UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 69 | Number 4 Article 7

4-1-1991

Unanswered Implications--The Clouded Rights of the Incompentent Patient under Cruzan v. Director, Missouri Department of Health

Jennifer E. Bennett Overton

Unanswered Implications—The Clouded Rights of the Incompentent Patient Under *Cruzan v. Director, Missouri Department of Health*

And, as she looked around, she saw how Death, the consoler,
Laying his hand upon many a heart, had healed it for ever.[1]

The intricacies of death often obscure the meaning of life itself. Conventional lexicography defines "life" as "the state of a material complex or individual characterized by the capacity to perform certain functional activities including metabolism, growth, reproduction, and some form of responsiveness or adaptability."[2] Legal vernacular employs a similar definition: "[T]hat state of animals, humans, and plants or of an organized being, in which its natural functions and motions are performed."[3]

Life took on a new meaning for Nancy Beth Cruzan when, on January 11, 1983, she became a victim of a single-car accident, which resulted in a cerebral contusion, compounded by the deprivation of oxygen to her brain for an estimated twelve to fourteen minutes.[4] These injuries left Nancy permanently hospitalized and led her parents to challenge through the judicial system these conventional definitions of life. During one stage of the judicial proceedings, a judge described Nancy's life as a perpetual state of oblivion to her environment "except for reflexive responses to sound and perhaps painful stimuli."[5] She existed as a spastic quadriplegic, her four extremities contracted from irreversible muscular and tendon damage, with "no cognitive or reflexive ability to swallow food or water to maintain her daily essential needs."[6]

In *Cruzan v. Director, Missouri Department of Health*,[7] the United States Supreme Court recently grappled with the varying principles of law, medicine, and ethics implicated in the definition of life, as the Court addressed for the first time the question whether an individual has a right to die under the United States Constitution. In constitutional terms, the right to die most often is linked

---

1. H. LONGFELLOW, EVANGELINE, A TALE OF ACADIE 156 (9th ed. 1854).

2. 2 WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 1306 (1976).

3. BLACK'S LAW DICTIONARY 833 (5th ed. 1979). Basic familiarity with two possible means of ending life assists in a complete understanding of the issues this Note discusses. Suicide requires (1) an act that will, "with reasonable certainty, lead to the death of the actor"; (2) the actor's knowledge that it will do so; and (3) the actor's intention to "engage in that action for the express purpose of bringing about [her] own death . . . and not for some other purpose." Legacqz & Engelhardt, *Suicide*, in DEATH, DYING, AND EUTHANASIA 670 (1980) [hereinafter *Suicide*]. Euthanasia generally means "the act of putting to death someone suffering from a painful or prolonged mortal illness or injury." G. GRISEZ & J. BOYLE, LIFE AND DEATH WITH LIBERTY AND JUSTICE: A CONTRIBUTION TO THE EUTHANASIA DEBATE 86 (1979).

4. Cruzan v. Harmon, 760 S.W.2d 408, 411 (Mo. 1988) (en banc), *aff'd sub nom.* Cruzan v. Director, Mo. Dep't of Health, 110 S. Ct. 2841 (1990).

5. Petition for Writ of Certiorari at A95, Cruzan v. Director, Mo. Dep't of Health, 110 S. Ct. 2841 (1990) (No. 88-1503) (unpublished circuit court opinion).

6. *Id.*

7. 110 S. Ct. 2841 (1990).

with an individual's right to personal freedom, self-determination, and privacy.[8] Under prevalent right to die analysis, when deciding upon medical treatment, the patient should have the unfettered ability to make choices, and the fact that his preferred choice is unwise and therefore could result in death should not preempt the decision.[9]

The Court, though not espousing the individual's right to die in those terms, recognized a patient's limited ability to modify prescribed treatment.[10] The Court narrowly addressed the rights of a patient diagnosed to be in a persistent vegetative state.[11] By a five-Justice majority, the Court held that a state

---

8. M. HEIFETZ, THE RIGHT TO DIE: A NEUROSURGEON SPEAKS ON DEATH WITH CANDOR 27 (1975). These rights historically have commanded great respect and, Dr. Heifetz suggests, should "not be abrogated by society unless a decision may endanger someone else." *Id.* at 27-28; *see also* Brandeis & Warren, *The Right to Privacy*, 4 HARV. L. REV. 193, 193 (1890) ("[N]ow the right to life has come to mean the right to enjoy life,—the right to be let alone.").

The right to life referenced by Justice Brandeis implies the availability of choices; individuals achieve enjoyment in different ways. One can argue that an implicit choice vindicated by this right is the decision to forego those situations that no longer bring enjoyment. Thus, the right to life tacitly gives rise to the right to die.

9. M. HEIFETZ, *supra* note 8, at 28.

10. *Cruzan*, 110 S. Ct. at 2852.

11. *Id.* at 2854. The legal significance of the persistent vegetative state first became apparent in *In re* Quinlan, 70 N.J. 10, 355 A.2d 647, *cert. denied sub nom.* Garger v. New Jersey, 429 U.S. 922 (1976). *See infra* notes 121-41 and accompanying text. A physician testifying as an expert at the *Quinlan* trial explained the nature of the persistent vegetative state. *Quinlan*, 70 N.J. at 24, 355 A.2d at 654. The physician testified that Karen Quinlan had " 'the capacity to maintain the vegetative parts of neurological function but . . . no longer ha[d] any cognitive function.' " *Id.* Brain functions are divided between those directed toward the body's vegetative needs and those directed toward the body's sapient needs. *Id.* The vegetative needs, which may be maintained in a patient after injuries such as Nancy's, Cruzan v. Harmon, 760 S.W.2d 408, 411 (Mo. 1988) (en banc), *aff'd sub nom.* Cruzan v. Director, Mo. Dep't of Health, 110 S. Ct. 2841 (1990), include the control of body temperature, breathing, blood pressure, heart rate, chewing, swallowing, sleeping, and waking. *Quinlan*, 70 N.J. at 24, 355 A.2d at 654. The sapient functions, which may be lost although the patient continues to live, are the highly developed, uniquely human abilities to relate to the outside world, to talk, to see, to feel, and to think. *Id.* Brain death commonly has been recognized only when both the vegetative and the sapient functions cease. *Id.*; *see, e.g.*, G. GRISEZ & J. BOYLE, *supra* note 3, at 65-67 (clinical signs suggestive of brain death include deep unconsciousness, no spontaneous movements, no spontaneous breathing, and no reflexes, as exemplified by a flat electroencephalogram); D. MEYERS, MEDICO-LEGAL IMPLICATIONS OF DEATH AND DYING § 4:5 (1981) (diagnosis of brain death results when a patient suffers from structural brain damage, exists in a deeply comatose state, and respires by mechanical means); *see also* Friloux, *Death, When Does It Occur?*, in DEATH, DYING, AND EUTHANASIA 27-38 (1980) (comparing brain death with other medical and legal definitions of death and pointing out the difficulties raised in defining death in exacting terms).

The brain dies in phases; the upper brain, controlling sapient functions not susceptible to recovery from injury or trauma, dies first, while the brain stem, maintaining more primitive vegetative functions capable of spontaneous recovery, dies later. This gradual death poses difficult issues when legislating the exact time of death. D. MEYERS, *supra*, § 4:2. Many states adopting legislative means of defining death have done so in one of three ways: (1) Death is based on the absence of respiratory and cardiac function or, in the alternative, the absence of brain function, *e.g.*, ALASKA STAT. § 09.65.120 (Supp. 1990); KAN. STAT. ANN. § 77-205 (1989); MD. HEALTH-GEN. CODE ANN. § 5-202 (1990); N.M. STAT. ANN. § 12-2-4 (1988); VA. CODE ANN. § 54.1-2972 (1988); UNIF. DETERMINATION OF DEATH ACT § 1, 12 U.L.A. 340 (Supp. 1991); (2) Death is typified by brain death and artificially maintained respiration and circulation, *e.g.*, MICH. COMP. LAWS ANN. § 14.15(1021) (West 1988); MO. REV. STAT. § 194.005 (1986); or (3) Death is based on the total, irreversible cessation of brain function, *e.g.*, N.C. GEN. STAT. § 90-323 (1990); W. VA. CODE § 16-19-1(c) (1991); UNIF. BRAIN DEATH ACT § 1, 12 U.L.A. 18 (Supp. 1991); *see also* D. MEYERS, *supra*, § 4:7 (discussing these options by outlining a typical statute representing each category).

Missouri integrated the concept of brain death into its statute concerning legal declarations of death, which reads as follows:

may place some constraint on a guardian seeking to discontinue nutrition and hydration of a patient such as Nancy.[12] The form of constraint affirmed is an evidentiary requirement that clear and convincing evidence support the guardian's assertion of the need for treatment withdrawal.[13]

Understanding the individual interest in treatment refusal necessitates determining the nature of the incompetent person's substantive right to refuse medical treatment;[14] what medical treatment means in a legal context;[15] and whether the right is based on common-law, constitutional guarantees, or both.[16] If a right to refuse treatment exists under the Constitution, additional issues that arise include whether the right may best be expressed as a liberty interest or a privacy interest;[17] what interests a state has in regulating the exercise of a right to refuse treatment;[18] what, if anything, a state may do to limit the exercise of the right;[19] and what procedures a state may use to protect its interests.[20] Finally, a concern exists as to whether there is one best way to achieve a balance among these countervailing interests.[21]

In *Cruzan*, the Court admittedly addressed only a few of these questions and answered only two—whether the right may best be expressed as a liberty interest or a privacy interest, and what a state may do to limit the exercise of the right. This Note, however, examines each of these questions through an analysis of the full meaning of the *Cruzan* holding. The Note offers an explanation of the individual right to refuse treatment as the Court recognized it, as well as a syn-

---

> For all legal purposes, the occurrence of human death shall be determined in accordance with the usual and customary standards of medical practice, provided that death shall not be determined to have occurred unless the following minimal conditions have been met: (1) When respiration and circulation are not artificially maintained, there is an irreversible cessation of spontaneous respiration and circulation; or (2) When respiration and circulation are artificially maintained, and there is a total and irreversible cessation of all brain function, including the brain stem and that such determination is made by a licensed physician.

MO. REV. STAT. § 194.005 (1986).

Professor Alexander Capron and Leon Kass, Executive Secretary to the Committee on the Life Sciences and Social Policy, National Research Council—National Academy of Sciences, critiqued a Kansas statute similar to Missouri's. *See* KAN. STAT. ANN. § 77-202, *repealed by* Act approved Apr. 13, 1984, ch. 345, § 4, 1984 Kan. Sess. Laws 1687. They pointed out the omission from the statute's definition of "human death" those patients, such as Nancy, who suffer from complete destruction of higher brain capacity, but who continue to breath spontaneously. Capron & Kass, *A Statutory Definition of the Standards for Determining Human Death: An Appraisal and a Proposal*, in DEATH, DYING, AND EUTHANASIA 68 (1980). Capron and Kass suggested that although this condition may provide a proper justification for interrupting all forms of treatment because "existence in this state falls far short of a full human life, . . . this moral and legal problem cannot and should not be settled by 'defining' these people 'dead.'" *Id.*

12. *Cruzan*, 110 S. Ct. at 2854.

13. *Id.*

14. *See infra* notes 213-30 and accompanying text.

15. *See infra* notes 56-57, 87-88, 255-59, and 281 and accompanying texts.

16. *Compare infra* notes 121-41 and accompanying text (discussing New Jersey's initial recognition of a constitutional right to refuse treatment) *with infra* notes 189-207 and accompanying text (discussing New Jersey's subsequent adoption of common-law principles as the basis for the right).

17. *See infra* notes 231-47 and accompanying text.

18. *See infra* notes 152-56 and accompanying text.

19. *See infra* notes 121-212, 260-66, and 273-74 and accompanying texts.

20. *See infra* notes 86, 102, 139, and 263-72 and accompanying texts.

21. *See infra* note 286 and accompanying text.

thesis of state interpretations of individuals' alternative substantive rights in this area. Next, this Note suggests the means by which states may regulate this right. Finally, the Note concludes that the last question—whether there is one best way to achieve a balance among these countervailing interests—can be answered most effectively outside the courtroom.

In 1983, as the consequence of an automobile accident, Nancy Beth Cruzan suffered severe injuries resulting in significant anoxia[22] that reduced her to a persistent vegetative state.[23] After approximately one month of unsuccessful attempts by hospital care-givers to administer nutrition orally, Nancy's father and her then-husband[24] consented to the surgical implantation of a gastrostomy feeding tube to assist her recovery and to ease the feeding process.[25] At the time this treatment began, physicians and family still hoped rehabilitative efforts would be successful.[26]

Nancy was not responsive to therapy. More than four years following the accident, and after considerable thought as to the gravity of the consequences and the interests at stake,[27] Nancy's parents, as her statutory coguardians, requested that employees of the hospital terminate artificial hydration and nutrition.[28] When the hospital's employees refused their request, the Cruzans filed a

22. Cruzan v. Harmon, 760 S.W.2d 408, 410-11 (Mo. 1988) (en banc), *aff'd sub nom.* Cruzan v. Director, Mo. Dep't of Health, 110 S. Ct. 2841 (1990). Anoxia is the deprivation of oxygen to the brain. *Id.* at 411. The Supreme Court of Missouri relied on the trial judge's finding that "a deprivation of oxygen to the brain approaching six minutes would result in permanent brain damage." *Id.* The period of deprivation to Nancy's brain was estimated to be between 12 and 14 minutes. *Id.*

23. *Id.* For a discussion of vegetative states and "brain death," see *supra* note 11. Although doctors could not declare Nancy dead because of her independent respiration and circulation, her recovery from unconsciousness was highly unlikely once she had remained in a persistent vegetative state for more than one month. PRESIDENT'S COMMISSION FOR THE STUDY OF ETHICAL PROBLEMS IN MEDICINE AND BIOMEDICAL AND BEHAVIORAL RESEARCH, DECIDING TO FOREGO LIFE-SUSTAINING TREATMENT 179 (1983) [hereinafter PRESIDENT'S COMMISSION].

24. Nancy was married at the time of her accident, but her husband subsequently divorced her. Brief for Petitioner at 17 n.7, Cruzan v. Director, 110 S. Ct. 2841 (1990) (No. 88-1503). In the case of an incompetent person, the Missouri legislature has provided steps a competent spouse may use to obtain dissolution of the marriage. Upon a competent spouse's showing that there remains "no reasonable likelihood" that the marriage can be preserved because it is "irretrievably broken," the circuit court shall enter a decree of dissolution. MO. REV. STAT. § 452.305-1(2) (1986). This provision permits a competent spouse to effectuate the end of a marriage unilaterally, without regard for the present or prior desires of an incompetent spouse.

25. Brief for Petitioner at 7, *Cruzan v. Director* (No. 88-1503).

26. Cruzan v. Harmon, 760 S.W.2d 408, 411 (Mo. 1988) (en banc), *aff'd sub nom.* Cruzan v. Director, Mo. Dep't of Health, 110 S. Ct. 2841 (1990).

27. Initially, Nancy's father visited Nancy daily before going to work and made efforts to feed her by mouth; however, during these many visits, he never saw any cognitive response from Nancy. Brief for Petitioner at 7, *Cruzan v. Director* (No. 88-1503). After more than 4 years without any response from Nancy, her father and other family members gave up hope that she would ever recover. *Id.* at 8. At this point, Nancy's father was convinced that Nancy would not want to continue a "merely biological existence." *Id.* He did not reach the decision to withdraw treatment, however, without deliberation or professional guidance. Mr. Cruzan talked with other families who had been through similar experiences, as well as with doctors, clergy, and ethicists. He read volumes of material on the persistent vegetative state and medical ethics. *Id.* at 9. Nancy's father resolved that his duty was not to sit back and do nothing while Nancy suffered the "greater injustice" of continued treatment, but rather to pursue means toward treatment withdrawal. *Id.*

28. Cruzan v. Harmon, 760 S.W.2d 408, 410 (Mo. 1988) (en banc), *aff'd sub nom.* Cruzan v. Director, Mo. Dep't of Health, 110 S. Ct. 2841 (1990). At the time of her parents' request, Nancy was a patient in Mount Vernon State Hospital. *Id.* at 411.

state declaratory judgment action seeking a judicial order implementing their wishes.[29]

The trial court, after appointing a guardian *ad litem* for Nancy and hearing the testimony of all parties, entered an order directing hospital employees[30] to comply with the Cruzans' request to cease artificial hydration and nutrition.[31] The trial court based its holding on its determination that Missouri's attempt through legislatively expressed intent[32] to set forth a public policy against the

---

29. *Id.* at 410. The State of Missouri bore the entire cost of Nancy's care beginning at some time prior to the Cruzans' initial request for treatment discontinuance. *Id.* at 411 n.2. The Cruzans estimated the cost of Nancy's care to be $130,000 per year. Brief for Petitioner at 8 n.3, *Cruzan v. Director* (No. 88-1503).

30. Although the court pointed out that Nancy was in a state facility, it did not indicate that this was necessary to support its holding. Some authorities assert that a private or religiously sponsored hospital or health care facility should not be subject to judicial coercion in treatment matters. New Jersey State Catholic Conference, *Comatose Patients Should Always Receive Food and Fluids*, in OPPOSING VIEWPOINTS SOURCES: DEATH/DYING 283 (1987).

In *In re Jobes*, the trial court held that a private nursing home could refuse to participate in the withdrawal of artificially administered nutrition and hydration. *In re* Jobes, 108 N.J. 394, 424-25, 529 A.2d 434, 450 (1987). Although Nancy Ellen Jobes' family received authorization to discontinue artificial feeding, the trial court conditioned the order on Jobes' transfer to a facility amenable to this course of treatment. *Id.* The Supreme Court of New Jersey struck down this prerequisite, stating that the nursing home's "specific obligations depend, of course, on the condition and treatment preferences of the individuals they attend." *Id.* at 426, 529 A.2d at 450. The court qualified its holding by indicating that a facility's policy not to participate in the withdrawal of artificial feeding might be enforceable if the facility gave notice of its policy at the time of the patient's admission. *Id.* at 425, 529 A.2d at 450.

Increasing court involvement in the treatment process, as seen in *Jobes*, places outside pressures on health care facilities as they formulate their moral and ethical principles for operation. At least one health care facility has decided to turn the tables on the judicial system, however. While some facilities fear loss of autonomy as court orders pervade treatment decisions, Hennepin County Medical Center in Minneapolis, Minnesota, has asked a state court to step in and grant the hospital permission to disconnect a persistent vegetative patient's life-support systems. Tifft, *Life and Death After* Cruzan, TIME, Jan. 21, 1991, at 67. Oliver Wanglie refused to permit Hennepin to terminate his wife's life-support, saying, " 'She told me that if anything happened to her, she didn't want anything done to shorten her life, . . . [and] I promised her I would respect that.' " *Id.* Hennepin's medical director countered that " '[w]e don't feel the physicians should be forced by the family to provide inappropriate medical care.' " *Id.* The Minnesota courts had not resolved this issue at time of writing.

31. Cruzan v. Harmon, 760 S.W.2d 408, 410 (Mo. 1988) (en banc), *aff'd sub nom.* Cruzan v. Director, Mo. Dep't of Health, 110 S. Ct. 2841 (1990).

32. Based upon various statutory provisions, the State asserted an unqualified policy interest in the preservation of life. The State defined its interest as embracing two concerns: An interest in prolonging life and an interest in the sanctity of life itself, without regard to its quality. *Id.* at 419.

The State pointed to two statutory schemes to support this policy stance. First, the State asserted its legislative stance on abortion to suggest a strong disposition in favor of preserving life. *Id.* This statute's express purpose is "to grant the right to life to all humans, born and unborn." MO. REV. STAT. § 188.010 (1986). "Fetus viability" occurs "when the life of the unborn child may be continued indefinitely outside the womb by natural or artificial life-supportive systems." *Id.* § 188.015(7). Missouri also denies a cause of action for wrongful life and wrongful birth. *Id.* § 188.130.

The State maintained the second statutory provision reflecting a strong interest in life is Missouri's living will statute, its version of the Uniform Rights of the Terminally Ill Act. Cruzan v. Harmon, 760 S.W.2d 408, 419-20 (Mo. 1988) (en banc), *aff'd sub nom.* Cruzan v. Director, Mo. Dep't of Health, 110 S. Ct. 2841 (1990); *see infra* notes 208-12 and accompanying text. In this statute the Missouri General Assembly expressed specifically that any rights it confers upon the terminally ill are not meant to "condone, authorize or approve mercy killing or euthanasia nor permit any affirmative or deliberate act or omission to shorten or end life." MO. REV. STAT. § 459.055(5) (1986).

The court accepted the application of Missouri's living will statute only to the extent that it

withholding and withdrawal of hydration and nutrition violated Nancy's right to liberty, due process of law, and equal protection under the state and federal constitutions.[33] The trial court found that Nancy, when she was competent, had expressed her wish that her life not be sustained through treatment such as artificial nutrition and hydration.[34] The court then concluded that no state interest outweighed Nancy's "right to liberty"[35] and that to deny Nancy's parents their request would deprive Nancy of equal protection of the law.[36] From this judgment, both the State and the guardian ad litem[37] appealed directly to the Supreme Court of Missouri.[38]

---

expressed "the policy of this State with regard to the sanctity of life." Cruzan v. Harmon, 760 S.W.2d 408, 420 (Mo. 1988) (en banc), *aff'd sub nom.* Cruzan v. Director, Mo. Dep't of Health, 110 S. Ct. 2841 (1990). Beyond representing this broad policy, the statute was not at issue for two reasons: (1) The statute did not take effect until after Nancy's accident; and (2) even if the statute had been effective, Nancy had not executed a living will. *Id.*

This author's survey of Missouri statutes, cases, and commentary in effect prior to Nancy's accident revealed no express statement supporting the preservation of life in treatment situations. With no other apparent source to rely upon, the State asserted and the court accepted Missouri's living will statute as manifesting its intent to promote life, even in the context of the terminally ill. Cruzan v. Harmon, 760 S.W.2d 408, 419-20 (Mo. 1988) (en banc), *aff'd sub nom.* Cruzan v. Director, Mo. Dep't of Health, 110 S. Ct. 2841 (1990). Nancy, however, never had the opportunity to benefit from the true purpose of this legislation—the protection of the terminally ill and the effectuation of their treatment wishes.

33. Cruzan v. Harmon, 760 S.W.2d 408, 410 (Mo. 1988) (en banc), *aff'd sub nom.* Cruzan v. Director, Mo. Dep't of Health, 110 S. Ct. 2841 (1990). The Circuit Court of Jasper County, Probate Division, entered judgment on July 27, 1988. Petition for Writ of Certiorari at A89, *Cruzan v. Director* (No. 88-1503) (unpublished circuit court opinion). The full opinion of the circuit court is reproduced in the Petition for Writ of Certiorari. *Id.* at A89-A100.

34. Cruzan v. Harmon, 760 S.W.2d 408, 411 (Mo. 1988) (en banc), *aff'd sub nom.* Cruzan v. Director, Mo. Dep't of Health, 110 S. Ct. 2841 (1990). Nancy's sister testified to a conversation with Nancy occurring in the fall of 1981 when Nancy said that "death is sometimes not the worst situation you can be in" when compared with being "sent to the point of death and then stabilized" without the hope of "ever really getting better." Brief for Petitioner at 6, *Cruzan v. Director* (No. 88-1503).

35. The protection of liberty interests implies reliance upon the fourteenth amendment of the United States Constitution, which provides in part, "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. On appeal, the Supreme Court of Missouri limited its discussion of constitutionally based interests to a narrower aspect of liberty, the interest in privacy. Cruzan v. Harmon, 760 S.W.2d 408, 417-18 (Mo. 1988) (en banc), *aff'd sub nom.* Cruzan v. Director, Mo. Dep't of Health, 110 S. Ct. 2841 (1990). The court did not discuss the merits of the equal protection claim relied on by the trial court. Possibly, the Cruzans did not incorporate the equal protection claim in their argument to the supreme court, as the court stated that "Nancy's guardians invoke her common law right to refuse treatment and her constitutional right of privacy as bases for their decision to stop feeding Nancy." *Id.* at 422.

36. Cruzan v. Harmon, 760 S.W.2d 408, 411 (Mo. 1988) (en banc), *aff'd sub nom.* Cruzan v. Director, Mo. Dep't of Health, 110 S. Ct. 2841 (1990).

37. The guardian *ad litem* found himself torn by his belief that it was in Nancy's " 'best interest to have the tube feeding discontinued' " and his duty to represent her interests in the judicial arena. *Id.* at 410 n.1. Ultimately, his duty to represent won out, and he appealed the action "because [his] responsibility to her as attorney[] and guardian[] *ad litem* was to pursue this matter to the highest court in the state in view of the fact that this is a case of first impression in the State of Missouri." *Id.* On appeal, however, the guardian *ad litem* showed his continued inner discord, stating that "[t]o even imply that if you are injured in some respect, you have to go to a doctor or a hospital whether you want to or not is a long step down the road to tyranny." Respondent Guardian *Ad Litem*'s Brief at 12, *Cruzan v. Director* (No. 88-1503).

38. Cruzan v. Harmon, 760 S.W.2d 408, 410 (Mo. 1988) (en banc), *aff'd sub nom.* Cruzan v. Director, Mo. Dep't of Health, 110 S. Ct. 2841 (1990). The Missouri Constitution states: "The Supreme Court shall have exclusive appellate jurisdiction in all cases involving the validity . . . of a statute or provision of the constitution of this state . . . ." MO. CONST. art. V, § 3. Because the trial

In this case of first impression, the Supreme Court of Missouri discussed only one issue: "May a guardian order that all nutrition and hydration be withheld from an incompetent ward who is in a persistent vegetative state, who is neither dead within the meaning of [the statutory definition of death],[39] nor terminally ill?"[40] In analyzing this question, the court first reviewed the history of this area of the law in other jurisdictions.[41] The court then outlined a syllogism premised upon the State's unqualified interest in the preservation of life and the limited rights the respondents might assert on Nancy's behalf. Without espousing either alternative, the court suggested that other jurisdictions have recognized the right to refuse treatment by one of two means—the patient's common-law right to refuse treatment or the patient's constitutional right of privacy.[42] Against these interests the court cast the State's interest in life, defining it as substantial, even "unqualified."[43] In its analysis, the court focused on life itself and not the quality of the life at issue.[44] The court weighed the State's "unqualified" interest against the individual's interest in the right to die in light of the facts that Nancy was not legally dead, that her care requirements were not burdensome to her, and that there was no evidence that Nancy was terminally ill.[45] Therefore, even if a right to terminate Nancy's treatment existed, for the court the only logical outcome of this syllogism was that the State's interest in life must outweigh Nancy's right to die.[46]

The court's holding trammeled Nancy's right to refuse treatment, whether that right proceeded from a constitutional right of privacy or a common-law right of self-determination.[47] Thus, after casting the balance of interests in the

---

court had ruled the Missouri living will statute unconstitutional, the Supreme Court of Missouri asserted proper jurisdiction through immediate review. Cruzan v. Harmon, 760 S.W.2d 408, 410 (Mo. 1988) (en banc), *aff'd sub nom.* Cruzan v. Director, Mo. Dep't of Health, 110 S. Ct. 2841 (1990).

39. MO. REV. STAT. § 194.005 (1986); *see supra* note 11.

40. Cruzan v. Harmon, 760 S.W.2d 408, 410 (Mo. 1988) (en banc), *aff'd sub nom.* Cruzan v. Director, Mo. Dep't of Health, 110 S. Ct. 2841 (1990). The court limited the scope of its review, indicating that the trial court judgment " 'will be sustained . . . unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law.' " *Id.* (quoting Murphy v. Carron, 536 S.W.2d 30, 32 (Mo. 1976) (en banc)). The Supreme Court of Missouri ultimately held that no legal basis existed to support the judgment of the trial court, *id.* at 427, presumably because of the trial court's erroneous declaration of the law. *Id.* at 410.

41. For a review of this area of the law, see *infra* notes 121-207 and accompanying text.

42. Cruzan v. Harmon, 760 S.W.2d 408, 420 (Mo. 1988) (en banc), *aff'd sub nom.* Cruzan v. Director, Mo. Dep't of Health, 110 S. Ct. 2841 (1990).

43. *Id.*

44. *Id.*

45. *Id.* at 424. The court concluded that those facts supported "the immense, clear fact of life in which the state maintains a vital interest." *Id.*

46. *Id.* Nancy's parents argued on appeal to the United States Supreme Court that the State's asserted interest foreclosed the exercise of any right by a person in Nancy's situation. "By definition, such an absolute interest can never be balanced, regardless of the strength of the individual's claim." Brief for Petitioner at 30, *Cruzan v. Director* (No. 88-1503). *But cf.* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 15-11, at 1362-63 (2d ed. 1988) ("[I]n the context of a claim to die in a dignified home environment rather than in the demeaning tangle of technology that has become death's least human face, the state would be hard pressed to advance a sufficient rationale for insisting on the medical model.").

47. Cruzan v. Harmon, 760 S.W.2d 408, 424 (Mo. 1988) (en banc), *aff'd sub nom.* Cruzan v. Director, Mo. Dep't of Health, 110 S. Ct. 2841 (1990).

State's favor, the court announced its rule, which became the sole issue on appeal to the Supreme Court: "No person can assume [a treatment] choice for an incompetent [patient] in the absence of the formalities required under Missouri's Living Will statutes or the clear and convincing, inherently reliable evidence absent here."[48]

After the Supreme Court of Missouri ruled, the United States Supreme Court granted the Cruzans' petition for certiorari.[49] Chief Justice Rehnquist wrote the "path-breaking"[50] majority opinion.[51] The majority began its analysis by delineating bases for the rights of patients like Nancy. The doctrine of informed consent,[52] the Court suggested, encompasses the logical corollary that "the patient generally possesses the right not to consent, that is, to refuse treatment."[53] From this proposition, the Court moved directly to a discussion of *In re Quinlan*[54] along with other cases crucial to the development of this body of law.[55] The Chief Justice briefly recounted the New Jersey court's discussion of

48. *Id.* at 425. The court already had summarily dismissed as "unreliable" statements introduced to show Nancy's intent concerning treatment. *Id.* at 424. The majority opinion provided no further interpretation of the operation of a clear and convincing evidentiary standard.

In his dissent, Judge Higgins criticized the majority for exceeding its scope of appellate review. *Id.* at 444 (Higgins, J., dissenting). The court was bound as an appellate tribunal to follow the facts as found by the lower court unless these facts were unsupported by any substantial evidence or the resulting ruling was against the weight of the evidence. *Id.* (Higgins, J., dissenting) (citing Murphy v. Carron, 536 S.W.2d 30, 32 (Mo. 1976) (en banc)). Judge Higgins suggested that Nancy was required to retry the facts of her case before the supreme court because it made its own determinations of reliability. *Id.* (Higgins, J., dissenting).

49. Cruzan v. Director, Mo. Dep't of Health, 109 S. Ct. 3240 (1989).

50. Stewart, *Right to Die, But . . .*, A.B.A. J., Sept. 1990, at 36. Stewart cited the *Cruzan* case along with other publicly and judicially controversial cases as the type of judicial decision that redefines the contours of the legal system. *See* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 271-72 (1978) (providing affirmative action remedies for race discrimination); Roe v. Wade, 410 U.S. 113, 153 (1973) (recognizing a constitutional right to abortion); Furman v. Georgia, 408 U.S. 238, 239-40 (1972) (per curiam) (striking down the death penalty as then administered).

51. *Cruzan v. Director*, 110 S. Ct. at 2844 (Justices White, O'Connor, Scalia, and Kennedy joined Chief Justice Rehnquist's opinion).

52. *See infra* note 192.

53. *Cruzan v. Director*, 110 S. Ct. at 2847 (emphasis added).

54. 70 N.J. 10, 355 A.2d 647, *cert. denied sub nom.* Garger v. New Jersey, 429 U.S. 922 (1976).

55. *Cruzan v. Director*, 110 S. Ct. at 2847-50. Acknowledging "the advance of medical technology capable of sustaining life well past the point where natural forces would have brought certain death in earlier times," *id.* at 2847, the majority outlined the holdings of several key cases. *Id.* at 2847-50 (citing Drabick v. Drabick (Conservatorship of Drabick), 200 Cal. App. 3d 185, 200, 245 Cal. Rptr. 840, 849, *cert. denied*, 109 S. Ct. 399 (1988) (upholding state probate statute authorizing conservator to order withdrawal); *In re* Estate of Longeway (Keiner v. Community Convalescent Center), 133 Ill. 2d 33, 55, 549 N.E.2d 292, 302 (1989) (upholding doctrine of informed consent); Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 744-45, 370 N.E.2d 417, 427 (1977) (permitting treatment termination based both on right of privacy and on doctrine of informed consent); *In re* Conroy, 98 N.J. 321, 347, 486 A.2d 1209, 1223 (1985) (recognizing common-law right to self-determination and informed consent in treatment decisions); *Quinlan*, 70 N.J. at 40, 355 A.2d at 663 (recognizing right of privacy grounded in the federal constitution); *In re* O'Connor, 72 N.Y.2d 517, 528-29, 531 N.E.2d 607, 611-12, 534 N.Y.S.2d 886, 890-91 (1988) (recognizing common-law right to refuse treatment when consent to do so is shown by clear and convincing evidence); *In re* Storar, 52 N.Y.2d 363, 377, 420 N.E.2d 64, 71, 438 N.Y.S.2d 266, 273 (recognizing common-law right to refuse treatment), *cert. denied*, 454 U.S. 858 (1981)). For further discussion of these cases, see *infra* notes 121-207 and accompanying text.

Quinlan was the only case cited by the *Cruzan* majority that relied solely on a constitutional right of privacy as a means for protecting an individual's right to refuse treatment. According to Professor Tribe, courts that previously had asserted a constitutional right, or a constitutional as well

artificial feeding as a medical treatment in *In re Conroy*;[56] however, the Chief Justice did not elaborate specifically on the Court's view of this matter.[57]

The majority concluded from this analysis that states have found that the common-law doctrine of informed consent generally encompasses the competent individual's right to refuse medical treatment.[58] The Court, however, did not have available to it the sources—state constitutions, statutes, or common law—on which these state decisions were based, as a resource for any particular rights Nancy could claim.[59] Therefore, the majority limited its discussion to the question of whether the United States Constitution alone prohibits Missouri from precluding treatment withdrawal in the absence of clear and convincing evidence of the patient's intent.[60] By tackling this narrow aspect of the right to die issue, the Court heeded the charge of its predecessors that " 'it is the [better] part of wisdom not to attempt, by any general statement, to cover every possible phase of the subject.' "[61]

Having set the stage in this manner, the majority turned to the Constitution's text[62] in search of a protected liberty interest in refusing unwanted medical treatment. The Court then outlined, through its prior decisions, an inference in favor of the right to refuse treatment based on the fourteenth amendment.[63]

---

as common-law right to refuse treatment, now are placing exclusive emphasis upon the common-law doctrine of informed consent. L. TRIBE, *supra* note 46, § 15-11, at 1365. *Compare In re* Conroy, 98 N.J. 321, 348, 486 A.2d 1209, 1223 (1985) ("While this right of privacy might apply in a case such as this, we need not decide that issue since the right to decline medical treatment is, in any event, embraced within the common-law right to self-determination.") *with Quinlan*, 70 N.J. at 40, 355 A.2d at 663 ("[T]he unwritten constitutional right of privacy . . . is broad enough to encompass a patient's decision to decline medical treatment.").

56. *Cruzan v. Director*, 110 S. Ct. at 2849 (citing *Conroy*, 98 N.J. at 369-74, 486 A.2d at 1233-37). Chief Justice Rehnquist pointed out that the New Jersey court "acknowledged the 'emotional significance' of food, but noted that feeding by implanted tubes is a 'medical procedur[e] with inherent risks and possible side effects' which analytically was equivalent to artificial breathing using a respirator." *Id.* (quoting *Conroy*, 98 N.J. at 373, 486 A.2d at 1236); *see infra* notes 189-207 and accompanying text. Some medical and legal commentators since have interpreted this remark as an expression that the Court now recognizes artificial feeding as a medical treatment. *See* Karbal, *The Constitutional Dimensions of the Right to Refuse Medically Assisted Nutrition and Hydration: An Analysis of* Cruzan, 23 J. HEALTH & HOSP. L. 241, 244 (1990) ("The Court held that artificial feeding cannot readily be distinguished from other forms of medical treatment.").

57. Given many opportunities to do so, Chief Justice Rehnquist elected not to indicate the Court's views on this topic directly, possibly because he excluded matters strictly of state law from his discussion. *See, e.g., Cruzan v. Director*, 110 S. Ct. at 2852 ("[U]nder the general holdings of our cases, the forced administration of life-sustaining medical treatment, and even of artificially-delivered food and water essential to life, would implicate a competent person's liberty interest."); *id.* at 2855 ("The observations did not deal in terms with withdrawal of medical treatment or of hydration and nutrition.").

58. *Id.* at 2851.

59. *Id.*

60. *Id.*

61. *Id.* (quoting Twin City Bank v. Nebeker, 167 U.S. 196, 202 (1897)).

62. *Id.*; *see supra* note 35.

63. *Cruzan v. Director*, 110 S. Ct. at 2851; *see, e.g.*, Washington v. Harper, 110 S. Ct. 1028, 1036 (1990); Parham v. J. R., 442 U.S. 584, 600 (1979) (recognizing a child's substantial liberty interest in not being confined unnecessarily for medical treatment).

In the *Harper* case, the treating physician at a correctional institute, charged with the diagnosis and treatment of convicted felons exhibiting serious mental disorders, sought to medicate an inmate over his objections. *Harper*, 110 S. Ct. at 1033. The facility maintained a formal policy for coercive treatment. According to the Court, the policy established the following guidelines:

This inference became the starting point on a road map for the remainder of the opinion. From there, the Court assumed that "the United States Constitution would grant a competent person a constitutionally protected right to refuse life-saving hydration and nutrition."[64] Here, in one of the more important developments in the opinion, the Court expressed the right to refuse treatment in terms of a general fourteenth amendment liberty interest as opposed to the more specific constitutional right of privacy.[65]

According to the majority, merely identifying this liberty interest under the due process clause was not enough to resolve this case.[66] As an additional step, the Court indicated the need to analyze, through a balancing of the liberty interest against relevant state interests, whether any constitutional right had been violated.[67] The potential liberty interest at stake differs from that of a competent person, however; "an incompetent person is not able to make an informed and voluntary choice to exercise a hypothetical right to refuse treatment or any other right," the Court explained.[68] Therefore, "[s]uch a 'right' must be exercised for [Nancy], if at all, by some sort of surrogate."[69]

The Court acknowledged that the Missouri court's handling of this matter recognized that "under certain circumstances a surrogate may act for the patient in electing to have hydration and nutrition withdrawn."[70] To ensure adequate protection of Missouri's immense interest in the preservation of life, however, the Court explained that Missouri required in such instances "a procedural safe-

---

> [I]f a psychiatrist determines that an inmate should be treated with antipsychotic drugs but the inmate does not consent, the inmate may be subjected to involuntary treatment with the drugs only if he (1) suffers from a "mental disorder" and (2) is "gravely disabled" or poses a "likelihood of serious harm" to himself, others, or their property. . . . [A]n inmate who refuses to take the medication voluntarily is entitled to a hearing before a special committee . . . .
>
> . . . [T]he inmate has certain procedural rights before, during, and after the hearing. . . . [A]fter the initial hearing, involuntary medication can continue only with periodic review.

Id. at 1033-34.

The Supreme Court recognized in this policy, and in the Washington Supreme Court's interpretation of the administration of the policy, both procedural and substantive aspects of the due process clause. *Id.* at 1036. With respect to substantive due process, the Court weighed the inmate's liberty interest in avoiding treatment against competing state interests in the administration of unwanted drugs. *Id.* at 1036-40. The majority concluded that the fourteenth amendment permits a state "to treat a prison inmate who has a serious mental illness with antipsychotic drugs against his will, if the inmate is dangerous to himself or others and the treatment is in the inmate's medical interest." *Id.* at 1039-40.

Next, the Court explored the minimum procedures required by the Constitution to determine the balance of the substantive issues. *See id.* at 1040-44. Procedural due process, the Court held, requires no more than a full and fair hearing before members of the correctional facility's staff whereby an inmate can assert his interests. *Id.* at 1042-43. Although Harper ultimately had to submit to the treatment, the Court expressed no doubt that he "possesse[d] a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs under the Due Process Clause of the Fourteenth Amendment." *Id.* at 1036.

64. *Cruzan v. Director*, 110 S. Ct. at 2852.

65. *See id.* at 2851 n.7.

66. *Id.* at 2851.

67. *Id.* at 2851-52.

68. *Id.* at 2852.

69. *Id.*

70. *Id.*

guard to assure that the action of the surrogate conforms as best it may to the wishes expressed by the patient while competent."[71] The Missouri procedure required "evidence of the incompetent's wishes as to the withdrawal of treatment be proved by clear and convincing evidence."[72] To evaluate Missouri's procedural safeguard, the Court performed a balancing test.[73]

Chief Justice Rehnquist opined that "[w]hether or not Missouri's clear and convincing evidence requirement comports with the United States Constitution depends *in part* on what interests the State may properly seek to protect in this situation."[74] The only interest the Supreme Court of Missouri relied upon and, therefore, the only one the Court weighed, was the State's interest in the protection and preservation of life.[75] The Court had little difficulty deciding that this lone interest was sufficient to justify the higher standard of proof commensurate with it.[76]

The majority held that there is no constitutional barrier to Missouri's heightened evidentiary requirement.[77] The standard of proof the Missouri court adopted for determining an incompetent patient's treatment wishes requires a showing by "clear and convincing" evidence that the patient would not choose to continue treatment.[78] The traditional measure of persuasion in civil proceedings requires a "preponderance" of evidence, a lesser showing than "clear and convincing" evidence.[79] The Court justified this higher standard by quoting previous Court decisions:

> The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to "instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a

71. *Id.*

72. *Id.*

73. *See id.* at 2851-54.

74. *Id.* at 2852 (emphasis added). The Court intimated that the State's interest comprised only part of the analysis; however, it failed to clarify what, in addition to the State's interest, might render Missouri's procedural requirement violative of the fourteenth amendment.

75. *Id.* The Supreme Court of Missouri based its holding largely on a finding that Missouri's version of the Uniform Rights of the Terminally Ill Act manifests a state interest in the preservation of life. *See supra* note 32; *infra* notes 208-12 and accompanying text. Although Missouri did not rely on an interest in preventing suicide, Justice Scalia only concurred in the holding because of his dissatisfaction with the Court's failure to announce "that American law has always accorded the State the power to prevent, by force if necessary, suicide—including suicide by refusing to take appropriate measures necessary to preserve one's life." *Cruzan v. Director*, 110 S. Ct. at 2859 (Scalia, J., concurring). State jurisdictions have expressly ceased to link the refusal of treatment with suicide. *See, e.g.*, FLA. STAT. ANN. § 765.11 (West 1986) ("The withholding or withdrawal of life-prolonging procedures from a patient in accordance with the provisions of [this statute] does not, for any purpose, constitute a suicide."); PRESIDENT'S COMMISSION, *supra* note 23, at 38-39. Justice Scalia's concurring opinion did offer an emphatic argument that would render this case essentially moot: "[T]he federal courts have no business in this field; . . . the point at which life becomes 'worthless' . . . [is] neither set forth in the Constitution nor known to the nine Justices of this Court any better than [it is] known to nine people picked at random from the Kansas City telephone directory . . . ." 110 S. Ct. at 2859 (Scalia, J., concurring).

76. *Cruzan v. Director*, 110 S. Ct. at 2854.

77. *Id.*

78. *Id.* at 2853.

79. E. CLEARY, MCCORMICK ON EVIDENCE § 340, at 959 (3d ed. 1984).

> particular type of adjudication."[80] This Court has mandated an intermediate standard of proof—"clear and convincing evidence"—when the individual interests at stake in a state proceeding are both "particularly important" and "more substantial than mere loss of money."[81]

Because the interests being litigated involved Nancy's life, or more particularly her right to loss of life, the Court reasoned that the heightened evidentiary showing serves both to reflect the importance of the proceeding and to place the risk of an erroneous decision on the party bearing this burden of proof.[82] In a footnote, the Court shed some meaning on the requirements necessary to meet the clear and convincing standard of proof.[83] Reviewing Nancy's statements concerning treatment, the Court noted that the observations did not deal with the withdrawal of nutrition and hydration; therefore, the Court found no constitutional error in the Missouri court's conclusion that the statements did not rise to the level of clear and convincing evidence.[84]

In her concurring opinion, Justice O'Connor qualified the significance of the majority's holding with respect to states other than Missouri.[85] The holding does not put forth Missouri's clear and convincing evidentiary requirement as the only constitutionally acceptable means for protecting an incompetent individual's liberty interest in refusing medical treatment; therefore, Justice O'Connor asserted that states may continue to develop their own approaches to that end.[86]

Justice O'Connor also discussed two points the majority failed to elucidate in its opinion. First, Justice O'Connor reviewed the nature of the artificial provision of nutrition and hydration, an issue to which the majority made little reference.[87] Answering doubts concerning whether the administration of nutrition and hydration is not medical treatment, Justice O'Connor stated that "[a]rtificial feeding cannot readily be distinguished from other forms of medical treatment."[88]

---

80. *Cruzan v. Director*, 110 S. Ct. at 2853 (quoting Addington v. Texas, 441 U.S. 418, 423 (1979)).

81. *Id.* (quoting Santosky v. Kramer, 455 U.S. 745, 756 (1982)). Therefore, proceedings for the termination of parental rights, Santosky v. Kramer, 455 U.S. 745, 747-48 (1982), for civil commitment, Addington v. Texas, 441 U.S. 418, 433 (1979), for deportation, Woodby v. INS, 385 U.S. 276, 286 (1966), and for denaturalization, Schneiderman v. United States, 320 U.S. 118, 123 (1943), require that a clear and convincing standard be met.

82. *Cruzan v. Director*, 110 S. Ct. at 2854.

83. *Id.* at 2855 n.11. The Court quoted a New York court's definition of "clear and convincing" evidence that requires " 'proof sufficient to persuade the trier of fact that the patient held a firm and settled commitment to the termination of life supports under the circumstances like those presented.' " *Id.* (quoting *In re* O'Connor, 72 N.Y.2d 517, 531, 531 N.E.2d 607, 613, 534 N.Y.S.2d 886, 892 (1988)). Referring to a New Jersey case, the Court also defined "clear and convincing" evidence as that which " 'produces in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established.' " *Id.* (quoting *In re* Jobes, 108 N.J. 394, 407, 529 A.2d 434, 441 (1987)).

84. *Id.* at 2855.

85. *Id.* at 2858 (O'Connor, J., concurring).

86. *Id.* at 2858-59 (O'Connor, J., concurring).

87. *Id.* at 2857 (O'Connor, J., concurring); *see supra* notes 56-57 and accompanying text.

88. *Cruzan v. Director*, 110 S. Ct. at 2857 (O'Connor, J., concurring). Other commentators and jurisdictions have agreed with Justice O'Connor. *See, e.g.*, PRESIDENT'S COMMISSION, *supra* note

Next, Justice O'Connor emphasized that the Court did not decide the issue whether a state must give effect to the decisions of a surrogate decisionmaker.[89] Because few individuals provide explicit instructions regarding situations such as Nancy's, Justice O'Connor noted, "States which decline to consider any evidence other than such instructions may frequently fail to honor a patient's intent."[90] Justice O'Connor strongly urged that allowing a proxy appointed by the patient to make medical decisions on the patient's behalf could prevent possible disregard for a patient's intent. Vesting this authority in a proxy, according to Justice O'Connor, "may well be constitutionally required to protect the patient's liberty interest in refusing medical treatment."[91]

In dissent, Justice Brennan, also writing for Justices Marshall and Blackmun, went a step further than Justice O'Connor. Not only should the Constitution be read to uphold the use of proxy decisions, Justice Brennan wrote, but also to guarantee unequivocally to patients like Nancy "a fundamental right to be free of unwanted artificial nutrition and hydration, which right is not outweighed by any interests of the State."[92] Justice Brennan criticized the Missouri procedure validated by the majority because "[n]o proof is required to support a finding that the incompetent person would wish to *continue* treatment."[93] Pointing out that approximately fifty-six percent of the two million Americans who die each year do so after a decision to forgo life-sustaining treatment has been made,[94] Justice Brennan expressed grave reservations about forcing continued treatment.[95] He stated: "An erroneous decision not to terminate life-support . . . robs a patient of the very qualities protected by the right to avoid unwanted medical treatment. His own degraded existence is perpetuated; his family's suffering is protracted; the memory he leaves behind becomes more and more distorted."[96]

Justice Brennan viewed Missouri's rule of decision as unconstitutional[97] because it imposes "a markedly asymmetrical evidentiary burden"[98] and, therefore, reduces the probability that resulting determinations will reflect accurately the patient's wishes.[99] The Constitution should serve as a framework, not a mandate, for the states to fashion procedural protections.[100] In this context,

---

23, at 90 ("The Commission has also found no particular treatments—including such 'ordinary' hospital interventions as parenteral nutrition or hydration, antibiotics, and transfusions—to be universally warranted and thus obligatory for a patient to accept."); Garvey, *Withdrawal of Nutrition and Hydration from an Incompetent Patient: Legal Developments Leading to* Cruzan, 23 J. HEALTH & HOSP. L. 225, 226-33 (1990) (discussing cases).

89. *Cruzan v. Director*, 110 S. Ct. at 2857 (O'Connor, J., concurring).

90. *Id.* (O'Connor, J., concurring).

91. *Id.* (O'Connor, J., concurring).

92. *Id.* at 2864 (Brennan, J., dissenting).

93. *Id.* at 2871 (Brennan, J., dissenting) (emphasis added).

94. *Id.* at 2864 (Brennan, J., dissenting) (citing Lipton, *Do-Not-Resuscitate Decisions in a Community Hospital: Incidence, Implications and Outcomes*, 256 J. A.M.A. 1164, 1168 (1986)).

95. *Id.* at 2873 (Brennan, J., dissenting).

96. *Id.* (Brennan, J., dissenting).

97. *Id.* at 2876 (Brennan, J., dissenting).

98. *Id.* at 2871 (Brennan, J., dissenting).

99. *Id.* at 2876 (Brennan, J., dissenting).

100. *Id.* (Brennan, J., dissenting).

Justice Brennan stated that the Constitution requires "protections genuinely aimed at ensuring decisions commensurate with the will of the patient."[101] States may continue to explore freely the advisability of family decisions, court proceedings, or the appointment of a guardian ad litem to promote and protect sufficiently the patient's will.[102] In any event, Justice Brennan concluded, the states through *parens patriae* power should not make treatment decisions for an incompetent patient.[103]

In a separate dissent, Justice Stevens criticized the majority for aiding the State of Missouri in "appropriating Nancy Cruzan's life as a symbol for its own purposes."[104] Justice Stevens poignantly summarized his views as follows:

> Only because Missouri has arrogated to itself the power to define life, and only because the Court permits this usurpation, are Nancy Cruzan's life and liberty put into disquieting conflict. If Nancy Cruzan's life were defined by reference to her own interests, so that her life expired when her biological existence ceased serving *any* of her own interests, then her constitutionally protected interest in freedom from unwanted treatment would not come into conflict with her constitutionally protected interest in life. . . . The opposition of life and liberty in this case are thus not the result of Nancy Cruzan's tragic accident, but are instead the artificial consequence of Missouri's effort, and this Court's willingness, to abstract Nancy Cruzan's life from Nancy Cruzan's person.[105]

Justice Stevens pointed out that the oneness of life and liberty has pervaded the traditions of this country from its founding.[106] As part of this tradition, Justice Stevens asserted that "an appreciation of morality [is] essential to understanding life's significance."[107] Justice Stevens also cast a religious tone about the issue of death, further distancing choices concerning death from the governmental arena.[108]

Recognizing the fundamental nature of the liberty interest involved in treatment decisions, Justice Stevens criticized the majority, not for its endorsement of Missouri's clear and convincing standard of proof for cases regarding treatment decisions, but for its emphasis on the facts necessary to meet this standard.[109] Justice Stevens succinctly stated that the analysis should be "not how to prove

---

101. *Id.* (Brennan, J., dissenting).

102. *Id.* (Brennan, J., dissenting).

103. *Id.* at 2877 (Brennan, J., dissenting).

104. *Id.* at 2892 (Stevens, J., dissenting).

105. *Id.* at 2889 (Stevens, J., dissenting).

106. *Id.* at 2885 (Stevens, J., dissenting). Justice Stevens pointed to leaders such as Nathan Hale, Patrick Henry, and Abraham Lincoln, all of whom spoke out for the choices of life *and* death in the pursuit of liberty. *See, e.g.*, R. MEADE, PATRICK HENRY: PRACTICAL REVOLUTIONARY 35 (1969) (quoting the famous lines from Henry's St. John's Church speech: " '[G]ive me liberty or give me death!' ").

107. *Cruzan v. Director*, 110 S. Ct. at 2885 (Stevens, J., dissenting).

108. *Id.* (Stevens, J., dissenting) ("[N]ot much may be said with confidence about death unless it is said from faith, and that alone is reason enough to protect the freedom to conform choices about death to individual conscience.").

109. *Id.* at 2889 (Stevens, J., dissenting).

the controlling facts but rather what proven facts should be controlling."[110] His answer, in this case, was that "the best interests of the individual, especially when buttressed by the interests of all related third parties, must prevail over any general state policy that simply ignores those interests."[111]

A little more than four months after the Court rendered its decision in *Cruzan*, Nancy's parents received another chance to effectuate her intent. On November 1, 1990, the Cruzans appeared before Judge Charles E. Peel of the Jasper County Probate Court to plead once again for the withdrawal of Nancy's feeding tube.[112] The Cruzans' attorney produced new testimony from three of Nancy's friends in a renewed attempt to meet the State's requirement of clear and convincing evidence.[113]

As opposition in their 1988 attempt to withdraw treatment, the Cruzans faced the state health director, Missouri's Attorney General, and Nancy's court-appointed guardian *ad litem*. Prior to the December 1990 hearing, the Attorney General withdrew from the case, saying his only goal was "to have a legal standard set."[114] The state health director vowed to comply with a new lower court order, if so directed.[115] Finally, Nancy's guardian *ad litem* sided with the Cruzan family, soliciting testimony from Nancy's physician that continued treatment was inadvisable and merely promoted " 'a living hell.' "[116]

On December 14, 1990, Judge Peel issued his final ruling, authorizing the Cruzans to discontinue artificial nutrition and hydration.[117] Twelve days later, on December 26, 1990, Nancy Beth Cruzan died "with her family at her bedside."[118]

The holding in the *Cruzan* case, although resulting from a controversy of first impression to the Court,[119] did not develop in a vacuum. The courts of many jurisdictions have addressed this issue, and a majority of these states have decided the issue in a manner contrary to that of the Court. At least twenty

---

110. *Id.* (Stevens, J., dissenting).

111. *Id.* (Stevens, J., dissenting) (footnote omitted). Justice Stevens indicated that the individual's best interests may be assessed by considering the patient's "quality of life." *Id.* (Stevens, J., dissenting).

112. N.Y. Times, Nov. 2, 1990, at A14, col. 3. When the Cruzans first sought judicial assistance to terminate Nancy's treatment, Judge Peel heard their motion. *Id.*

113. *Id. Compare id.* (new testimony indicating that Nancy "would never want to live 'like a vegetable' on medical machines") *with Cruzan v. Director*, 110 S. Ct. at 2855 (Nancy's earlier statements to a housemate "that she would not want to live should she face life as a 'vegetable.' ").

114. N.Y. Times, Nov. 2, 1990, at A14, col. 3. Justice Brennan foreshadowed this motive in his dissent:

> Yet Missouri . . . [has] displaced Nancy's own assessment of the processes associated with dying. [It has] discarded evidence of her will, ignored her values, and deprived her of her right to a decision as closely approximating her own choice as humanly possible. [Missouri has] done so disingenuously in her name, and openly in Missouri's own.

Cruzan v. Director, 110 S. Ct. at 2878 (Brennan, J., dissenting).

115. N.Y. Times, Nov. 2, 1990, at A14, col. 3.

116. *Id.*

117. N.Y. Times, Dec. 15, 1990, § 1, at 10, col. 1.

118. N.Y. Times, Dec. 27, 1990, at A1, col. 1.

119. *Cruzan v. Director*, 110 S. Ct. at 2851 ("This is the first case in which we have been squarely presented with the issue of whether the United States Constitution grants what is in common parlance referred to as a 'right to die.' ").

states have reviewed the issue of withholding or withdrawing treatment of some type. Of these, twelve have permitted the withdrawal of nutrition administered through some form of surgically implanted tube from an incompetent patient.[120]

120. *See* Gray v. Romeo, 697 F. Supp. 580, 590-91 (D.R.I. 1988) (upholding declaratory relief authorizing spouse to remove feeding tube and life support being administered to unconscious patient); Drabick v. Drabick (Conservatorship of Drabick), 200 Cal. App. 3d 185, 218, 245 Cal. Rptr. 840, 861 (reversing trial court denial of petition made by conservator of comatose patient in persistent vegetative state for permission to remove patient's nasogastric feeding tube), *cert. denied*, 488 U.S. 1024 (1988); McConnell v. Beverly Enters.-Conn., Inc., 209 Conn. 692, 708-09, 553 A.2d 596, 604-05 (1989) (allowing removal of gastrostomy tube pursuant to statute, requiring evidence that incompetent patient was in terminal condition but had made prior expressions regarding life support); Severns v. Wilmington Medical Center, Inc. (*In re* Severns), 425 A.2d 156, 160 (Del. Ch. 1980) (authorizing order to withhold heroic treatments from comatose patient including replacing feeding tube in event of emergency); *In re* Guardianship of Browning, 568 So. 2d 4, 17 (Fla. 1990) (permitting guardian of patient who was incompetent but not in permanent vegetative state and who suffered from an incurable but not terminal condition to exercise patient's right of self-determination to forego sustenance provided artificially by nasogastric tube); *In re* L.H.R., 253 Ga. 439, 447, 321 S.E.2d 716, 723 (1984) (permitting exercise by parents of infant's right to terminate all life-sustaining treatment after diagnosis of terminal illness); *In re* Longeway, 133 Ill. 2d 33, 549 N.E.2d 292, 302 (1989) (permitting guardian of incompetent patient to exercise right to refuse artificial nutrition and hydration on behalf of patient who was terminally ill and diagnosed as irreversibly comatose); *In re* Gardner, 534 A.2d 947, 956 (Me. 1987) (holding that patient in persistent vegetative state, who prior to accident declared he did not wish to be kept alive in such state, had right to have life-sustaining procedures including artificial nutrition and hydration discontinued); Brophy v. New England Sinai Hosp., Inc., 398 Mass. 417, 441-42, 497 N.E.2d 626, 639-40 (1986) (holding that substituted judgment be applied to discontinue treatment of patient in persistent vegetative state); *In re* Jobes, 108 N.J. 394, 420, 529 A.2d 434, 447 (1987) (spouse permitted to exercise right of persistently vegetative patient to determine whether to remove life-sustaining food nutrition system); Delio v. Westchester County Medical Center (*In re* Delio), 129 A.D.2d 1, 26, 516 N.Y.S.2d 677, 693 (1987) (conservator of patient in chronic vegetative state entitled to act in accordance with prior clearly expressed wishes of patient and have use of feeding and hydration tubes discontinued); *In re* Guardianship of Grant, 109 Wash. 2d 545, 565, 747 P.2d 445, 455 (1987) (guardian obtained order authorizing future withholding of life-sustaining procedures including artificial means of nutrition and hydration). *See generally* Garvey, *supra* note 88, at 225 (full discussion of cases in which courts have permitted withdrawal or withholding of nutrition and hydration).

Four states have disallowed removal of life-sustaining nutrition and hydration. New Jersey and New York have denied removal in specific situations without upsetting prior precedent in favor of termination of nutrition and hydration. *See In re* Visbeck, 210 N.J. Super. 527, 542, 510 A.2d 125, 133 (N.J. Super. Ct. Ch. Div. 1986); *In re* O'Connor, 72 N.Y.2d 517, 534-35, 531 N.E.2d 607, 615-16, 534 N.Y.S.2d 886, 894-95 (1988); *In re* Vogel, 134 Misc. 2d 395, 398-99, 512 N.Y.S.2d 622, 624 (N.Y. Sup. Ct. 1986). Missouri and Ohio, in cases of first impression, denied the withdrawal of nutrition and hydration. *See* Cruzan v. Harmon, 760 S.W.2d 408, 426 (Mo. 1988) (en banc), *aff'd sub nom.* Cruzan v. Director, Mo. Dep't of Health, 110 S. Ct. 2841 (1990); Couture v. Couture, 48 Ohio App. 3d 208, 215, 549 N.E.2d 571, 577 (1989) (per curiam).

In addition to allowing the termination of nutrition and hydration, California, Connecticut, Florida, Massachusetts, New Jersey, New York, and Washington courts have permitted the withdrawal of other life-sustaining treatments such as mechanical respirators and dialysis machines. *See* Dority v. Superior Court of San Bernardino County, 145 Cal. App. 3d 273, 280, 193 Cal. Rptr. 288, 292 (1983) (respirator); Foody v. Manchester Memorial Hosp., 482 A.2d 713, 721-22 (Conn. Super. Ct. 1984) (respirator); *In re* Guardianship of Barry, 445 So. 2d 365, 367 (Fla. Dist. Ct. App. 1984) (ventilator); *In re* Spring, 380 Mass. 629, 630, 405 N.E.2d 115, 118 (1980) (hemodialysis); *In re* Farrell, 108 N.J. 335, 359, 529 A.2d 404, 416 (1987) (respirator); *In re* Lydia E. Hall Hosp., 116 Misc. 2d 477, 488, 455 N.Y.S.2d 706, 713 (N.Y. Sup. Ct. 1982) (hemodialysis); *In re* Colyer, 99 Wash. 2d 114, 117, 660 P.2d 738, 740 (1983) (respirator).

The courts of Arizona, Colorado, Iowa, Louisiana, and Minnesota, while leaving unanswered the question of nutrition and hydration, have authorized the removal of other treatments. *See* Rasmussen v. Fleming, 154 Ariz. 207, 222, 741 P.2d 674, 689 (1987) ("Do Not Resuscitate" order permitted); Lovato v. District Court, 198 Colo. 419, 433, 601 P.2d 1072, 1081 (1979) (respirator); Morgan v. Olds, 417 N.W.2d 232, 236 (Iowa Ct. App. 1987) (treatment not specified); *In re* P.V.W., 424 So. 2d 1015, 1020 (La. 1982) (ventilator); *In re* Torres, 357 N.W.2d 332, 341 (Minn. 1984) (respirator). Ohio, while denying the removal of nutrition and hydration, has permitted the removal

The seminal case on the discontinuance of treatment, *In re Quinlan*,[121] was decided in 1976. Karen Ann Quinlan, like Nancy Cruzan, suffered anoxia[122] that reduced her to a "chronic persistent vegetative state."[123] Quinlan needed assistance in respiration, nutrition, and hydration.[124] Less than one year after Quinlan's hospitalization, her father was appointed as Quinlan's general guardian and thereafter sought express power to authorize the discontinuance of life-sustaining treatment.[125] The Chancery Division of the New Jersey Superior Court denied Mr. Quinlan's request,[126] and the Supreme Court of New Jersey granted direct certification[127] of the issues prior to a hearing before the Superior Court, Appellate Division.[128]

The Supreme Court of New Jersey reviewed the potential legal bases posited by Quinlan's father as grounds for identifying her right to refuse treatment—a right that, if it existed, could only be exercised derivatively.[129] The

---

of a respirator. *See* Leach v. Akron Gen. Medical Center, 68 Ohio Misc. 1, 12-13, 426 N.E.2d 809, 816 (1980).

For compilations of cases in the treatment removal area, see *Cruzan v. Director*, 110 S. Ct. at 2888 n.21 (Stevens, J., dissenting); Cruzan v. Harmon, 760 S.W.2d 408, 412 n.4 (Mo. 1988) (en banc), *aff'd sub nom.* Cruzan v. Director, Mo. Dep't of Health, 110 S. Ct. 2841 (1990); Karbal, *supra* note 56, at 247 n.13.

121. *In re* Quinlan, 70 N.J. 10, 355 A.2d 647, *cert. denied sub nom.* Garger v. New Jersey, 429 U.S. 922 (1976); *see supra* note 11.

122. The cause of oxygen deprivation to Quinlan's brain was unclear. *Quinlan*, 70 N.J. at 23, 355 A.2d at 653. The record indicated that Quinlan ceased breathing for at least two fifteen-minute periods, but her hospital admission history was incomplete and uninformative. *Id.* at 23, 355 A.2d at 653-54.

123. *Id.* at 23-24, 355 A.2d at 654. Several medical and neurological experts testified that Quinlan was not "brain dead," even though she could no longer maintain any cognitive activity. *Id.* at 24, 355 A.2d at 654.

124. The court couched its holding in terms of the removal of life-sustaining mechanisms, but actually discussed removal of her respirator only. *Id.* at 40, 355 A.2d at 663-64. Presumably, the court took that focus because Quinlan's father did not seek removal of the feeding system. Cruzan v. Harmon, 760 S.W.2d 408, 413 n.6 (Mo. 1988) (en banc), *aff'd sub nom.* Cruzan v. Director, Mo. Dep't of Health, 110 S. Ct. 2841 (1990). Neurological damage to Quinlan's brain stem affected her independent breathing patterns; therefore, an MA-1 respirator assisted her breathing by delivering a given volume of air at a certain rate into her lungs followed by a "sigh" volume, a relatively large volume of air designed to purge the lungs of excretions. *Quinlan*, 70 N.J. at 25, 355 A.2d at 655. Attempts to "wean" Quinlan from the respirator proved unsuccessful. *Id.* A neurologist testified on Quinlan's behalf that " 'technology has now reached a point where you can in fact start to replace anything outside of the brain to maintain something that is irreversibly damaged.' " *Id.* at 20 n.2, 355 A.2d at 652 n.2.

125. *Quinlan*, 70 N.J. at 22, 355 A.2d at 653.

126. *In re* Quinlan, 137 N.J. Super. 227, 348 A.2d 801 (N.J. Super. Ct. Ch. Div. 1975), *modified and remanded*, 70 N.J. 10, 355 A.2d 647, *cert. denied sub nom.* Garger v. New Jersey, 429 U.S. 922 (1976).

127. *Quinlan*, 70 N.J. at 18, 355 A.2d at 651.

128. *Id.* Quinlan's father sought judicial authority to withdraw a life-sustaining mechanism on three bases: (1) a constitutionally claimed right of free exercise of religion, (2) a constitutionally claimed right of privacy, and (3) a constitutional prohibition against cruel and unusual punishment. *Id.* at 22, 355 A.2d at 653.

129. *Id.* at 34-42, 355 A.2d at 660-64. The court recognized the novelty of a litigant asserting the constitutional rights of another person; however, the court determined that Mr. Quinlan's interests were "real and adverse and he raise[d] questions of surpassing importance. Manifestly, he ha[d] standing to assert his daughter's constitutional rights, she being incompetent to do so." *Id.* at 35, 355 A.2d at 661. Justice Stevens, in his *Cruzan* dissent, stated, "There is certainly nothing novel about the practice of permitting a next friend to assert constitutional rights on behalf of an incompetent patient who is unable to do so." *Cruzan v. Director*, 110 S. Ct. at 2890 (Stevens, J., dissenting)

court, without lengthy analysis, rejected the right to religious freedom as a constitutional basis for withdrawing treatment.[130] The *Quinlan* court also dismissed the allegation that continued treatment would be cruel and unusual punishment as "[n]either the State, nor the law, but the accident of fate and nature, has inflicted upon [Quinlan] conditions which though in essence cruel and most unusual, yet do not amount to 'punishment' in any constitutional sense."[131]

Rejecting these constitutional arguments, the court turned to the right of privacy that the Supreme Court defined in *Griswold v. Connecticut*[132] and *Roe v. Wade*.[133] Based on these precedents, the court accepted the right of privacy as broad enough to encompass a patient's decision to decline medical treatment under certain circumstances.[134] The court also supported this conclusion by citing the New Jersey Constitution.[135] Only countervailing interests vested in the State could bar the exercise of the right of privacy, but the court acknowledged that any interest in "the preservation and sanctity of human life and defense of the right of the physician to administer medical treatment according to his best judgment . . . weakens[,] and the individual's right to privacy grows as the degree of bodily invasion increases and the prognosis dims."[136] The court ruled that Quinlan's situation posed a balance in favor of her right of privacy.[137]

Positing Quinlan's rights in this privacy framework, the court determined that "if Karen were herself miraculously lucid for an interval (not altering the existing prognosis of the condition to which she would soon return) and perceptive of her irreversible condition, she could effectively decide upon discontinuance of the life-support apparatus, even if it meant the prospect of natural

(citing Whitmore v. Arkansas, 110 S. Ct. 1717, 1734-35 (1990); Youngberg v. Romeo, 457 U.S. 307, 310 (1982)).

130. *Quinlan*, 70 N.J. at 37, 355 A.2d at 661.

131. *Id.* at 37-38, 355 A.2d at 662.

132. 381 U.S. 479, 485 (1965) (finding an unwritten constitutional right of privacy that interdicts legislative intrusion into aspects of personal decisionmaking such as choices with regard to contraception).

133. 410 U.S. 113, 153 (1973) (broadening the right of privacy to encompass a woman's decision to terminate pregnancy under certain conditions). Both the fundamental privacy right implicated in *Griswold* and the abortion right delineated in *Roe v. Wade* have come into question with changes in the makeup of the Supreme Court. Therefore, the very foundations of the *Quinlan* court's argument may soon be challenged or overturned.

134. *Quinlan*, 70 N.J. at 40, 355 A.2d at 663. This legal precedent has become the foundation of many claims for treatment withdrawal. *See* Note, *Someone Make up My Mind: The Troubling Right to Die Issues Presented by Incompetent Patients with No Prior Expression of a Treatment Preference*, 64 NOTRE DAME L. REV. 394, 399 n.23 (1989) (compiling various cases recognizing the constitutional right of privacy as authorizing the removal of life-sustaining systems).

135. N.J. CONST. art. I., para. 1 ("All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.").

136. *Quinlan*, 70 N.J. at 40-41, 355 A.2d at 663-64.

137. Although physicians predicted that Quinlan's death would quickly follow treatment termination, she lived for nine years after the respirator was disconnected. Cruzan v. Harmon, 760 S.W.2d 408, 413 n.6 (Mo. 1988) (en banc), *aff'd sub nom.* Cruzan v. Director, Mo. Dep't of Health, 110 S. Ct. 2841 (1990). Quinlan continued to receive nutrition and hydration artificially until her death. *Id.* at 413 n.7.

death."[138] Unable to discern Quinlan's choice, however, the court concluded that a guardian might assert Quinlan's right of privacy on her behalf.[139] Upon the attending physician's conclusion that there was no reasonable possibility of Quinlan's return to cognition,[140] her guardian, in this case her father, might render his best judgment as to whether Quinlan would exercise her right of privacy to refuse treatment.[141] The *Quinlan* court's approach has become known as the "substituted judgment" test. This test requires that the surrogate "attempt to reach the decision that the incapacitated person would make if he or she were able to choose."[142]

Shortly after the *Quinlan* decision, Massachusetts defined the outer limits of the applicability of the substituted judgment doctrine in *Superintendent of Belchertown State School v. Saikewicz*.[143] In this case, Joseph Saikewicz, a mentally retarded resident at a state mental health facility, suffered from acute myeloblastic monocytic leukemia.[144] The superintendent of the facility petitioned the Probate Court of Hampshire County, Massachusetts for appointment of an

---

138. *Quinlan*, 70 N.J. at 39, 355 A.2d at 663.

139. *Id.* at 41, 355 A.2d at 664. The court stated:

> [Quinlan's right of privacy] should not be discarded solely on the basis that her condition prevents her conscious exercise of the choice. The only practical way to prevent destruction of the right is to permit the guardian and family of [Quinlan] to render their best judgment, subject to the qualifications hereinafter stated, as to whether she would exercise it in these circumstances.

Id.

The court envisioned qualifications to this exercise that would diffuse professional responsibility for the decision, "comparable in a way to the value of multi-judge courts in finally resolving on appeal difficult questions of law." *Id.* at 50, 355 A.2d at 669. The system also protected hospitals and doctors by screening out meritless or suspect motivations and contemplating additional views and diverse knowledge in the decisionmaking process. *Id.* The system proposed would require: (1) diagnosis by the attending physician that there is no possibility of emergence from the comatose condition to a cognitive, sapient state, and that life-support should be discontinued; (2) concurrence of the guardian and family of the patient; and (3) review of the decision by an ethics committee or consultative body at the institution providing the treatment in question. *Id.* at 55, 355 A.2d at 671.

140. *Id.*

141. *Id.* at 41, 355 A.2d at 664.

142. PRESIDENT'S COMMISSION, *supra* note 23, at 132. The Commission recommended that the substituted judgment standard should be used only if a patient was capable of developing views relevant to the matter at hand prior to incompetency and if reliable evidence of those views existed. The best proof of these views is the patient's prior expressions of opinion with respect to hypothetical situations similar to the patient's now-current medical state. *Id.* at 133. The Commission expressed its belief that, when possible, "decisionmaking for incapacitated patients should be guided by the principle of substituted judgment, which promotes the underlying values of self-determination and well-being." *Id.* at 136.

Because the substituted judgment test does not rely solely on the patient's previously expressed wishes, the standard has come under attack for incorporating objective elements into the decisionmaking process. *See infra* notes 180-83 and accompanying text. Under the test, the desires of the patient can derive from the perceptions of a third party; therefore, objective elements including the patient's physical condition, pain, and prognosis, enter into the analysis. Rhoden, *Litigating Life and Death*, 102 HARV. L. REV. 375, 398-400 (1988). Under a purely subjective test adopted in a later case, see *infra* notes 174-88 and accompanying text, a court rejected these extrinsic elements in favor of the subjective intentions expressly manifested by the patient prior to incompetency.

143. 373 Mass. 728, 370 N.E.2d 417 (1977).

144. *Id.* at 729, 370 N.E.2d at 419. The trial record indicated that Saikewicz's illness was incurable and that, at the age of sixty-seven, he had an intelligence quotient of ten and a mental age of approximately two years and eight months. The patient was ambulatory but not able to communicate verbally or respond coherently to others. *Id.* at 729-31, 370 N.E.2d at 419-20.

independent guardian vested with the authority to make treatment decisions for Saikewicz.[145] One month after his appointment, the guardian filed a report with the court, concluding that Saikewicz's illness was incurable, that the prescribed chemotherapy caused "significant adverse side effects and discomfort," and that Saikewicz's inability to understand the treatment subjected him to undue fear and pain.[146] Based on these conclusions, the guardian recommended that the mental health facility discontinue Saikewicz's treatment.[147] The probate judge then entered an order agreeing with the recommendation of the guardian *ad litem* that treatment not be initiated.[148] The Supreme Judicial Court allowed an application from the probate court judge for direct review of the order.[149]

The Massachusetts court limited its review to two issues: (1) Whether the probate court had the general authority to order the withholding of medical treatment when appropriate even though treatment withheld in this manner might shorten the patient's life; and (2) whether, on the facts of this case, the court was correct in directing that the mental health facility administer no treatment to Saikewicz except by further order of the court.[150] As in the *Quinlan* case, the court described the patient's rights in terms of a constitutional right of privacy, limited to the extent that state interests outweigh individual rights.[151]

In *Saikewicz*, Massachusetts claimed the four interests most commonly asserted by states in this area: the preservation of life;[152] the protection of the interests of innocent third parties;[153] the prevention of suicide;[154] and the main-

145. *Id.* at 729, 370 N.E.2d at 419.

146. *Id.* at 729-30, 370 N.E.2d at 419.

147. *Id.* at 730, 370 N.E.2d at 419.

148. *Id.*

149. *Id.*

150. *Id.* at 730 n.2, 370 N.E.2d at 419 n.2.

151. *Id.* at 739-45, 370 N.E.2d at 424-27. The court also briefly alluded to a strong interest in being free from nonconsensual invasions of bodily integrity, represented by the doctrine of informed consent; however, the court couched its holding in terms of a more fundamental privacy right as weighed against the State's own interests. *Id.* at 739-40, 370 N.E.2d at 424. In any event, the court maintained that:

> [T]he substantive rights of the competent and the incompetent person are the same in regard to the right to decline potentially life-prolonging treatment. The factors which distinguish the two types of persons are found only in the area of how the State should approach the preservation and implementation of the rights of an incompetent person and in the procedures necessary to that process of preservation and implementation.

Id. at 736-37, 370 N.E.2d at 423.

152. *Id.* at 741, 370 N.E.2d at 425.

153. *Id.* at 742, 370 N.E.2d at 426. The interest in protecting third parties usually arises when there are minor children who will be emotionally or financially damaged as a result of an adult's decision to refuse lifesaving or life-prolonging treatment. In *Saikewicz*, the court did not weigh this interest in its analysis because third parties were not at issue. *Id.* at 742-43, 370 N.E.2d at 426.

154. *Id.* at 743 n.11, 370 N.E.2d at 426 n.11. The court summarily concluded that the interest in preventing suicide was not applicable. *Id.* The refusal of medical treatment does not necessarily constitute suicide, *see supra* note 3, because the patient may not have the specific intent to die and, to the extent that death is from natural causes, the patient did not set the death-producing agent in motion with the intent of causing his own death. The criminal context provides support that treatment withdrawal does not give rise to suicide. Defendants accused of murder have asserted as a defense that the physician's removal of the victim's life-support equipment, not the defendant's inculpatory actions, precipitated the victim's death. *See, e.g.*, Commonwealth v. Golston, 373 Mass. 249, 256, 366 N.E.2d 744, 750 (1977) (holding that the attending physician's act to disconnect the victim's respirator was not a superseding act in the cause of death), *cert. denied*, 434 U.S. 1039

tenance of ethical integrity within the medical profession.[155] The court denominated the state's interest in the preservation of life as the most significant interest.[156] The court added, however, that the value of life "is lessened not by a decision to refuse treatment, but by the failure to allow a competent human being the right of choice."[157] The court acknowledged that "principles of equality and respect for all individuals" require the choice be exercised for an incompetent patient as well.[158] This choice becomes "that which would be made by the incompetent person, if that person were competent, but taking into account the present and future incompetency of the individual as one of the factors which would necessarily enter into the decision-making process of the competent person."[159]

Based on this analysis, Massachusetts adopted the substituted judgment test used in the *Quinlan* case,[160] but with one significant gloss. Saikewicz had been incompetent his entire life;[161] therefore, the court's endeavor to replicate his desires included an element plainly absent from his life—his competent reflection on the issue. While the *Quinlan* court assumed Quinlan's return to competency to ascertain her preferred treatment decision,[162] the *Saikewicz* court assumed that if Saikewicz for the first time in his life were rendered competent, he would forego treatment based on the nature of his disease and the degree of his actual incompetence.[163] In an effort to exercise the substituted judgment of a

---

(1978). Courts have uniformly rejected the argument. *See* F. ROZOVSKY, CONSENT TO TREATMENT: A PRACTICAL GUIDE § 9.8.2, at 646 (2d ed. 1990). By analogy, actions to suspend treatment are not the precipitating factor in death, and therefore cannot serve as the act effectuating a suicide.

155. *Saikewicz*, 373 Mass at 743, 370 N.E.2d at 426. The medical profession's interest relates to the preservation of its ethical integrity as well as the continued opportunity for hospitals to care for people under their control. In cases such as Saikewicz's, "prevailing ethical practice seems to be to recognize that the dying are more often in need of comfort than treatment." *Id.*; *see also In re* Quinlan, 70 N.J. 10, 47, 355 A.2d 647, 667, *cert. denied sub nom.* Garger v. New Jersey, 429 U.S. 922 (1976) ("[P]hysicians distinguish between curing the ill and comforting and easing the dying; . . . they refuse to treat the curable as if they were dying or ought to die, and . . . they have sometimes refused to treat the hopeless and dying as if they were curable.").

156. *Saikewicz*, 373 Mass. at 741, 370 N.E.2d at 425.

157. *Id.* at 742, 370 N.E.2d at 426.

158. *Id.* at 745, 370 N.E.2d at 427.

159. *Id.* at 752-53, 370 N.E.2d at 431. The court ascertained that the facts on the record supported the proposition that Saikewicz himself would have made the decision to forego treatment under the standard set forth. *Id.* at 753, 370 N.E.2d at 431. The trial court concluded that the following considerations weighed against administering chemotherapy to the patient: his age; his inability to cooperate with the treatment; probable adverse side-effects of treatment; the low chance of the treatment producing remission; the certainty that treatment would cause immediate suffering; and the quality of life possible for him even if the treatment did bring about remission. *Id.* at 753-54, 370 N.E.2d at 432. The considerations weighing in favor of the treatment were the chance of a longer life and the fact that most competent people with Saikewicz's illness elect to take the gamble of treatment. *Id.* at 753, 370 N.E.2d at 431. Against these favorable factors, the court anomalously pointed out that "[t]o presume that the incompetent person must always be subjected to what many rational and intelligent persons may decline is to downgrade the status of the incompetent person by placing a lesser value on his intrinsic human worth and vitality." *Id.* at 747, 370 N.E.2d at 428.

160. *In re* Quinlan, 70 N.J. 10, 41-42, 355 A.2d 647, 664, *cert. denied sub nom.* Garger v. New Jersey, 429 U.S. 922 (1976); *see supra* note 142 and accompanying text.

161. *Saikewicz*, 373 Mass. at 751, 370 N.E.2d at 430.

162. *See supra* notes 138-39 and accompanying text.

163. *Saikewicz*, 373 Mass. at 752-53, 370 N.E.2d at 431.

lifelong incompetent patient, Massachusetts introduced the idea of imputed competence, thus expanding the element of objectivity previously recognized in the subjective version of the test applied in *Quinlan*.[164]

In *In re Storar*,[165] a case representing the consolidation of two lower court decisions supporting treatment withdrawal,[166] the Court of Appeals of New York reviewed the substituted judgment test as reformulated by the *Saikewicz* decision.[167] In its analysis, the New York court declined to discuss a constitutionally guaranteed right of privacy, finding common-law principles adequate to grant any relief available.[168] From this premise, the court turned to the question whether someone other than the incompetent patient could make the decision to discontinue the patient's life-sustaining treatment.[169] Rejecting the *Quinlan-Saikewicz* types of substituted judgment test, the *Storar* court opted for a shift in the evidence necessary to establish an incompetent patient's intent.[170] To terminate an incompetent patient's life-sustaining treatment, the court held, the surrogate decisionmaker must provide "clear and convincing" evidence[171] that the

164. *See supra* notes 138-39, 142 and accompanying texts; *cf.* Robertson, *Organ Donations by Incompetents and the Substituted Judgment Doctrine*, 76 COLUM. L. REV. 48, 63 (1976) (distinguishing imputed competence from reasonable inferences based on incompetent patient's subjective preferences). Professor Robertson expounded on the philosophical debate of treating incompetent patients as though they were competent:

> [M]aintaining the integrity of the person means that we act toward him "as we have reason to believe [he] would choose for [himself] if [he] were [capable] of reason and deciding rationally." It does not provide a license to impute to him preferences he never had .... If preferences are unknown, we must act with respect to the preferences a reasonable, competent person in the incompetent's situation would have.

Id. (quoting J. RAWLS, A THEORY OF JUSTICE 209 (1971)).

165. 52 N.Y.2d 363, 420 N.E.2d 64, 438 N.Y.S.2d 266, *cert. denied*, 454 U.S. 858 (1981).

166. *In re* Storar, 78 A.D.2d 1013, 434 N.Y.S.2d 46 (N.Y. App. Div. 1980), *rev'd*, 52 N.Y.2d 363, 420 N.E.2d 64, 438 N.Y.S.2d 266, *cert. denied*, 454 U.S. 858 (1981); Eichner v. Dillon, 73 A.D.2d 431, 426 N.Y.S.2d 517 (N.Y. App. Div. 1980), *modified sub nom. In re* Storar, 52 N.Y.2d 363, 420 N.E.2d 64, 438 N.Y.S.2d 266, *cert. denied*, 454 U.S. 858 (1981).

167. *See supra* notes 143-64 and accompanying text.

168. *Storar*, 52 N.Y.2d at 377, 420 N.E.2d at 70, 438 N.Y.S.2d at 272. In New York, a statute that codified the common-law doctrine of informed consent protects the right of a patient to control the course of his medical treatment. *See* N.Y. PUB. HEALTH LAW § 2504 (McKinney 1985) (enabling certain persons to consent to certain medical treatments). Implicit within the common-law doctrine of informed consent, however, is the concept that consent will not be implied if the patient had stated previously that he would not consent to such treatment. *Storar*, 52 N.Y.2d at 376, 420 N.E.2d at 70, 438 N.Y.S.2d at 272 (citing RESTATEMENT (SECOND) OF TORTS § 62 illustration 5 (1965)).

169. *Storar*, 52 N.Y.2d at 378, 420 N.E.2d at 71, 438 N.Y.S.2d at 274.

170. *Id.* at 378-79, 420 N.E.2d at 72, 438 N.Y.S.2d at 274.

171. The court recognized that in civil cases a preponderance of the evidence is generally sufficient for a party to meet her burden of persuasion. *Id.* at 379, 420 N.E.2d at 72, 438 N.Y.S.2d at 274. The District Attorney, however, arguing on the State's behalf against treatment withdrawal, urged that if the court deemed withdrawal appropriate, it should order it only on the basis of the highest standard of proof—proof beyond a reasonable doubt. *Id.* The court rejected both standards as inappropriate in cases involving the effectuation of an individual's stated intentions. *Id.* Citing the United States Supreme Court, the New York court adopted the highest evidentiary standard applicable to civil cases—clear and convincing proof. *Id.* ("Where particularly important personal interests are at stake, clear and convincing evidence should be required.") (citing Addington v. Texas, 441 U.S. 418, 424 (1979) (in cases seeking involuntary commitment, constitutionally requiring clear and convincing evidence of subject's inability to care for himself and potential danger to the community)). The New York court announced the following rule: "Clear and convincing proof should ... be required in cases where it is claimed that a person, now incompetent, left instructions to terminate life-sustaining procedures when there is no hope of recovery." *Id.*

incompetent patient had made the treatment decision for himself before he became incompetent, that in fact the patient subsequently had become incompetent, and that the patient's chance of recovery was minimal.[172] This requirement of a clear and convincing evidentiary showing of the patient's actual intent rendered the resulting test subjective; in New York, treatment withdrawal decisions no longer could incorporate objective postulation based on elements outside the patient's intent.[173]

Seven years later, New York faced the treatment withdrawal issue again in *In re O'Connor*.[174] This time the court supplanted any remnants of the doctrine of substituted judgment with a purely subjective approach, relying on a patient's expressed intent.[175] The case involved an elderly woman hospitalized as a result of a series of strokes that rendered her incompetent.[176]

O'Connor was unable to ingest food or drink without assistance because of an inability to swallow, but she was alert, able to follow simple commands, and able to respond verbally to simple questions.[177] The patient's physician determined that a nasogastric tube was necessary to provide essential nourishment. After O'Connor's daughters objected to the procedure, the hospital's ethics committee reviewed the matter and found that it would be inappropriate to withhold the treatment. The hospital then petitioned the court for authorization to insert the nasogastric tube.[178] O'Connor's daughters opposed the action, claiming that the treatment would be against the express wishes of the patient. The record showed that the patient had made repeated statements that she did not want her life prolonged by artificial means if she were unable to care for herself.[179] The

172. *Id.*

173. *Id.* Applying this newly adopted procedural requirement to the facts of the case, the court held that Eichner, who had been rendered incompetent as a result of cardiac arrest, was entitled to removal of a respirator based upon prior statements the court deemed "carefully reflected," "obviously solemn," and "not casual." *Id.* at 379-80, 420 N.E.2d at 72, 438 N.Y.S.2d at 274. In contrast, Storar never had been competent and always had been incapable of understanding or making a reasoned decision about medical treatment. *Id.* at 380, 420 N.E.2d at 72, 438 N.Y.S.2d at 275. In a complete abrogation of the principles of preserving incompetent patients' rights enunciated by the *Saikewicz* holding, the New York court found it "unrealistic to attempt to determine whether he would want to continue potentially life prolonging treatment if he were competent." *Id. But see* Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 750, 370 N.E.2d 417, 430 (1977) (by imputing competence to patient, court was able "to determine with as much accuracy as possible the wants and needs of the individual involved"); *In re* Quinlan, 70 N.J. 10, 41, 355 A.2d 647, 664 (analysis of Quinlan's interests required a rendering of the "best judgment . . . as to whether she would exercise [the right] in these circumstances"), *cert. denied sub nom.* Garger v. New Jersey, 429 U.S. 922 (1976). Although the *Storar* court did not reject this form of substituted judgment altogether, it distinguished the cases of Eichner and Storar from that of Saikewicz by presuming that an objective approach would not enhance the clear evidence at hand.

174. 72 N.Y.2d 517, 531 N.E.2d 607, 534 N.Y.S.2d 886 (1988).

175. *Id.* at 530, 531 N.E.2d at 613, 534 N.Y.S.2d at 892.

176. *Id.* at 522, 531 N.E.2d at 608, 534 N.Y.S.2d at 887.

177. *Id.* at 523-24, 531 N.E.2d at 609, 534 N.Y.S.2d at 888.

178. *Id.* at 524, 531 N.E.2d at 609, 534 N.Y.S.2d at 888. The trial court denied the hospital's petition and then entered an order on a counterclaim brought by O'Connor's daughters directing the hospital also to discontinue intravenous feeding currently being administered to O'Connor. *Id.* at 527, 531 N.E.2d at 611, 534 N.Y.S.2d at 890. Based on the trial court's conclusion that O'Connor's " 'past expressions plainly covered any form of life-prolonging treatment,' " the intermediate appellate court affirmed the lower ruling. *Id.* The hospital then appealed to the New York Court of Appeals. *Id.* at 522, 531 N.E.2d at 608, 534 N.Y.S.2d at 887.

179. *Id.*

court rejected the patient's repeated statements made prior to incompetency about life-prolonging treatment as not manifesting an "expressed intent" concerning the treatment at issue.[180] Chief Judge Wachtler, writing for the majority, summarized the quality of O'Connor's expressions:

> Although . . . repeated over a number of years, there is nothing . . . to persuade the fact finder that her expressions were more than immediate reactions to the unsettling experience of seeing or hearing of another's unnecessarily prolonged death. Her comments—that she would never want to lose her dignity before she passed away, that nature should be permitted to take its course, that it is "monstrous" to use life-support machinery—are, in fact, no different than those that many of us might make after witnessing an agonizing death.[181]

The court expressed the fear that if such general statements were held to be clear and convincing proof of an intent to forego treatment, "[t]he aged and infirm would be placed at grave risk . . . once . . . silenced by mental disability."[182]

Finding the substituted judgment test "unacceptable" because of its disguised objectivity,[183] the court announced what has become the "subjective test." This test, the court explained, narrowly focuses on the patient's express intent.[184] In a proceeding by a surrogate for a treatment removal directive, the surrogate must prove by clear and convincing evidence that the incompetent patient expressed her intent prior to incompetency that she not be subjected to

---

180. *Id.* at 532, 531 N.E.2d at 613, 534 N.Y.S.2d at 893.

181. *Id.*

182. *Id.*

183. *Id.* at 530, 531 N.E.2d at 613, 534 N.Y.S.2d at 892. In an effort to ascertain what an incompetent patient would desire in a particular circumstance, surrogate decisionmakers and courts have substituted their judgment "as to what would be an acceptable quality of life for another," a practice that the *O'Connor* majority criticized. *Id.*

The concurring and dissenting judges disagreed with the majority's flat refusal to apply the substituted judgment approach. Judge Hancock, concurring, believed the fact that "the patient is neither terminal, comatose nor vegetative . . . [and] is awake, responsive and experiencing no pain" should weigh heavily in favor of continuing treatment. He asserted, however, that the rule established to bring about this result was "unrealistic, often unfair or inhumane and, if applied literally, totally unworkable. . . . What the rule literally demands is an impossibility: a factual determination of the incompetent patient's actual desire at the time of the decision." *Id.* at 535-36, 531 N.E.2d at 616, 534 N.Y.S.2d at 895 (Hancock, J., concurring).

Judge Hancock suggested a workable list of factors which should be considered before making a life-support decision:

> (1) [T]he intention of the patient under the existing circumstances, *to whatever extent it can be ascertained* from past expressions; (2) any moral, ethical, religious or other deeply held belief, insofar as it might bear on the patient's probable inclinations in the matter; (3) the medical condition of the patient, including the level of mental and physical functioning and the degree of pain and discomfort; (4) the nature of the prescribed medical assistance, including its benefits, risks, invasiveness, painfulness, and side effects; (5) the prognoses with and without the medical assistance, including life expectancy, suffering and possibility of recovery; (6) the sentiments of the family or intimate friends; and (7) the professional judgment of the involved physicians.

Id. at 537, 531 N.E.2d at 617, 534 N.Y.S.2d at 896 (Hancock, J., concurring).

In a dissenting opinion, Judge Simons accused the majority of not rejecting the substituted judgment approach to decision-making, but instead making "its own substituted judgment." *Id.* at 552, 531 N.E.2d at 626, 534 N.Y.S.2d at 905-06 (Simons, J., dissenting).

184. *Id.* at 530, 531 N.E.2d at 613, 534 N.Y.S.2d at 892.

the treatment in question.[185] The court defined the requirements that would permit a finding of clear and convincing evidence as proof sufficient to persuade the trier of fact that the patient held "a firm and settled commitment to the termination of life supports under the circumstances like those presented."[186] A clear and convincing finding also would require evidence showing the durability of the commitment and the unlikelihood of a change of heart on the matter.[187] This new subjective test represented a complete abandonment of reliance on objective factors often incorporated in the substituted judgment approach.[188]

The disagreement on the bench in the *O'Connor* case exemplified the lack of consensus among jurisdictions regarding the decision-making process for incompetent patients. Even within a single jurisdiction, a court could change its mind. In *In re Conroy*,[189] for example, the Supreme Court of New Jersey revisited the substantial issues surrounding treatment removal. Although the patient died prior to the court's decision,[190] the court chose this opportunity to review the area[191] for the first time since its *Quinlan* decision. The New Jersey court in *Conroy* took its first step away from its prior holding in *Quinlan* by expressing the patient's rights in terms of a common-law right to self-determination rather than a constitutionally protected right of privacy.[192]

---

185. *Id.* at 531, 531 N.E.2d at 613, 534 N.Y.S.2d at 892.

186. *Id.*

187. *Id.*

188. *See supra* note 142.

189. 98 N.J. 321, 486 A.2d 1209 (1985).

190. The patient in *Conroy* was an elderly bedridden woman with serious and irreversible physical and mental impairments. As a full-time nursing home patient, she required constant care. Physicians familiar with her condition described her as neither brain dead nor comatose nor in a persistent vegetative state. *Id.* at 337, 486 A.2d at 1216-17. Her mental condition was very limited, however; she was severely demented and unable to respond to verbal stimuli. *Id.* at 338, 486 A.2d at 1217. Her nephew, as guardian, sought permission to remove a nasogastric feeding tube from Conroy. *Id.* at 335, 486 A.2d at 1216. The trial court granted permission for removal; the Appellate Division reversed. *Id.* at 335-36, 486 A.2d at 1216. During the pending appeal, Conroy died. *Id.* at 341, 486 A.2d at 1219.

191. *Id.* at 342, 486 A.2d at 1219.

192. *Id.* at 348, 486 A.2d at 1223. *But cf. In re* Quinlan, 70 N.J. 10, 39-40, 355 A.2d 647, 663 ("Supreme Court decisions have recognized that a right of personal privacy exists and that certain areas of privacy are guaranteed under the Constitution.... Presumably this right is broad enough to encompass a patient's decision to decline medical treatment under certain circumstances...."), *cert. denied sub nom.* Garger v. New Jersey, 429 U.S. 922 (1976).

The New Jersey court provided no explanation for now favoring the common-law right to self-determination over a right of privacy. *Conroy*, 98 N.J. at 348, 486 A.2d at 1223. Commentators criticized the court after its *Quinlan* holding, however, for abandoning the common-law doctrine for which "the rules for playing [the] game were very well developed." G. GRISEZ & J. BOYLE, *supra* note 3, at 98. By finding support for the right to refuse treatment in the constitutional right of privacy, the *Quinlan* court may have been attempting to shield the right from legislative modification or repeal. I. SLOAN, THE RIGHT TO DIE: LEGAL AND ETHICAL PROBLEMS 8 (1988). On the other hand, as the determination of these issues becomes more difficult, courts have deferred to their state legislatures. *See, e.g.*, Cruzan v. Harmon, 760 S.W.2d 408, 426 (Mo. 1988) (en banc) ("legislatures ... have the ability to address the issue comprehensively"), *aff'd sub nom.* Cruzan v. Director, Mo. Dep't of Health, 110 S. Ct. 2841 (1990); *In re* Farrell, 108 N.J. 335, 341-42, 529 A.2d 404, 407 (1987) ("[G]iven the fundamental societal questions that must be resolved, the Legislature is the proper branch of government to set guidelines in this area...."); *In re* Storar, 52 N.Y.2d 363, 382-83, 420 N.E.2d 64, 74, 438 N.Y.S.2d 266, 276 ("If it is desirable to enlarge the role of the courts in cases involving discontinuance of life sustaining treatment for incompetents ... the change should come from the Legislature."), *cert. denied*, 454 U.S. 858 (1981). By adopting the common-law doc-

Recognizing that "the goal of decision-making for incompetent patients should be to determine and effectuate, insofar as possible, the decision that the patient would have made if competent," the court considered a number of new tests derived from the substituted judgment approach announced in *Quinlan*.[193] The court settled on three tests—the subjective test, a limited-objective best interest test, and a pure-objective best interest test.[194] The first test, a subjective one, provided "that life-sustaining treatment may be withheld or withdrawn from an incompetent patient when it is clear that the particular patient would have refused the treatment under the circumstances involved. . . . The question is *not* what a reasonable or average person would have chosen to do under the circumstances . . . ."[195] The court suggested several forms of evidence that a surrogate could present to satisfy the test's requirement of clear intent: a written document or living will; an oral directive to a family member, friend, or health care provider; a durable power of attorney or appointment of a proxy authorizing a particular person to make treatment decisions in the event of incompetency; an opinion expressed regarding medical treatment administered to others; the patient's religious beliefs and the tenets of that religion; or the patient's consistent pattern of conduct with respect to prior decisions about his own medical care.[196]

Should the subjective test not be satisfied by one of these forms of evidence, the court offered two alternative tests. Finding in the state's *parens patriae* power "the authority . . . to allow decisions to be made for an incompetent that

---

trine of informed consent as a basis for treatment removal, the courts leave it to their legislatures to establish different standards and procedures. L. TRIBE, *supra* note 46, § 15-11, at 1366 n.15.

In addition, early decisions permitting treatment removal rested on the invasiveness of the treatment. *See, e.g., Quinlan*, 70 N.J. at 41, 355 A.2d at 664 ("[T]he State's interest *contra* weakens and the individual's right to privacy grows as the degree of bodily invasion increases and the prognosis dims."). The courts' analysis became dichotomous: while a patient had a constitutional right to refuse highly invasive treatments, he could not reject ordinary treatments. L. TRIBE, *supra* note 46, § 15-11, at 1365. As medical technology makes such distinctions increasingly difficult, courts have turned to the common-law doctrine of informed consent, based not on the degree of bodily invasion but on the very fact that treatment gives rise to invasion. *Id.* at 1366.

The common-law doctrine of informed consent traditionally is based on the fundamental proposition that "the human body . . . is the exclusive personal property of its possessor and is inviolate without his or her consent." D. MEYERS, *supra* note 11, § 5:2, at 61. Thus, courts approach any medical treatment as an invasion of bodily integrity. Recognizing the nature of informed consent, the Supreme Court of New Jersey stated, "The patient's ability to control his bodily integrity through informed consent is significant only when one recognizes that this right also encompasses a right to informed refusal." *Conroy*, 98 N.J. at 347, 486 A.2d at 1222.

Likewise, the advent of incompetency does not destroy the patient's right to self-determination in these matters. For example, "duly appointed guardians of minors and incompetents have legal capacity to consent to much conduct and to many invasions, especially medical procedures deemed to be in the interest of children and incompetents." W. KEETON, D. DOBBS, R. KEETON, & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 18, at 115 (5th ed. 1984).

193. *Conroy*, 98 N.J. at 360, 486 A.2d at 1229.

194. *Id.* at 374, 486 A.2d at 1236.

195. *Id.* at 360-61, 486 A.2d at 1229 (emphasis added). Unlike the subjective test adopted in *O'Connor*, *see supra* notes 174-88 and accompanying text, the New Jersey court incorporated, as an essential prerequisite to subjective decision making, medical evidence bearing on the patient's condition, treatment, and prognosis. *Conroy*, 98 N.J. at 363, 486 A.2d at 1231. This approach more closely paralleled the one suggested by Judge Hancock in his concurring opinion in *O'Connor*. *See supra* note 183.

196. *Conroy*, 98 N.J. at 361-62, 486 A.2d at 1229-30.

serve the incompetent's best interests, even if the person's wishes cannot be clearly established,"[197] the court introduced two "best interests" tests: a limited-objective test and a pure-objective test.[198]

The limited-objective test requires both some "trustworthy" evidence that the patient would have refused the treatment, and "clear" evidence that the burden of the patient's continued life with the treatment outweighs the benefits of that life for him.[199] According to the court, the methods for showing intent under the subjective test[200] also provide "trustworthy" evidence that the patient would choose treatment cessation.[201] Evidence that is "too vague, casual, or remote" to constitute "clear" proof under the subjective test might still be sufficiently "trustworthy" to satisfy the limited-objective test.[202] "Clear" evidence that the patient's treatment burdens outweigh the benefits of his life includes weighing the extent of the patient's suffering and unavoidable pain against any physical pleasure, emotional enjoyment, or intellectual satisfaction the patient experiences.[203] Medical evidence must show that "the treatment would merely prolong the patient's suffering and not provide him any net benefit."[204]

In the absence of trustworthy evidence concerning the patient's preference, or when no evidence is available, the court advocated using the pure-objective test.[205] This test requires only that the net burden of the patient's life with treatment "clearly and markedly" outweigh the benefits that the patient derives from life.[206] In other words, the effects of administering life-sustaining treatment must be inhumane to justify treatment cessation.

As a caveat under all three of the tests, the court warned that "life-sustaining treatment should not be withdrawn from an incompetent patient who had previously expressed a wish to be kept alive in spite of any pain that he might experience."[207]

In response to pervasive uncertainty in the treatment of incompetent patients, the National Conference of Commissioners on Uniform State Laws ap-

197. *Id.* at 365, 486 A.2d at 1231. This *parens patriae* power would permit the state to authorize a guardian to withhold or withdraw life-sustaining treatment from an incompetent patient "if it is manifest that such action would further the patient's best interests." *Id.*

198. *Id.* at 365, 486 A.2d at 1232.

199. *Id.*

200. *See supra* note 196 and accompanying text.

201. *Conroy*, 98 N.J. at 366, 486 A.2d at 1232.

202. *Id.* The court cited "informally" expressed opinions regarding others' medical conditions and treatment as an example of "trustworthy," but not "clear," evidence of intent. *Id.*

203. *Id.*

204. *Id.* The court stressed information with respect to the degree, expected duration, and constancy of pain with and without treatment; the possibility that pain could be reduced; the patient's life expectancy, prognosis, level of functioning, degree of humiliation and dependency; and other treatment options. *Id.*

205. *Id.*

206. *Id.*

207. *Id.* at 366-67, 486 A.2d at 1232. Other commentators have recommended the use of the substituted judgment standard combined with an attempt to emulate the subjective wishes of the patient. PRESIDENT'S COMMISSION, *supra* note 23, at 136. These commentators have admitted, however, that those wishes might not always be known. *Id.* In those circumstances, therefore, a surrogate decisionmaker should use one of the "best interests" standards to choose a course that will promote the patient's well-being. *Id.*

proved the Uniform Rights of the Terminally Ill Act (URITA) in 1985.[208]

208. UNIF. RIGHTS OF THE TERMINALLY ILL ACT, 9B U.L.A. 609 (1989) [hereinafter URITA]. URITA provides individuals with a method of making decisions in advance regarding life-sustaining treatment. The Act's scope is narrow; it applies only to persons who have executed a declaration instructing a physician to withhold life-sustaining treatment should the person be in a terminal condition and unable to make his own decisions. Under URITA, these concepts are defined as follows:

> "Life-sustaining treatment" means any medical procedure or intervention that, when administered to a qualified patient, will serve only to prolong the process of dying. . . . "Terminal condition" means an incurable or irreversible condition that, without the administration of life-sustaining treatment, will, in the opinion of the attending physician, result in death within a relatively short time.

Id. § 1, 9B U.L.A. 611-12.

URITA sets forth a model declaration as an illustration of an effective method for an individual to manifest his intentions regarding future treatments:

> If I should have an incurable or irreversible condition that will cause my death within a relatively short time, and I am no longer able to make decisions regarding my medical treatment, I direct my attending physician, pursuant to the Uniform Rights of the Terminally Ill Act of this State, to withhold or withdraw treatment that only prolongs the process of dying and is not necessary to my comfort or to alleviate pain.

Id. § 2, 9B U.L.A. 614. In its 1989 amendment, the URITA drafters added § 7, allowing written consent to withhold or withdraw treatment to be given by an individual on behalf of the patient when a physician has determined that the patient's condition is terminal, even in the absence of a written declaration by the patient. *Id.* § 7, 9B U.L.A. 90-91 (Supp. 1991). The individuals empowered with authority to give such consent are the patient's spouse, the patient's adult children, the patient's parents, the patient's adult siblings, and the patient's nearest other adult relative. *Id.* § 7(b)(1)-(5).

At the time of the 1989 amendments to URITA, 33 states and the District of Columbia had adopted either the 1985 or 1989 version of URITA or some form of Living Will or Natural Death Act. *Id.*, 9B U.L.A. 79 (Supp. 1991). Currently, 44 states and the District of Columbia have adopted some portion of URITA or otherwise made provisions for a health care declaration. Thirty-two states and the District of Columbia have adopted acts substantially similar to the 1985 version of URITA, with the noted qualifications concerning the treatment of nutrition and hydration. *See* ALA. CODE §§ 22-8A-1 to -10 (1990); ALASKA STAT. §§ 18.12.010 to .100 (1986); ARIZ. REV. STAT. ANN. §§ 36-3201 to -3210 (1986) (" 'Life-sustaining procedure' does not include the administration of . . . food or fluids . . . ." *Id.* § 36-3201.); CAL. HEALTH & SAFETY CODE §§ 7185-7195 (West Supp. 1991); COLO. REV. STAT. §§ 15-18-101 to -113 (1987 & Supp. 1990) (" 'Life-sustaining procedure' shall not include any . . . intervention for nourishment of the qualified patient . . . . However, artificial nourishment may be withdrawn or withheld pursuant to [a declaration disfavoring this form of treatment]." *Id.* § 15-18-103(7) (Supp. 1990).); CONN. GEN. STAT. ANN. §§ 19a-570 to -575 (West Supp. 1990) (" 'Life support system' means any mechanical or electronic device, excluding the provision of nutrition and hydration . . . ." *Id.* § 19a-570.); DEL. CODE ANN. tit. 16, §§ 2501-2509 (Supp. 1982); D.C. CODE ANN. §§ 6-2421 to -2430 (Supp. 1988); GA. CODE ANN. §§ 31-32-1 to -12 (1985 & Supp. 1990) (" 'Life-sustaining procedures' shall not include . . . [n]ourishment . . . ." *Id.* § 31-32-2(5)(A) (1985).); HAW. REV. STAT. §§ 327D-1 to -27 (Supp. 1989) (" 'Life-sustaining procedure' means any medical procedure . . . except for the provision of fluids [and] nourishment . . . ." *Id.* § 327D-2.); IDAHO CODE §§ 39-4502 to -4509 (Supp. 1990); ILL. ANN. STAT. ch. § 110, para. 701-710 (Smith-Hurd Supp. 1990) (" 'Deathdelaying procedure' means . . . intravenous feeding . . . [or] tube feeding . . . . Nutrition and hydration shall not be withdrawn or withheld from a qualified patient if the withdrawal or withholding would result in death solely from dehydration or starvation rather than from the existing terminal condition." *Id.* § 702(d).); IND. CODE ANN. §§ 16-8-11-1 to 11-22 (Burns 1990) (" 'Life-prolonging procedure' does not include the provision of appropriate nutrition and hydration . . . ." *Id.* § 16-8-11-4.); KAN. STAT. ANN. §§ 65-2801 to -2809 (1985 & Supp. 1990); KY. REV. STAT. ANN. §§ 311.622 to .644 (Baldwin Supp. 1990) (" 'Life-prolonging treatment' shall not include . . . nutrition or hydration . . . ." *Id.* § 311.624(5)(b).); MD. HEALTH-GEN. CODE ANN. §§ 5-601 to -614 (1990)); MINN. STAT. ANN. §§ 145B.01 to .17 (West Supp. 1991); MISS. CODE ANN. §§ 41-41-101 to -121 (Supp. 1988); MO. REV. STAT. §§ 459.010 to .055 (1986) (*see infra* note 212); MONT. CODE ANN. §§ 50-9-101 to -206 (1989); NEV. REV. STAT. §§ 449.540 to .690 (1985); N.H. REV. STAT. ANN. §§ 137-H:1 to :16 (1990) (" 'Life-sustaining procedures' shall not include the administration of . . . sustenance . . . ." *Id.* § 137H:2(II).); N.Y. PUB. HEALTH LAW §§ 2980-2994 (McKinney Supp. 1991); N.D. CENT. CODE §§ 23-06.4-01 to -14 (Supp. 1989) (" 'Life-prolonging treatment' . . . does not include the provision of appropriate nutrition and hydration . . . ." *Id.* § 23-06.4-02(4).); OHIO REV. CODE

URITA provides states with general guidelines for a statutory scheme covering the administration of life-sustaining treatment. Outlining basic definitions of terms critical to the treatment process, including declaration, life-sustaining treatment, and terminal condition,[209] URITA provides the format for a competent person to authorize withdrawal of future treatment in the event of incompetency.[210] Other issues, such as revocation of the declaration, penalties for failure to comply with the declaration, and effects of previous declarations, are covered as well.[211] Missouri adopted its own version of URITA, outlining an appropriate declaration for the withholding or withdrawal of treatment.[212]

ANN. §§ 1337.11 to .17 (Baldwin Supp. 1989); OKLA. STAT. ANN. tit. 63, §§ 3101-3111 (West Supp. 1991) (" 'Life-sustaining procedure' means . . . the invasive administration of nourishment and hydration . . . ." *Id.* § 3102(4).); S.C. CODE ANN. §§ 44-77-10 to -160 (Law. Co-op Supp. 1990) (" 'Life-sustaining procedures' do not include . . . the provision of . . . nutrition, and hydration for comfort care . . . ." *Id.* § 44-77-20(2).); TENN. CODE ANN. §§ 32-11-101 to -110 (Supp. 1990) ("Medical care includes . . . artificial or forced feeding . . . . In no case shall this section be interpreted to allow the withholding of simple nourishment or fluids so as to condone death by starvation or dehydration." *Id.* § 32-11-103(5).); VT. STAT. ANN. tit. 18, §§ 5251-5262 (1987); WASH. REV. CODE ANN. §§ 70.122.010 to .905 (Supp. 1990); W. VA. CODE §§ 16-30-1 to -10 (1991); WIS. STAT. ANN. §§ 154.01 to .15 (West 1989) (" 'Life-sustaining procedure' . . . does not include . . . [t]he provision of fluid maintenance and nutritional support." *Id.* § 154.01(5)(b).); WYO. STAT. §§ 35-22-101 to -109 (1988) (" 'Life-sustaining procedure' does not include the administration of nourishment . . . ." *Id.* § 35-22-101(iii).). In addition, 11 states have adopted language similar to § 7 of URITA, providing for surrogate decision-making in the absence of a declaration. *See* ARK. STAT. ANN. §§ 20-17-201 to -218 (Supp. 1989); FLA. STAT. ANN. §§ 765.01 to .15 (West 1986 & Supp. 1991) (" '[L]ife-prolonging procedure' does not include the provision of sustenance . . . ." *Id.* § 765.03(3) (Supp. 1991). Florida permits the withdrawal of sustenance, however, under certain circumstances. *Id.* § 765.075.); IOWA CODE ANN. §§ 144A.1 to .11 (1989) (" 'Life-sustaining procedure' does not include the provision of sustenance . . . ." *Id.* § 144A.2(5)(b).); LA. REV. STAT. ANN. §§ 40:1299.58.1 to .58.10 (West Supp. 1991); ME. REV. STAT. ANN. tit. 18-A, §§ 5-701 to -714 (Supp. 1990); N.M. STAT. ANN. §§ 24-7-1 to -7-10 (1986); N.C. GEN. STAT. §§ 90-320 to -322 (1990); OR. REV. STAT. §§ 127.605 to .650 (1989) (" 'Life-sustaining procedure' does not include . . . the usual and typical provision of nutrition which in the medical judgment of the attending physician a patient can tolerate." *Id.* § 127.605(3).); TEX. HEALTH & SAFETY CODE ANN. §§ 672.001 to .021 (Vernon 1991); UTAH CODE ANN. §§ 75-2-1101 to -1118 (Supp. 1990) (" 'Life-sustaining procedure' does not include the administration of . . . sustenance . . . ." *Id.* § 75-2-1103(6)(b).); VA. CODE ANN. §§ 54.1-2981 to -2992 (1988 & Supp. 1990). Rhode Island has a statutory provision for a durable power of attorney for health care decisions. R.I. GEN. LAWS §§ 23-4.10-1 to -2 (1989). New Jersey, in view of its strong case law in the area, *see supra* notes 121-41 and 189-207 and accompanying texts, has formed a commission to identify the "issues still in need of resolution in the aftermath of Conroy and [to recommend] . . . a legislative solution, if necessary." N.J. STAT. ANN. § 52:9Y-6(d) (West 1986); *see id.* §§ 52:9Y-1 to -6. Only 5 states—Massachusetts, Michigan, Nebraska, Pennsylvania, and South Dakota—have no statutory provisions concerning treatment withdrawal, although Massachusetts does have case law in the area. *See supra* notes 143-64 and accompanying text.

See also Cruzan v. Director, 110 S. Ct. at 2857-58 nn.2-4 (O'Connor, J., concurring) (compiling statutes of fourteen jurisdictions authorizing appointment of proxies for making health care decisions, statutes of all fifty-one jurisdictions pertaining to general durable powers of attorney, and statutes of thirteen states permitting living wills authorizing the appointment of healthcare proxies); B. COLEN, THE ESSENTIAL GUIDE TO A LIVING WILL (1987) (detailed commentary for the layman concerning drafting a living will to fit specific needs); SOCIETY FOR THE RIGHT TO DIE, HANDBOOK OF LIVING WILL LAWS (1987) (compiling full text of many jurisdictions' living will statutes with analysis helpful for compliance).

209. URITA § 1, 9B U.L.A. 611-12 (1989).

210. *Id.* § 2, 9B U.L.A. 614.

211. *Id.* §§ 3-17, 9B U.L.A. 615-22.

212. MO. REV. STAT. §§ 459.010 to .055 (1986). See *supra* note 32 and accompanying text for a discussion of the significance of this statute in *Cruzan*. The Missouri statute differs in two important ways from URITA. First, the statute does not speak in terms of life-sustaining treatment; instead, it governs death-prolonging procedures. *Id.* § 459.010(3). A death-prolonging procedure is defined as:

In view of this disharmonious background, the need for a clear and conflict-free decision from the Court is apparent. In answering one of the key questions *Cruzan* raised,[213] however, the Court made assumptions rather than providing answers about an individual's right to refuse treatment. The Court's approach to the substantive rights of an incompetent person was twofold—it assumed that the Constitution would grant a *competent* person a protected right to refuse life-sustaining nutrition and hydration,[214] and it stated that the issue falls within the scope of a fourteenth amendment liberty interest.[215] The Court's assumption of a constitutionally protected right to refuse treatment did not apply equally to incompetent patients.[216] Rather than proclaim equal rights for the competent and the incompetent patient, the Court pointed to Nancy's inability to assert her rights as a basis for adopting Missouri's procedural safeguard.[217] This approach overlooks the underlying issue. The Court acknowledged the need for Missouri's "unqualified interest in the preservation of human life to be weighed against the constitutionally protected interests of [Nancy]"[218] when formulating a new procedure, but the Court never articulated Nancy's interests.

The Court's decision in *Washington v. Harper*,[219] rendered just months before *Cruzan*, further exemplifies this anomaly. *Harper* also dealt with the interest in avoiding unwanted treatment. The inmate Harper asserted violation of his liberty interest to avoid the unwanted administration of antipsychotic drugs. The *Harper* Court analyzed both the substantive and procedural aspects of the liberty interest identified, finding it "axiomatic that procedural protections must be examined in terms of the substantive rights at stake."[220] Justice Kennedy, writing for the *Harper* Court, quoted *Mills v. Rogers*:[221]

> [A]ny medical procedure or intervention which, when applied to a patient, would serve only to prolong artificially the dying process and where, in the judgment of the attending physician pursuant to usual and customary medical standards, death will occur within a short time whether or not such procedure or intervention is utilized. Death-prolonging procedure shall not include the administration of medication or the performance of medical procedure deemed necessary to provide comfort care or to alleviate pain nor the performance of any procedure to provide nutrition or hydration.

Id. In addition, the Missouri statute does not "condone, authorize or approve mercy killing or euthanasia nor permit any affirmative or deliberate act or omission to shorten or end life." *Id.* § 459.055(5).

213. *See supra* note 14 and accompanying text.

214. *Cruzan v. Director*, 110 S. Ct. at 2852.

215. *Id.* at 2851 n.7.

216. *Id.* at 2852 ("Petitioners go on to assert that an incompetent person should possess the same right in this respect as is possessed by a competent person. . . . The difficulty with petitioners' claim is that in a sense it begs the question . . . .").

217. *Id.*

218. *Id.* at 2853.

219. 110 S. Ct. 1028 (1990); *see supra* note 63.

220. *Harper*, 110 S. Ct. at 1036. The Court ultimately held that, "given the requirements of the prison environment, the Due Process Clause permits the State to treat a prison inmate who has a serious mental illness . . . against his will, if the inmate is dangerous to himself or others and the treatment is in the inmate's medical interest." *Id.* at 1039-40. Concerning the procedural due process concerns, the Court concluded that, "[n]otwithstanding the risks that are involved, . . . an inmate's interests are adequately protected, and perhaps better served, by allowing the decision to medicate to be made by medical professionals rather than a judge." *Id.* at 1042.

221. 457 U.S. 291 (1982).

> "[T]he substantive issue involves a definition of th[e] protected constitutional interest, as well as identification of the conditions under which competing state interests might outweigh it. The procedural issue concerns the minimum procedures required by the Constitution for determining that the individual's liberty interest actually is outweighed in a particular instance."[222]

In *Cruzan*, Chief Justice Rehnquist cited the *Mills* case as well as *Harper*.[223] He recognized these cases only as additional support for a general liberty interest[224] and failed to accord them appropriate weight. Both *Mills* and *Harper* outlined a means for analyzing interests implicating the due process clause.[225]

In the context of the *Cruzan* case, the Court accurately posited the procedural aspect of its analysis. The majority addressed whether the due process clause permits a state court to require clear and convincing evidence of a patient's intent before allowing that patient to exercise her liberty interest in refusing treatment.[226] Affirming this procedure as within the realm of protections contemplated by the due process clause, the Court determined the sufficiency of the protection of Nancy's interest without ascertaining the substantive extent of the interest itself.[227] Contrary to prior "axiomatic" dictates, the Court did little to validate Nancy's substantive due process claims.[228]

The *Cruzan* Court simply assumed that "an incompetent person is not able to make an informed and voluntary choice to exercise a hypothetical right to refuse treatment or any other right."[229] This supposition did not outline a spe-

---

222. *Harper*, 110 S. Ct. at 1036 (quoting *Mills*, 457 U.S. at 299).

223. *Cruzan v. Director*, 110 S. Ct. at 2851-52 (citing *Harper*, 110 S. Ct. at 1036; and *Mills*, 457 U.S. at 299).

224. *Id.*

225. *Harper*, 110 S. Ct. at 1036; *Mills*, 457 U.S. at 299. The Court must recognize the substance of the individual right at stake before it can assess comparatively the right in terms of conflicting state interests. From this assessment, the Court should determine the suitability of a state's chosen means to alter procedurally an individual substantive right.

226. *Cruzan v. Director*, 110 S. Ct. at 2852.

227. *Id.*

228. By failing to define the exact nature and extent of Nancy's right, the *Cruzan* Court omitted a crucial step in a proper analysis under the due process clause. *Cf. Harper*, 110 S. Ct. at 1036 ("[I]dentifying the contours of the substantive right remains a task distinct from deciding what procedural protections are necessary to protect that right."). In the context of the *Harper* case, the substantive issue was "what factual circumstances must exist before the State may administer antipsychotic drugs to the prisoner against his will," and the procedural issue was "whether the State's nonjudicial mechanisms used to determine the facts in a particular case are sufficient." *Id.* at 1036.

Justice Scalia justified this oversight by the *Cruzan* Court, explaining that "no 'substantive due process' claim can be maintained unless the claimant demonstrates that the State has deprived him of a right historically and traditionally protected against State interference. That cannot possibly be established here." *Id.* at 2859-60 (Scalia, J., concurring) (citations omitted). Justice Scalia further asserted that the right to refuse treatment traditionally has not been protected because it has been equated with committing suicide. *Id.* at 2860 (Scalia, J., concurring). This proposition is not uniformly accepted. *See supra* notes 75; 154 and accompanying text.

229. *Cruzan v. Director*, 110 S. Ct. at 2852. The Chief Justice's use of terms such as "hypothetical right" degrades the status of the incompetent person whom some courts have asserted has rights identical to those of the competent person. *See, e.g.*, Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 736, 370 N.E.2d 417, 423 (1977) ("[T]he substantive rights of the competent and the incompetent person are the same in regard to the right to decline potentially life-prolonging treatment. The factors which distinguish the two types of persons are . . . preservation and

cifically protected lesser right in Nancy[230] or identify the circumstances that must exist before the state may interfere with the "right," unless the Court presupposed that incompetency alone allows a state through its *parens patriae* power to recognize and at the same time subjugate a patient's right to refuse treatment.

While skirting the definitive enumeration of a right in patients like Nancy, the Court did categorize broadly the interest theoretically implicated as one grounded in liberty as opposed to privacy.[231] By rejecting the proposition that an incompetent patient has a constitutional right of privacy, as recognized in *Griswold* and *Roe v. Wade* and as relied upon by lower courts that have asserted a constitutional interest in a patient's right to die,[232] the Court stripped away some degree of protection previously thought to inure to this right.

Justice Brandeis first articulated the right of privacy in constitutional terms: "[N]ow the right to life has come to mean the right to enjoy life,—the right to be let alone."[233] Justice Brandeis continued, "The makers of our Constitution . . . sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. . . . They conferred . . . the right to be let alone—the most comprehensive of rights and the right most valued by civilized man."[234]

In *Roe v. Wade*,[235] the Court articulated this privacy right in the fourteenth amendment[236] as a species of liberty deemed fundamental or " 'implicit in the concept of ordered liberty.' "[237] By this taxonomy, the *Roe v. Wade* Court set privacy apart from the general fourteenth amendment liberty interest and held that only a compelling state interest justifies regulation limiting these rights.[238] This stance connotes the unequivocal guarantee of fundamental rights.

In contrast, the general "domain of liberty" within fourteenth amendment

---

implementation of the rights."). The incompetent person's rights differ only in the method by which they may be effectuated. *Id.*

230. Justice Brennan asserted that the majority avoided discussing the measure of Nancy's liberty interest as well as its application. *Cruzan v. Director*, 110 S. Ct. at 2864 (Brennan, J., dissenting).

231. *Id.* at 2851 n.7.

232. *See, e.g.*, Superintendent of Belchertown v. Saikewicz, 373 Mass. 728, 738-40, 370 N.E.2d 417, 424 (1977); *In re* Quinlan, 70 N.J. 10, 39-42, 355 A.2d 647, 663-64, *cert. denied sub nom.* Garger v. New Jersey, 429 U.S. 922 (1976).

233. Brandeis & Warren, *supra* note 8, at 193.

234. Olmstead v. United States, 277 U.S. 438, 478 (1928).

235. 410 U.S. 113 (1973).

236. *Id.* at 153.

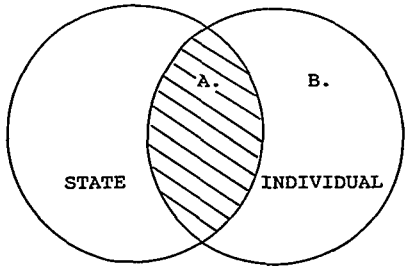
237. *Id.* at 152 (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)). The right of privacy encompasses abortion, *id.*; contraception, Eisenstadt v. Baird, 405 U.S. 438, 453-54 (1972); marriage, Loving v. Virginia, 388 U.S. 1, 12 (1967); family relationships, Prince v. Massachusetts, 321 U.S. 158, 166 (1944); and procreation, Skinner v. Oklahoma, 316 U.S. 535, 541-42 (1942).

238. Roe v. Wade, 410 U.S. at 155. The Court ruled anti-abortion statutes violative of the due process clause of the fourteenth amendment and established a framework, based on the three trimesters of pregnancy, for promoting both the individual and state interests at stake. *Id.* at 164-65. Although permitting states to place restrictions on abortion as the fetus reaches viability, the Court carved out an inalienable right to an abortion, or a zone of privacy, during the first trimester of pregnancy. *Id.* at 164.

The Court established the individual's right of privacy as a protected zone into which the government could not penetrate. The following graph shows the significance of this zone:

purview shields the individual from "oppressive and arbitrary" governmental activity,[239] but permits those constraints founded on proper governmental objectives.[240] This framework suggests something less than the certain security outlined in *Roe v. Wade*; the general liberty interest is not impervious, but is afforded protection commensurate to its import.[241]

By expressing Nancy's interest in unwanted treatment in terms of a general liberty right, the *Cruzan* majority recognized a need for constitutional protection in this area but not for constitutional guarantee.[242] To effectuate her rights, the Court had to balance them "against *relevant* state interests,"[243] a lesser scrutiny than that found in *Roe v. Wade*.[244] As a result, Nancy's parents had to present clear and convincing evidence of her intent not to be treated before her interest, in balance, outweighed that of Missouri.[245] Although the Court did not categorically deny a liberty-based right to refuse treatment,[246] its holding will subject incompetent patients to judicial resolution of the extent of their rights on a case-by-case basis. Therefore, the holding provides no constitutional guarantee.[247]



The area signified by A. represents an individual's liberty interests; in this area the individual's and the state's interests overlap. Because of this area of conflict, the fourteenth amendment entitles a state to infringe on these individual liberty interests, if done in the name of a relevant state interest and by means of protective procedural safeguards. The area signified by B. represents the individual's zone of privacy. Some interests are so fundamental and particular to the individual that they reside outside the regular scope of governmental regulation. A state may penetrate this zone of privacy only for compelling reasons.

239. Palko v. Connecticut, 302 U.S. 319, 327 (1937).

240. Bolling v. Sharpe, 347 U.S. 497, 499-500 (1954).

241. Therefore, states justifiably can infringe on individual liberty through restrictions such as mandatory seatbelt laws, *see, e.g.*, N.C. GEN. STAT. § 20-135.2A (1989); and compulsory immunization programs, *see, e.g.*, N.C. GEN. STAT. § 130A-152 (1989).

242. Justice Brennan, joined by Justices Marshall and Blackmun, differed with the majority on this point. Justice Brennan defined Nancy's substantive right as "a fundamental right to be free of unwanted artificial nutrition and hydration, which right is not outweighed by any interests of the State." *Cruzan v. Director*, 110 S. Ct. at 2864 (Brennan, J., dissenting).

243. *Id.* at 2852 (emphasis added).

244. Roe v. Wade, 410 U.S. 113, 115 (1973); *see supra* note 238 and accompanying text.

245. *Cruzan v. Director*, 110 S. Ct. at 2852.

246. *Id.*

247. As abortion rights stand currently under *Roe v. Wade*, judicial intervention is neither mandated nor suggested. The *Roe v. Wade* Court outlined the parameters of the privacy interest and conferred on private physicians, guided by state legislatures, the discretion to exercise their medical judgment in consultation with their patients. *Roe v. Wade*, 410 U.S. at 164-65. This holding by a seven-Justice majority precariously awaits almost inevitable review by future Courts.

The issues surrounding the beginning and the ending of life are closely intertwined, and the increasing volatility of the abortion issues implicitly pervades the issues surrounding the right to

The Court went a step further to cloud the issues. In addition to couching its argument in terms of liberty rather than privacy, the majority made an unwarranted assumption in its analysis that simply is not true. The Court stated, "Missouri has . . . recognized that under certain circumstances[248] a surrogate may act for the patient in electing to have hydration and nutrition withdrawn in such a way as to cause death."[249] After determining that Missouri was not foreclosing the right to refuse treatment altogether, the Court reviewed Missouri's procedural requirements that must precede treatment withdrawal.[250]

Missouri's provisions for circumstances under which treatment withdrawal is permissible[251] are themselves anomalous, and the Court's adoption of the proviso promotes ambiguity in treatment withdrawal decisions. First, the Missouri living will statute excludes the administration of nutrition and hydration from the medical procedures that a patient may elect to terminate.[252] Therefore, even if a competent patient chooses to execute a living will pursuant to the Missouri statute, which is the first means by which Missouri permits treatment withdrawal, use of that statutory language precludes him from consensually manifesting his intent to forego artificial nutrition and hydration. Missouri's second means of permitting treatment withdrawal is a showing by clear and convincing evidence that a patient so desired.[253] What Missouri did not explain, however, is how clear and convincing evidence that a patient does not consent to artificial administration of hydration and nutrition will suffice to permit removal of such treatment when a written declaration to that effect will not. To further the

---

refuse life-sustaining treatment. Abortion opponents went to court unsuccessfully seven times to intervene on Nancy's behalf and to force Missouri to resume feeding after the Court's December, 14, 1991, order permitting treatment termination. N.Y. Times, Dec. 27, 1990, at A15, col. 2. Nineteen demonstrators were arrested when they entered the hospital in an attempt to resume Nancy's artificial feeding. *Id.*

The relationship between these interests is not tenuous. The following hypothetical is illustrative. Assume the *Cruzan* Court recognized that incompetent patients hold an unfettered privacy right to refuse life-sustaining treatment, or more broadly the right to die. Assume also that the Court placed vindication of this right in the hands of a third party such as Nancy's parents or other health care surrogates. Then, if the Court later chooses to overturn *Roe v. Wade* and retract the privacy right from the area of abortion, under the *Cruzan* precedent, a woman may still assert the right: she only need present herself as the incompetent fetus' surrogate, seeking the effectuation of its constitutionally guaranteed desire to die.

By positing the interest to refuse treatment as a general liberty interest, *Cruzan v. Director*, 110 S. Ct. at 2851 n.7, the Court may have sought to distance these controversial issues and thus to preclude just such a doctrinal merger.

248. Missouri was willing to accept surrogate decisionmaking under two circumstances: (1) Third-party action to effectuate an incompetent patient's wishes as detailed according to the formalities required under Missouri's Living Will Statute; and (2) third-party action to carry out the incompetent patient's intent as shown by "clear and convincing, inherently reliable evidence." Cruzan v. Harmon, 760 S.W.2d 408, 425 (Mo. 1988) (en banc), *aff'd sub nom.* Cruzan v. Director, Mo. Dep't of Health, 110 S. Ct. 2841 (1990).

249. *Cruzan v. Director*, 110 S. Ct. at 2852.

250. *Id.*

251. *See supra* note 248.

252. MO. REV. STAT. § 459.010(3) (1986) ("Death-prolonging procedure shall not include . . . the performance of any procedure to provide nutrition or hydration.").

253. Cruzan v. Harmon, 760 S.W.2d 408, 425 (Mo. 1988) (en banc), *aff'd sub nom.* Cruzan v. Director, Mo. Dep't of Health, 110 S. Ct. 2841 (1990).

circuitous nature of this argument, one might ask whether a living will is clear and convincing evidence of intent.

Thus Missouri created parameters for permissible treatment withdrawal that are antithetical, and the Court presumptively incorporated these parameters in its analysis. Because Missouri since has permitted the Cruzans to terminate Nancy's treatment,[254] this ambiguity remains unresolved. Missouri affords incompetent patients varying rights based on the procedure followed. Hence, had Nancy executed a living will, she might still be alive.

It is axiomatic that, if a right to refuse treatment exists, it must be a uniform one. Procedures erected as protective measures should not alter the nature of the right incongruously. The *Cruzan* majority failed to unravel the Missouri paradigm or the fallacy on which it is based—that artificial hydration and nutrition are not medical treatments.[255] The lack of uniformity in Missouri's handling of treatment withdrawal stems from the distinction the state gives nutrition and hydration,[256] and the *Cruzan* majority chose not to clarify expressly the medical nature of nutrition and hydration.[257] Although Justice O'Connor emphatically described artificial nutrition and hydration as medical treatment,[258] nowhere did the Court attempt to rectify Missouri's statutory and judicial inconsistency. Therefore, incompetent patients in Missouri have no guarantee of, or protection for, the uniform implementation of their right to refuse artificial nutrition and hydration.[259]

What incompetent patients do have is a procedural impediment to the exer-

254. N.Y. Times, Dec. 15, 1990, § 1, at 10, col. 1.

255. Cruzan v. Harmon, 760 S.W.2d 408, 423 (Mo. 1988) (en banc) ("[C]ommon sense tells us that food and water do not treat an illness, they maintain a life."), *aff'd sub nom.* Cruzan v. Director, Mo. Dep't of Health, 110 S. Ct. 2841 (1990).

256. *See* MO. REV. STAT. § 459.010(3) (1986).

257. *See supra* note 57.

258. *Cruzan v. Director*, 110 S. Ct. at 2856 (O'Connor, J., concurring) ("Artificial feeding cannot readily be distinguished from other forms of medical treatment."). In addition, the Council on Ethical and Judicial Affairs of the American Medical Association issued a statement in 1986 declaring that life-prolonging medical treatments, including artificial nutrition and hydration, may be withheld from a patient in a persistent vegetative state. O'Rouke, *Comatose Patients Should Not Always Receive Food and Fluids*, in OPPOSING VIEWPOINTS SOURCES: DEATH/DYING 285 (1987). The President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research found that artificial nutrition and hydration are not obligatory. PRESIDENT'S COMMISSION, *supra* note 23, at 90; *see also* D. MEYERS, *supra* note 11, at Supp. §§ 12:26 to :26.2 (collecting cases authorizing the termination of nutrition and hydration). *Contra* Child Abuse Prevention, Adoption, and Family Services Act, 42 U.S.C. §§ 5106g(4) & (10) (1988) (defining "child abuse and neglect" to include "negligent treatment . . . which indicate[s] that the child's health . . . is harmed or threatened thereby" and defining negligent "withholding of medically indicated treatment" as "the failure to respond to the infant's life-threatening conditions by providing treatment (including appropriate nutrition [and] hydration)"); D. MEYERS, *supra* note 11, at Supp. § 12:27 (providing arguments against terminating nourishment).

259. Judge Welliver of the Supreme Court of Missouri recognized this injustice in his *Cruzan v. Harmon* dissent:

> Yes, we Missourians can sign an instrument directing the withholding or withdrawal of death-prolonging procedures, but . . . "death-prolonging procedure" does not include: (1) "the administration of medication," (2) "the performance of medical procedure deemed necessary to provide comfort care or to alleviate pain," (3) "the performance of any procedure to provide nutrition," or (4) "the performance of any procedure to provide . . . hydration." If we cannot authorize withdrawing or withholding "medication," "nutrition" or "hydration," then what can we authorize to be withheld in Missouri? The Mis-

cise of any right to refuse treatment.[260] The Court affirmed Missouri's erection of an evidentiary safeguard to ensure that risk of an erroneous decision is borne by the patient's surrogate decision maker.[261] Thereby, the surrogate must meet a higher burden of proof—a clear and convincing standard—than is required in most civil proceedings.[262]

The evidentiary procedure the Court accepted has two aspects. First, the surrogate decision maker must establish the expressed intentions of the incompetent patient concerning administration of the treatment in question.[263] Secondly, the surrogate must do so by clear and convincing evidence.[264] The first aspect of the procedure is the subjective test.[265] The test itself is not unreasonable; as the Court pointed out, withdrawing treatment so as to hasten death, when not in accord with the patient's wishes, is "not susceptible of correction."[266] The efficacy of the subjective test breaks down, however, when the patient has been incompetent his entire life or has specific but uncommunicated desires concerning his treatment. The Court did not address these situations, but the *Cruzan* facts are distinguishable.[267] Thus, a narrow reading of the holding does not foreclose the applicability of a different test to the lifetime incompetent.

In contrast, if an incompetent patient merely failed to articulate his desires while competent, the second prong of Missouri's procedural framework precludes effectuation of his right to refuse treatment. Such a patient has established no basis for clear and convincing proof of his intent. The Court inferred that the basis for proof must be, at the least, oral observations about the treat-

---

souri Living Will Act is a fraud on Missourians who believe we have been given a right to execute a living will, and to die naturally, respectably, and in peace.

Cruzan v. Harmon, 760 S.W.2d 408, 423 (Mo. 1988) (en banc) (Welliver, J., dissenting) (quoting MO. REV. STAT. § 459.010(3) (1986)), *aff'd sub nom.* Cruzan v. Director, Mo. Dep't of Health, 110 S. Ct. 2841 (1990).

260. Justice Brennan disavowed the procedural protection upheld by the majority, as "the improperly biased procedural obstacles imposed by the Missouri Supreme Court impermissibly burden that right." *Cruzan v. Director*, 110 S. Ct. at 2864 (Brennan, J., dissenting).

261. *Id.* at 2854.

262. E. CLEARY, *supra* note 79, § 340, at 959.

263. *See* Cruzan v. Harmon, 760 S.W.2d 408, 424 (Mo. 1988) (en banc), *aff'd sub nom.* Cruzan v. Director, Mo. Dep't of Health, 110 S. Ct. 2841 (1990)

264. *Cruzan v. Director*, 110 S. Ct. at 2852.

265. *See supra* text accompanying notes 183-87. This test has been adopted in at least two other jurisdictions, although it is not the exclusive test in one of the states. *See In re* Conroy, 98 N.J. 321, 360, 486 A.2d 1209, 1229 (1985) (also adopting limited-objective and pure-objective tests); *In re* O'Connor, 72 N.Y.2d 517, 531, 531 N.E.2d 607, 613, 534 N.Y.S.2d 886, 892 (1988). These cases involved incompetent patients. A majority of jurisdictions, on the other hand, apply an "objective test" to determine the existence of informed consent to medical treatment when the patient is competent. F. ROZOVSKY, *supra* note 154, § 1.15.4, at 79. The objective test is based on what a reasonable person in the patient's position, not the patient, would consent to. *Id.*; *see, e.g.*, LaCaze v. Collier, 434 So. 2d 1039, 1048 (La. 1983); Woolley v. Henderson, 418 A.2d 1123, 1132 (Me. 1980); Reikes v. Martin, 471 So. 2d 385, 392-93 (Miss. 1985). *But see* McPherson v. Ellis, 305 N.C. 266, 273, 287 S.E.2d 892, 897 (1982) (holding that the subjective test is the proper standard to apply in determining whether competent patient would have undergone treatment).

266. *Cruzan v. Director*, 110 S. Ct. at 2854.

267. Nancy had not been incompetent her entire life and she had made expressions regarding treatment preferences. Cruzan v. Harmon, 760 S.W.2d 408, 411 (Mo. 1988) (en banc), *aff'd sub nom.* Cruzan v. Director, Mo. Dep't of Health, 110 S. Ct. 2841 (1990).

ment contemplated.[268] The Court noted further the fact that most states forbid extrinsic oral testimony regarding the terms of a written contract, that the Statute of Frauds makes unenforceable oral contracts to leave property by will, and that the formalities surrounding the making of a will invariably require the instrument to be in writing.[269] Because the Court equated these requirements with Missouri's clear and convincing burden of proof, it implicitly showed a strong preference for evidence in the form of a writing.[270] The Court would impose an unjust burden upon many individuals by requiring a writing to effectuate the right to self-determination. Such a procedural requirement would be cumbersome on the indigent and illiterate, essentially foreclosing their right to make independent decisions concerning their treatment. Only a small number of highly educated and motivated patients would be able to achieve true self-determination, and not all of those patients would know of this requirement or avail themselves of the opportunity to declare their wishes in writing.[271] Of at least seven jurisdictions currently requiring clear and convincing evidence in such matters, none recognize a written documentation as the only form of evidence meeting the burden of proof.[272]

In *Cruzan*, the Court showed its unwillingness to grant an unfettered right to the incompetent patient to refuse treatment. By limiting the scope of its analysis to the procedure implemented by the Missouri court, the Court might be foretelling its intention to leave this question to the states. Because the Court's decision does not prevent states from developing other approaches for protecting an incompetent patient's interest in refusing unwanted treatment,[273] each state now is charged with formulating or revising its own policy concerning treatment withdrawal. The states may adopt *Cruzan*'s subjective test with a clear and convincing evidentiary requirement, but states are equally charged to develop their own approach in their own "laboratory."[274] By affirming one narrow standard, the Court has precluded only one thing—the categoric denial by a state of a

268. *Cruzan v. Director*, 110 S. Ct. at 2855 ("[Nancy's] observations did not deal in terms with withdrawal of medical treatment or of hydration and nutrition.").

269. *Id.* at 2854.

270. *Id.* As Missouri's living-will statute was not in effect prior to Nancy's accident, the Supreme Court of Missouri could not assert that compliance with the statute would satisfy the evidentiary requirement, and the United States Supreme Court, on review, was limited to drawing implications only from the statute. *See id.* at 2852.

271. *Cf.* N.Y. Times, Dec. 27, 1990, at A15, col. 1 (During the month following the Court's ruling, the Society for the Right to Die answered nearly 300,000 requests for living will forms.).

272. *See* McConnell v. Beverly Enters.-Conn., Inc., 209 Conn. 692, 709-10, 553 A.2d 596, 605 (1989); *In re* Guardianship of Browning, 568 So. 2d 4, 15 (Fla. 1990); *In re* Estate of Longeway, 133 Ill. 2d 33, 549 N.E.2d 292, 300 (1989); *In re* Gardner, 534 A.2d 947, 953 (Me. 1987); *In re* Conroy, 98 N.J. 321, 360-61, 486 A.2d 1209, 1229-30 (1985); *In re* O'Connor, 72 N.Y.2d 517, 531-32, 531 N.E.2d 607, 613-14, 534 N.Y.S.2d 886, 892-93 (1988); Leach v. Akron Gen. Medical Center, 22 Ohio Op. 3d 49, 53, 426 N.E.2d 809, 815 (1980).

273. *Cruzan v. Director*, 110 S. Ct. at 2858-59 (O'Connor, J., concurring).

274. *Id.* at 2859 (O'Connor, J., concurring).

At the time of writing, Missouri itself had proposed legislation that would "allow a person to stipulate that another person has legal authority to decide about life-sustaining medical treatment if the first person becomes incapacitated." Chicago Tribune, Jan. 23, 1991, § 1, at 8, col. 1. If passed by both houses, the legislation must by approved by a statewide referendum. *Id.* at col. 2. Recently passed federal legislation requires health facilities receiving funds from Medicare and Medicaid programs to provide patients with written information explaining their right to die options under their

patient's right to refuse treatment.[275]

The *Cruzan* Court answered only a few of the questions posed by the case.[276] Before turning to the issue of treatment removal itself, the Court properly viewed the context in which the right would be exercised. The facts of this case are compelling. For eight years, Nancy remained a spastic quadriplegic[277] unable to perform basic bodily functions[278] and, more significantly, unable to enjoy life.[279] Through a senseless accident, Nancy was robbed of the sapient qualities of emotion, thought, and sensation. Yet this was not enough; for two years, the State of Missouri robbed Nancy of peace and consolation. Missouri chose to view its role as a preserver of life and asserted its authority not to treat Nancy but to maintain her.[280] Medical treatment, however, should not be a legal term of art. Physicians are best equipped to define treatments, and the courts should take judicial notice of these definitions. Therefore, deference to medical judgment dictates that the courts deem artificial administration of nutrition and hydration a medical treatment. Missouri has yet to accept this, but Justice O'Connor and the four dissenting justices—a majority of the Court—agreed on this matter.[281]

Turning to the legal implications of treatment withdrawal, the Court assumed a substantive liberty interest exists that allows a patient to refuse treatment,[282] leaving for a later day the definition of the scope of this interest. The incompetent patient's interest would be most protected, however, if formulated as a right of privacy.[283] The Court did speak decisively here; this avenue of ideology is no longer available. The Court established the interest, to the extent

---

state laws. Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 4206, 104 Stat. 1388 (1991).

Currently, North Carolina's Right to Natural Death statute provides:

> If a person is comatose and there is no reasonable possibility that he will return to a cognitive sapient state or is mentally incapacitated, and [i]t is determined by the attending physician that the person's present condition is [t]erminal; and [i]ncurable; and [i]rreversible; and . . . [a] vital function of the person . . . is being sustained by extraordinary means; then, extraordinary means may be withheld or discontinued.

N.C. GEN. STAT. § 90-322 (1990). The North Carolina Medical Society recently issued *Layman's Guide to Death with Dignity*, "intended to promote communication between a physician and patient regarding the way treatment decisions will be made when the patient is diagnosed as being in a persistent vegetative state." Diosegy, *Advance Care Directives: May the Force Be with You*, in THE WILL & THE WAY: NORTH CAROLINA BAR ASS'N ESTATE PLANNING & FIDUCIARY LAW SECTION NEWSLETTER, Jan. 1991, at 4. The guide assists attorneys and their clients by providing a sample living will, a medical directive form outlining the patient's choices of preferred treatments, and a sample durable power of attorney for health care decisionmaking. *Id.* The guide is available through the North Carolina Bar Association.

275. *Cruzan v. Director*, 110 S. Ct. at 2852.

276. *See supra* notes 14-21 and accompanying text.

277. Petition for Writ of Certiorari at A95, *Cruzan v. Director* (No. 88-1503).

278. *See supra* notes 5-6 and accompanying text.

279. *See supra* notes 233-34 and accompanying text.

280. *See* Cruzan v. Harmon, 760 S.W.2d 408, 423 (Mo. 1988) (en banc), *aff'd sub nom.* Cruzan v. Director, Mo. Dep't of Health, 110 S. Ct. 2841 (1990).

281. *See Cruzan v. Director*, 110 S. Ct. at 2857 (O'Connor, J., concurring); *id.* at 2864 (Brennan, J., dissenting); *id.* at 2879 (Stevens, J., dissenting).

282. *Id.* at 2851-52, 2851 n.7.

283. *See supra* notes 235-47 and accompanying text.

that it exists constitutionally, as a general fourteenth amendment liberty interest.[284] This is not to say that the right also cannot be expressed exclusively or tangentially as a common-law interest. As a common-law right based on the doctrine of informed consent, the interest is most flexibly granted but also most subject to legislative or judicial extinction. Most living will statutes, however, are based on this common-law principle of self-determination.[285] States, therefore, would be remiss to turn away from their own common-law doctrine now, particularly in view of the minimal constitutional guarantee to the individual outlined by the Court.

Finally, the Court did approve one test—the subjective test met with clear and convincing evidence—as a satisfactory method for a state to regulate the process of treatment removal. Thus the Court provided one possible solution to the puzzling issues raised concerning state intervention into the treatment area.[286] In fact, these issues are raised rhetorically, because apparently the Court has left the questions unanswered so that each of the states may respond. This leads to the last question—whether there is one best way to balance these countervailing interests?

The answer is found in the heart and mind of each individual and is expressed by a vote. The solutions to these life-threatening issues must come from the people through their legislatures. The process of death is viewed in many ways that cannot be articulated by a nine-member bench; for assurance that consolation will be the end, the states' legislatures must provide the means.

JENNIFER E. BENNETT OVERTON

284. *Cruzan v. Director*, 110 S. Ct. at 2851 n.7.

285. *See supra* note 208 and accompanying text. Justice O'Connor spoke favorably of states' consensual based statutes. *Cruzan v. Director*, 110 S. Ct. at 2857-58 (O'Connor, J., concurring).

286. *See supra* notes 18-20 and accompanying text.