluation.

2. The right of action to recover for medical malpractice based on a lack of informed consent is limited to those cases involving either (a) non-emergency treatment, procedure or surgery, or (b) a diagnostic procedure which involved invasion or disruption of the integrity of the body.

3. For a cause of action therefor it must also be established that a reasonably prudent person in the patient's condition would not have undergone the treatment or diagnosis if he had been fully informed and that the lack of informed consent is a proximate cause of the injury or condition for which recovery is sought.

4. It shall be a defense to any action for medical malpractice based upon an alleged failure to obtain such an informed consent that:
   (a) the risk not disclosed is too commonly known to warrant disclosure; or
   (b) the patient assured the medical practitioner he would undergo the treatment, procedure or diagnosis regardless of the risk involved, or the patient assured the medical practitioner that he did not want to be informed of the matters to which he would be entitled to be informed; or
   (c) consent by or on behalf of the patient was not reasonably possible; or
   (d) the medical practitioner, after considering all of the attendant facts and circumstances, used reasonable discretion as to the manner and extent to which such alternatives or risks were disclosed to the patient because he reasonably believed that the manner and extent of such disclosure could reasonably be expected to adversely and substantially affect the patient's condition.

New York has codified the doctrine developed from its common law on medical informed consent. The statute, through the reasonableness standard, reiterates the previously established jurisprudential elements involved in a negligence cause of action for lack of medical informed consent.\(^{111}\) This statute also resembles the jurisprudential rules which existed in Louisiana prior to the enactment of the Louisiana Uniform Consent Law in 1975. The Louisiana statute, however, did not codify the common law doctrine of informed consent but more specifically provided its own legislative doctrine of informed consent.

The New York courts have reserved the power to interpret the search and seizure provision of the New York constitution as more expansive than the fourth amendment of the United States Constitution.\(^{112}\) Since the New York statute incorporates the state's prior jurisprudence, the New York statutory construction may not violate the New York constitution.

The Florida legislature, in 1975, enacted the Florida Medical Consent Law\(^{113}\) which provided a similar codification of the Florida jurisprudential informed consent doctrine. The Florida Medical Consent Law provided:

1. No recovery shall be allowed in any court in this state against any physician . . . in an action brought for treating, examining, or operating on a patient without his informed consent when:
   a. obtaining the consent of the patient was in accordance with an accepted standard of medical practice among members of the medical profession with similar training and experience in the same or similar medical community; and
   b. A reasonable individual . . . would have a general understanding of the procedure, the . . . alternative procedures or treatments, and the substantial risks and hazards inherent in the proposed treatment or procedures . . .

2. A consent which is evidenced in writing and meets the requirements of subsection (3) shall, if validly signed by the patient or another authorized person, be conclusively presumed to be valid consent. This presumption may be rebutted if there was a fraudulent misrepresentation of a material fact in obtaining the signature.\(^{114}\)

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114. Id. This statute provides:

   (1) This section shall be known and cited as the 'Florida Medical Consent
The Fifth District Court of Appeal of Florida declared that the Florida statute violated the due process clause by creating a conclusive presumption of informed consent from the signed, written form.\textsuperscript{115} The court reasoned that the plaintiff could not prove that the physician failed to comply with the statutory requirements because the written consent established a conclusive presumption of informed consent absent fraud.

The Supreme Court of Florida reversed on the due process question.\textsuperscript{116} The court acknowledged that the statute was a mere codification of the prior common law doctrine of informed consent but held that the conclusive presumption absent misrepresentation was constitutional. The supreme court agreed with the court of appeal that evidence of a

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(2) In any medical treatment activity not covered by § 768.13, entitled the "Good Samaritan Act," this act shall govern.

(3) No recovery shall be allowed in any court in this state against any physician licensed under chapter 458, osteopath licensed under chapter 459, chiropractor licensed under chapter 460, podiatrist licensed under chapter 461, or dentist licensed under chapter 466 in an action brought for treating, examining, or operating on a patient without his informed consent when:

(a) 1. The action of the physician, osteopath, chiropractor, podiatrist, or dentist in obtaining the consent of the patient was in accordance with an accepted standard of medical practice among members of the medical profession with similar training and experience in the same or similar medical community; and

2. A reasonable individual, from the information provided by the physician, osteopath, chiropractor, podiatrist, or dentist, under the circumstances, would have a general understanding of the procedure, the medically acceptable alternative procedures or treatments, and the substantial risks and hazards inherent in the proposed treatment or procedures, which are recognized among other physicians, osteopaths, chiropractors, podiatrists, or dentists in the same or similar community who perform similar treatment or procedures; or

(b) The patient would reasonably, under all the surrounding circumstances, have undergone such treatment or procedure had he been advised by the physician, osteopath, chiropractor, podiatrist, or dentist in accordance with the provisions of paragraph (a).

(4) (a) A consent which is evidenced in writing and meets the requirements of subsection (3) shall, if validly sign by the patient or another authorized person, be conclusively presumed to be valid consent. This presumption may be rebutted if there was a fraudulent misrepresentation of a material fact in obtaining the signature.

(b) A valid signature is one which is given by person who under all the circumstances is mentally and physically competent to give consent.


signed consent form only does not establish the conclusive presumption of informed consent absent misrepresentation. The supreme court, on the other hand, corrected the court of appeal in holding that compliance with statutory requirements through the written consent form does establish the conclusive presumption of informed consent absent misrepresentation.¹¹⁷

The Florida statute is similar in construction to the Louisiana statute because of the presumption established absent misrepresentation upon a physician's compliance with the statute. The Florida statute, however, is different in that it sets forth the common law elements of the same or similar medical community standards into the statute, whereas the Louisiana statute does not. Thus, compliance with the Florida statute is also compliance with the prior jurisprudence in Florida, whereas compliance with the Louisiana statute is not compliance with the prior Louisiana jurisprudence.

The Florida constitution's search and seizure provision is explicitly co-extensive with the United States Constitution.¹¹⁸ Since the state constitution does not give any more protection than does the federal Constitution, the Florida statutory construction should not violate the Florida constitution.

In contrast to New York and Florida, Ohio in 1975 passed its medical informed consent statute¹¹⁹ which provided a legislative doctrine of informed consent superseding the prior jurisprudence. The statute provided:

Written consent to a surgical or medical procedure or course of procedures shall, to the extent that it fulfills all the requirements in divisions (A), (B), and (C) of this section, be presumed to be valid and effective, in the absence of proof by a preponderance of the evidence that the person who sought such consent was not acting in good faith, or that the execution of the consent was induced by fraudulent misrepresentation of material facts . . . . Except as herein provided, no evidence shall be admissible to impeach, modify, or limit the authorization for performance of the procedure or procedures set forth in such written consent.

(A) The consent sets forth in general terms the nature and

¹¹⁷. Id.

The physician could establish the presumption by complying with the statute through the written consent form by adequately explaining to the patient the procedure, possible alternatives, and the substantial risks involved. Once the physician established the elements of a valid consent, the patient could rebut the presumption only by a showing of misrepresentation.


purpose of the procedure or procedures, and what the procedures are expected to accomplish, together with the reasonably known risks, and, except in emergency situations, sets forth the names of the physicians who shall perform the intended surgical procedures. . . . 120

The Trumbull County Court of Appeal of Ohio interpreted the statute in the case of Dodson v. Olcese.121 The jury granted the physician summary judgment and the patient appealed. The patient alleged that the trial judge committed error by instructing the jury that the signed

120. Id. The statute provides:

A hospital shall not be held liable for a physician's failure to obtain an informed consent from his patient prior to a surgical or medical procedure or course of procedures, unless the physician is an employee of the hospital.

Written consent to a surgical or medical procedure or course of procedures shall, to the extent that it fulfills all the requirements in divisions (A), (B), and (C) of this section, be presumed to be valid and effective, in the absence of proof by a preponderance of the evidence that the person who sought such consent was not acting in good faith, or that the execution of the consent was induced by fraudulent misrepresentation of material facts, or that the person executing the consent was not able to communicate effectively in spoken and written English or any other language in which the consent is written. Except as herein provided, no evidence shall be admissible to impeach, modify, or limit the authorization for performance of the procedure or procedures set forth in such written consent.

(A) The consent sets forth in general terms the nature and purpose of the procedure or procedures, and what the procedures are expected to accomplish, together with the reasonably known risks, and, except in emergency situations, sets forth the names of the physicians who shall perform the intended surgical procedures.

(B) The person making the consent acknowledges that such disclosure of information has been made and that all questions asked about the procedure or procedures have been answered in a satisfactory manner.

(C) The consent is signed by the patient for whom the procedure is to be performed, or, if the patient for any reason including, but not limited to, competence, infancy, or the fact that, at the latest time that the consent is needed, the patient is under the influence of alcohol, hallucinogens, or drugs, lacks legal capacity to consent, by a person who has legal authority to consent on behalf of such patient in such circumstances.

Any use of a consent form that fulfills the requirements stated in divisions (A), (B), and (C) of this section has no effect on the common law rights and liabilities, including the right of a physician to obtain the oral or implied consent of a patient to a medical procedure, that may exist as between physicians and patients on July 28, 1975.

As used in this section, the term "hospital" has the meaning set forth in division (D) of section 2305.11 of the Revised Code. The provisions of this division apply to hospitals, doctors of medicine, doctors of osteopathic medicine, and doctors of podiatric medicine.


written consent form is valid and effective unless the person who sought the written consent did not act in good faith or obtained the written consent by misrepresenting material facts. The appellate court approved the trial court’s instructions and affirmed the judgment. The appellate court, in addition, rejected the patient’s allegation that the written consent form must particularize the risks involved in the procedures. The court held that such a claim ignores the language of the statute which provides that the physician must set forth the reasonably known risks in “general terms.” In *Dodson*, the written consent form, therefore, need not specifically describe infection as a risk of the particular operation involved in the suit but only as a general risk of any operation. Continuing to reject the plaintiff’s assignments of error, the appellate court held that the physician could present standardized forms and that specific, individual forms for each patient were not necessary. If the use of standardized forms were prohibited by requiring personalized forms, as the plaintiff argued, the underlying purpose of the statute would have been rendered meaningless by eliminating the presumption created by the statute.

The Ohio courts have interpreted the Ohio constitution as co-extensive with the federal constitution. The similar wording of the Ohio and Louisiana statutes suggests that the courts should interpret the statutes similarly. Since the right to privacy under the Louisiana constitution, however, goes beyond that provided in the Ohio constitution, an Ohio statutory interpretation in Louisiana may violate the Louisiana constitution. The difference in the extent of the right to privacy between Ohio and Louisiana suggests the different statutory interpretations.

The Georgia medical informed consent statute, as enacted in 1971, also parallels the language of the Louisiana statute. The Georgia statute provided:

(d) A consent to surgical or medical treatment which discloses in general terms the treatment or course of treatment in connection with which it is given and which is duly evidenced in writing and signed by the patient or other person or persons authorized to consent pursuant to the terms of this chapter shall be conclusively presumed to be a valid consent in the absence

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122. The third exception to a valid written consent, that the person executing the consent form was not able to communicate effectively in written and spoken English, did not apply in this case. Id.


of fraudulent misrepresentations of material facts in obtaining
the same.\footnote{125}

Georgia courts consistently have interpreted the statute literally. The
statute requires only that the physician disclose in general terms the
proposed treatment in order to effect a valid consent absent evidence
of fraudulent misrepresentations.\footnote{126} The statute does not include a duty
to disclose risks of treatment, and the courts will not sustain an action
alleging a breach of duty based either on a failure to warn of the risks
involved or that the consent was thereby invalid.\footnote{127} The only basis for
overcoming the conclusive presumption of informed consent is by proof
of fraudulent misrepresentations. Mere allegations of fraud, however,
which are met by opposing affidavits will result in summary judgment
for the physician.\footnote{128} In enacting the statute in 1971, Georgia specifically
rejected the traditional jurisprudential doctrine of informed consent and
supplanted it with a legislatively enacted doctrine of medical informed
consent.\footnote{129}

Georgia courts have interpreted the search and seizure provision of
the Georgia constitution also as co-extensive with the federal Constitu-
tion.\footnote{130} The difference in interpretation of similar statutes between

\footnotesize{125. Id. The statute provides:
(a) This chapter shall be liberally construed, and all relationships set forth
herein shall include the adoptive, foster, and step relations as well as blood
relations and the relationship by common-law marriage as well as ceremonial
marriage.
(b) A consent by one person authorized and empowered to consent to surgical
or medical treatment shall be sufficient.
(c) Any person acting in good faith shall be justified in relying on the
representations of any person purporting to give consent, including, but not
limited to, his identity, his age, his marital status, his emancipation, and his
relationship to any other person for whom the consent is purportedly given.
(d) A consent to surgical or medical treatment which discloses in general terms
the treatment or course of treatment in connection with which it is given and
which is duly evidenced in writing and signed by the patient or other persons
or persons authorized to consent pursuant to the terms of this chapter shall be
conclusively presumed to be a valid consent in the absence of fraudulent mis-
representations of material facts in obtaining the same.


113 (1975).

127. Fox, 160 Ga. App. at 270, 287 S.E.2d at 272; Parr, 139 Ga. App. at 457, 228
at 737, 222 S.E.2d at 113.


129. See Parr, 139 Ga. App. at 457, 228 S.E.2d at 596.

681 (1986).}
Georgia and Louisiana again may reflect the difference in the extent of the privacy right between the Georgia constitution and the Louisiana constitution.

Analyzing the wording of the informed consent statutes in various states is important in understanding the appropriate construction of Louisiana's own statute. Arguably the different state courts would interpret similar statutes similarly. The application of each state's own constitution, however, may account for the differences in the various states' interpretations of similar statutes. Thus, although the Hondroulis interpretation of Louisiana's informed consent statute is inconsistent with the interpretations of similar statutes by other states, this inconsistency may reflect the proper incorporation of our constitutional right to privacy into the area of medical informed consent.

IV. Evaluation

When resolving a case which involves a statute, the court should attempt first to interpret the statute in a manner which protects its constitutionality but still gives the statute its intended purpose and effect. When considering a statute's constitutionality, the court should be cognizant of the relationship between the legislature's duty to enact the law and the judiciary's duty to interpret that law. The court, in addition, should consider the relationship between an individual's constitutionally protected area of personal freedom, which the court should protect from legislative encroachment, and the legislature's duty to govern its citizens, which the court should respect through judicial deference.

A. Statutory Interpretations Which Avoid the Constitutional Issue

Other interpretations of the Uniform Consent Law attempt to construe the statute in a manner which avoids the constitutional tension. If the right to privacy exists in medical informed consent, these statutory interpretations fail in accounting for this constitutional right, lending more credence to the Hondroulis interpretation.

Judge Lobrano in his concurring opinion in the court of appeals' decision in Hondroulis provided an alternative interpretation. Judge Lobrano pointed out that, although LaCaze held that the statute supersedes the jurisprudential rules, compliance with the statute is still a matter of interpretation by the courts. He believed a reasonable interpretation of the statute is that it requires information of known risks in the specific categories set out. If there is a known risk of injury to a particular organ or limb associated with a particular surgical operation,

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the patient should be informed about it. To hold otherwise would lead
to the absurd result that a physician can merely copy the language of
the statute for every surgical operation even though each operation
involves different risks.\textsuperscript{132}

Perhaps, this rationale is more advisable than that chosen by the
supreme court in \textit{Hondroulis} because it relegates the judicial authority
to statute interpretation by deciding whether a case fulfills that statute
rather than a constitutional interpretation by rendering the statute un-
constitutional. This rationale, on the other hand, may destroy the stability
the legislature intended to give physicians by permitting the physicians
to describe generally the risks involved. To require specificity would also
lead to the absurd result of listing every conceivable risk involved in
order to ensure security from liability. In addition, this interpretation
could have the same effect as the unconstitutional interpretation by the
supreme court in \textit{Hondroulis} because by requiring specificity the cause
of action reverts back to the prior jurisprudential rules and a fact-
finding contest which would eliminate the statutorily provided pre-
sumption.

Another interpretation, advanced by Justice Blanche's concurrence
in \textit{LaCaze}, suggests that the statute provides only an evidentiary rule,
creating a presumption of informed consent but leaving the jurispru-
dential rules intact.\textsuperscript{133} This theory suggests that Subsection A provides
a procedure to obtain a written informed consent which is granted the
presumption of validity. Subsection B, read together with Subsection A,
provides an evidentiary rule which prohibits the admission of parol
testimony to alter the written document.\textsuperscript{134} A written statutory consent,
therefore, carries an irrebuttable presumption absent misrepresentation,
which prohibits alteration by parol evidence. Justice Blanche also stated
that noncompliance with the statute does not create a cause of action
because the statute is only one means of obtaining informed consent
due to the evidentiary focus of the rule excluding all other evidence.\textsuperscript{135}
Cases in which the physician does not obtain consent in accordance
with the statute fall back into the prior rules developed by the courts
for determining whether the physician obtained a valid informed con-

\textsuperscript{132} \textit{Id.} at 538.
\textsuperscript{133} \textit{LaCaze v. Collier}, 434 So. 2d 1039, 1050 (Blanche, J., concurring).
\textsuperscript{134} \textit{Id.} at 1051. The amendment, adding Subsection (C) to permit oral informed
consents, extended the evidentiary presumption of the written consent of Subsection (A)
to physicians who could not obtain written consents but only oral ones. An oral statutory
consent carried an irrebuttable presumption absent misrepresentation, which permitted
alteration according to the rules of evidence in ordinary cases but only in an attempt to
prove statutory noncompliance.
\textsuperscript{135} \textit{Id.} at 1051.
\textsuperscript{136} \textit{Id.} at 1052.
Justice Blanche's statutory construction maintains the statute's independence from the prior jurisprudence. With the incorporation of the privacy issue since LaCaze, this evidentiary interpretation, however, could not sustain a similar constitutional attack. Cases in medical informed consent which arose by complying with the statute would create the presumption and preclude the patient from admitting evidence to overcome it. The patient's privacy interest, incorporated in Hondroulis, would prohibit this interpretation. This interpretation, in addition, would permit the cases which were not in compliance with the statute to sustain a constitutional attack because the jurisprudence would govern them—the same result as in Hondroulis.

Another author proposes that the Hondroulis court should have interpreted the statute to provide a rebuttable presumption of a valid informed consent, instead of a rebuttable presumption of a valid consent. This occurs when the written form complies with parts (a), (b), and (c) of Subsection A of the statute. Although all the material information may not be disclosed on the written form, the patient acknowledges the disclosure of other information outside the written form through part (b) of the statute, which is included on the written form. The statutory presumption is maintained through the use of the general consent form. If the general consent form, however, does not adequately disclose the material information, the patient could overcome the presumption through other communication outside the written form which proves the lack of disclosure.

This interpretation of the statute would properly permit the statute to govern the informed consent field instead of the consent field. This interpretation, however, fails to consider Subsection B which excludes the admissibility of any evidence, except evidence of fraud, to modify or limit the authorization in the written consent form. With the admission of evidence outside the written form, the rebuttable presumption provided by the statute is circumvented. The protection given to the physician through the written form is thus negated.

B. Autonomy Rights and Policy Concerns

Many courts faced with right to die cases recognized the power and authority of the judiciary to decide such issues, even in the absence or presence of legislative action. These courts, however, further under-

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138. Id.
139. Rasmussen by Mitchell v. Fleming, 154 Ariz. 207, 741 P.2d 674 (Ariz. 1987); Severns v. Wilmington Medical Center, Inc., 421 A.2d 1334 (Del. 1980); Satz v. Perlmutter, 362 So. 2d 160 (Fla. App. 4th Dist. 1978), aff'd 379 So. 2d 359 (Fla. 1980); In re
stood that medical issues involved moral, ethical, social, medical, and legal considerations which made the issues not well-suited for resolution in an adversarial judiciary proceeding. These issues are more suitably addressed by the state legislature which has the resources necessary to gather and synthesize the vast quantities of information needed to formulate guidelines in these areas. Only the legislature can deal with these issues in a way which will best accommodate the rights and interests of the people of the state.140

The Louisiana legislature, by enacting the Uniform Consent Law, has acted to provide for the area of medical informed consent. The legislature, rather than the courts, is in a better position to assess the needs and interests of the people. The courts, on the other hand, should not always sit by passively in the face of legislative action because a constitution would be meaningless without some responsible authority to ensure its viability.

Constitutions seek to define the appropriate role of government while protecting an individual's right to personal freedom. Article 1 of the Louisiana Constitution of 1974 is titled the “Declaration of Rights” as it contains the protected individual rights. The judiciary is the mechanism to uphold the individual liberties guaranteed in article 1 and protect an individual against invasions of his constitutional rights. In the face of legislative encroachment, the court should not neglect its judicial duty to protect its litigants against deprivations of these granted constitutional rights. The court, on the other hand, should not abuse this authority and “discover” or “create” rights which have no constitutional legitimacy.

V. CONCLUSION

Some evidence exists to support the Hondroulis court’s findings that article 1, section 5 of the Louisiana constitution contains a right to privacy regarding medical informed consent. The Louisiana constitution does provide greater protection than the federal Constitution in the area


of right to privacy. This is evidenced by the language in article 1, section 5 which reads "[e]very person shall be secure . . . against unreasonable . . . invasions of privacy." This provision is understood to incorporate explicitly the right to privacy decision of *Griswold v. Connecticut* into the Louisiana constitution. The constitutional convention proceedings regarding section 5 contain some indication of an intent to expand the privacy right into non-criminal areas of the law.

The Louisiana Constitution in article 1, section 20, which declares that "no law shall subject any person to euthanasia," further suggests that the constitution explicitly recognizes an individual's right to reject medical treatment. Furthermore, other states' differing interpretations of similar informed consent statutes may be attributed to the greater privacy right in the Louisiana constitution, which supports the *Hondroulis* interpretation of the Uniform Consent Law.

This evidence provides a foundation for the Louisiana Supreme Court to incorporate an individual's right to privacy into the medical informed consent field. Even if a Louisiana constitutional right to privacy exists with regard to medical informed consent, the statute may only impinge upon this right and not unduly burden it. The statute would then withstand federal, and perhaps state, constitutional scrutiny as it is reasonably drawn to meet rational state interests.

At first glance, the court used the Louisiana constitutional right to privacy provision as a catapult into the medical informed consent area in order to supersede the legislature's Uniform Consent Law which governed this area. Although, the court should guard against using a constitutional provision in order to act as a "good samaritan" to reach a fair and equitable result in emotionally trying cases, this comment shows that the court's right to privacy tour de force into the medical informed consent area has some support and may be justified.

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