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THE UNCONSTITUTIONAL TREATMENT OF NANCY CRUZAN

By M. Rose Gasner*

On January 11, 1983 Nancy Beth Cruzan, then 25 years of age, was found lying near her overturned car. Paramedics began efforts to revive her and transported her to Freeman Hospital in Joplin, Missouri. There she was diagnosed as having a lacerated liver and probable cerebral contusion compounded by anoxia (deprivation of oxygen) estimated at twelve to fourteen minutes. Nancy remained unconscious. A gastrostomy tube was implanted on February 7th to supply nutrition and hydration, and rehabilitation efforts began, however, without success.¹ Nine months after the accident,

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1. Nancy Cruzan spent a month to six weeks in the Brady Building Rehabilitation Unit of St. John's Hospital in Joplin, Missouri. There, the rehabilitation specialists tried to teach her to sit up and to respond to her environment again. They engaged her in exercises involving tactile, oral and auditory stimulation and passive range of motion. There was no success. Testimony of Dr. Saad M. Al-Shatir, March 9, 1988, at 271-72, 278. *Cruzan v. Harmon*, 760 S.W.2d 408, 411 (Mo. 1988) (*en banc*).

Nancy was transferred to the Missouri Rehabilitation Center in Mount Vernon, where she has remained in a persistent vegetative state.² Her parents (as co-guardians) requested that hospital employees discontinue the gastrostomy feedings.³ The request was refused. In response, the Cruzans filed a declaratory judgment action seeking judicial sanction of their instruction.⁴ The initial petition sought a ruling that Nancy Cruzan has a common law right to be free of unwanted treatment as well as a state and federal constitutional right to privacy, which also protects the right to refuse medical treatment.⁵

The trial court ruled for the guardians, finding that there was clear and convincing evidence that Nancy "would not wish to continue with nutrition and hydration,"⁶ that she had a "right to liberty"⁷ and that to deny her co-guardians authority to act would deprive her of equal protection of the

2. As described by the American Academy of Neurology:

the persistent vegetative state is a form of eyes-open permanent unconsciousness in which the patient has periods of wakefulness and physiological sleep/wake cycles, but at no time is the patient aware of him- or herself or the environment. Neurologically, being awake but unaware is the result of a functioning brainstem and the total loss of cerebral cortical functioning.

Position of the American Academy of Neurology on Certain Aspects of the Care and Management of the Persistent Vegetative State Patient, 39 NEUROLOGY 125 (1989); Cranford, *The Persistent Vegetative State: The Medical Reality (Getting the Facts Straight)*, 18 HASTINGS CTR. REP. 27 (1988).

3. Joe and Joyce Cruzan, as Nancy Cruzan's co-guardians, wrote the Director of the hospital on May 12, 1987, requesting the "cooperation of the Missouri Rehabilitation Center in discontinuing the life support system that provides nutrition and hydration to our daughter." *Cruzan*, 760 S.W.2d at 432. The hospital administration responded that it would not remove the tube because it would not be permitted under Missouri law. Testimony of Donald Lampkins, March 10, 1988, at 341. *Id.* at 432 (Judgment of the trial court reprinted in the opinion of Higgins, J., dissenting).

4. The petition was filed in the Probate Division of the Circuit Court of Jasper County, Missouri, Estate. (CV384-9P). *Id.* (Judgment of the trial court reprinted in the opinion of Higgins, J., dissenting).

5. The petition alleged that each of these rights could be exercised on Nancy's behalf by her parents as her co-guardians. *Id.* at 422 (majority opinion).

6. *Cruzan*, 760 S.W.2d at 433. (trial court believed clear and convincing evidence was presented) (judgment of the trial court reprinted in the opinion of Higgins, J., dissenting).

7. *Id.*

law.⁸ The state and Nancy's guardian ad litem appealed to the Missouri Supreme Court, which reversed in a 4-3 decision.⁹

I. THE MISSOURI SUPREME COURT DECISION

The decision by a narrow majority of the Missouri Supreme Court was the first time an appellate court found that under no circumstances could nutrition and hydration be removed from a patient in a persistent vegetative state. Nine appellate courts have held that it is permissible to end tube feeding in these circumstances.¹⁰

In rejecting the reasoning of some 50 appellate decisions from 16 jurisdictions,¹¹ the court scrupulously examined and dismissed the existing theoretical bases of the right to die.¹² It first looked at the common law right to refuse treatment, and traced its development from a right of individual autonomy, to the concept that a physician commits a battery when a medical procedure is performed without the patient's consent.¹³ The next step in the analysis is that the doctrine of informed consent implies a choice, and must

8. *Id.*

9. *Cruzan*, 760 S.W.2d at 411.

10. *Rasmussen v. Fleming*, 154 Ariz. 207, 741 P.2d 674 (Ariz. 1987); *In re Conservatorship of Drabick*, 200 Cal. App. 3d 185, 245 Cal. Rptr. 840 (Cal. Ct. App. 1988), *cert. denied*, 109 S. Ct. 399, reh'g denied, 109 S. Ct. 828 (1988); *McConnell v. Beverly Enterprises-Connecticut*, 209 Conn. 692, 553 A.2d 596 (1989); *Corbett v. D'Alessandro*, 487 So. 2d 368 (Fla. Dist. Ct. App.), *rev. denied*, 492 So. 2d 1331 (Fla. 1986); *In re Estate of Longway*, No. 67318 (Il. Sup. Ct. Nov. 13, 1989); *In re Gardner*, 534 A.2d 947 (Me. 1987); *Brophy v. New England Sinai Hospital*, 398 Mass. 417, 497 N.E.2d 626 (1986); *In re Jobes*, 108 N.J. 394, 529 A.2d 434 (1987); *Delio v. Westchester County Medical Center*, 129 A.D.2d 1, 516 N.Y.S.2d 677 (2d Dep't 1987).

11. The Missouri Supreme Court itself cited the cases from other jurisdictions, and then stated, "[n]early unanimously, those courts have found a way to allow persons wishing to die, or those who seek the death of a ward, to meet the end sought." *Cruzan*, 760 S.W.2d at 412 n.4 (citing 50 cites from 17 jurisdictions: Arizona; California; Colorado; Connecticut; Delaware; Florida; Georgia; Iowa; Louisiana; Maine; Massachusetts; Minnesota; New Jersey; New York; Ohio; Pennsylvania; and Washington).

12. *See id.* at 412-18.

13. "The doctrine of informed consent arose in recognition of the value society places on a person's autonomy and as the primary vehicle by which a person can protect the integrity of his body." *Id.* at 416-17.

include a right to refuse consent as well. The court quoted from the New Jersey case of *In re Conroy*, which stated that "[t]he patient's ability to control his body integrity . . . is significant only when one recognizes that his right also encompasses a right to informed refusal."¹⁴

The court proceeded to entirely gut the applicability of the common-law right to refuse treatment to incompetent patients by stating that these decisions must be "informed." The Court then recited the prerequisites to "informed consent" for competent patients: (1) the patient must have the capacity to reason and make judgments; (2) the decision must be made voluntarily and without coercion; and (3) the patient must have a clear understanding of the risks and benefits of the treatment as well as the nature of the disease.¹⁵

Most patient choices about the use of life sustaining treatment must be made in advance, because the decisions are usually carried out when the patient is incompetent. The Missouri court found that "[i]t is definitionally impossible for a person to make an informed decision--either to consent or to refuse--under hypothetical circumstances, neither the benefits nor the risks of treatment can be properly weighed or fully appreciated."¹⁶

The court next looked to the right to privacy. While unequivocally stating that the Missouri Constitution did not "support the right of a person to refuse medical treatment in every circumstance,"¹⁷ with regard to federal protection, it only stated that it had "grave doubts as to the applicability of privacy rights to decisions to terminate the provision of food and water to an incompetent patient."¹⁸ The court then went on to make its most radical holding: no matter what the

14. *Id.* at 417 (citing *In re Conroy*, 98 N.J. 321, 347, 486 A.2d 1209, 1222 (1985)).

15. *See id.* at 417 (citing Wanzer, et al., *The Physician's Responsibilities Toward Hopelessly Ill Patients*, 310 NEW ENGL. J. MED. 955 (1984)).

16. *Id.* at 417.

17. *Id.* at 417.

18. *Id.* at 418.

nature of Nancy Cruzan's rights, the state's interest in preservation of life is "unqualified"¹⁹ and outweighs whatever her preferences would be:

Given the fact that Nancy is alive and that the burdens of her treatment are not excessive for her, we do not believe her right to refuse treatment, whether that right proceeds from a constitutional right of privacy or a common law right to refuse treatment, outweighs the immense, clear fact of life in which the state maintains a vital interest.²⁰

No other state has seen its "vital" interest in the same way.²¹ Missouri saw its special interest in the preservation of life reflected in two separate legislative statements: the Living Will²² statute's exclusion of artificial nutrition and hydration from medical treatment²³ and the preamble to the restrictive abortion statute,²⁴ which asserts a "right to life to all humans"²⁵

19. *Id.* at 420.

20. *Id.* at 424.

21. The Missouri Court was very aware of its unique path:

[I]n casting the balance between the patient's common law right to refuse treatment/constitutional right to privacy and the state's interest in preserving life, we acknowledge that the great majority of courts allow the termination of life-sustaining treatment. In doing so, these courts invariably find that the patient's right to refuse treatment outweighs the state's interest in preserving life. In some cases, that result is the product of a hopeless medical prognosis; in others, the court allows concerns with the quality of life to discount the state's interest in life.

Id. at 420-21.

22. A "living will" is a writing in which a person sets forth his or her treatment preferences in the event a certain medical condition is met. For those states with living will statutes, see *infra* note 73, the specific execution requirements are defined by the statute, as are the treatments that may be withheld or withdrawn, and the specific medical condition that must be present. See generally Cohen, *Living wills and Health Care Proxies*, in 3 MURPHY'S WILL CLAUSES Ch. 20 (1988).

23. MO. REV. STAT. § 459.010(3) (1983 & Supp. 1990).

24. MO. REV. STAT. § 188.010, 188.015(7) (1983 & Supp. 1990).

25. *Id.* at § 188.010.

and was tested in *Webster v. Reproductive Health Services*.²⁶

The Supreme Court granted *certiorari* on July 3, 1989, marking the first time it has agreed to hear a "right to die" case.²⁷ Four previous cases have been denied *certiorari*, but in all other cases, either the patient's right to have treatment withheld was vindicated or the issue became moot.²⁸ While the petition for *certiorari* vigorously argued that there was a split among the circuits, the Missouri decision was more of an aberration than a real trend reflecting a number of states taking an absolute stand on the preservation of life.²⁹

Not only was the Missouri decision an anomaly, but Nancy Cruzan is not representative of most dying patients.³⁰ Yet her plight raises many of the issues that arise in other cases where life-sustaining treatment is sought to be withheld or withdrawn. Approximately two million Americans die every year.³¹ Eighty percent of those deaths take place in a hospital

26. *Webster v. Reproductive Health Services*, 109 S.Ct. 3040 (1989).

27. Greenhouse, *Does Right to Privacy Include Right to Die? Court to Decide*, N.Y. Times, July 25, 1989, at A1, col. 3.

28. *In re Quinlan*, 70 N.J. 10, 355 A.2d 647 (1976), *cert. denied sub nom. Garger v. New Jersey*, 429 U.S. 922 (1976) (patient's right to have respirator withdrawn upheld by state court); *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) (formerly competent patient's right to have treatment withdrawn upheld, patient who was never incompetent denied right); *In re Estate of Prange*, 166 Ill. App. 3d 1091, 520 N.E.2d 946 (1988), *vacated*, 122 Ill. Dec. 805, 527 N.E.2d 303, *cert. denied sub nom. Murphy v. Benson*, 109 S.Ct. 229 (1988) (Illinois Supreme Court vacated lower court decision without opinion, but patient had died after trial court hearing but before the decision was issued); *In Re Conservatorship of Drabick*, 200 Cal. App. 3d 185, 245 Cal. Rptr. 840 (Cal. Ct. App. 1988), *appeal denied* (July 28, 1988), *cert. denied*, 109 S. Ct. 399, *reh'g denied*, 109 S. Ct. 828 (1988) (patient's right to have tube feeding withdrawn upheld).

29. See *Supra* note 28.

30. There are approximately 5,000-10,000 patients in a persistent vegetative state in the United States. Cranford, *The Persistent Vegetative State: The Medical Reality (Getting the Facts Straight)*, 18 HASTINGS CTR. REP. 27, 31 (Feb./Mar. 1988). Moreover, the majority of deaths occur at older ages than Nancy's. In 1984, 70% of all deaths occurred in the age group over 65. U.S. Cong.: Office of Technology Assessment, *Life Sustaining Technologies and the Elderly* 77 (1987) [hereinafter Office of Technology Assessment Report]. President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, *Deciding to Forego Life-Sustaining Treatment, A Report on the Ethical, Medical, and Legal Issues in Treatment Decisions* 176-77 (1983) [hereinafter President's Commission Report].

31. President's Commission Report, *supra* note 30, at 15. United States National Center for Health Statistics, 37 MONTHLY VITAL STATISTICS 6 (1989).

or nursing home,³² and nearly all of those deaths involve a decision by someone to do or *not* to do something which could, for some time, avert the moment of that death and prolong the dying process.³³ "[T]he timing of death--once a matter of fate--is now a matter of human choice."³⁴

Nancy Cruzan's case presents a dramatic and poignant example of the complex societal issue which many families now face. Due to Nancy's youth and her condition, the use of artificial life support (in her case, tube feeding) can maintain her in her current condition long enough for her case to proceed through the appellate courts and well beyond.³⁵ Nancy's youth has two other effects which sharpen the issue before the Supreme Court. It has permitted her to stabilize into a condition that will not improve,³⁶ but in which she could be maintained for thirty years.³⁷ In addition, since her accident occurred when she was only 25 years old, her statements about her personal preferences about life sustaining treatment were not as extensive as they might have been if she were older when the accident occurred.³⁸

The question before the Supreme Court is who is empowered to decide the course of Nancy Cruzan's medical care, and whether that decision is of constitutional dimension.³⁹ Her close family, whose loving motives were acknowledged by

32. President's Commission Report, *supra* note 30, at 17-18.

33. *Id.* at 16-18.

34. Office of Technology Assessment Report, *supra* note 30, at 41 (1987).

35. President's Commission Report, *supra* note 30, at 71. Patients can survive in this condition for five, ten or twenty years. The factors that affect the duration of time are 1) age, because elderly patients develop more medical complications; 2) economic, family and institutional factors that can affect the quality of care; 3) the natural resistance of the body and 4) relevant views on the propriety of stopping treatment. Cranford, *supra* note 2, at 31.

36. See *Cruzan v. Harmon*, 760 S.W.2d 408, 411 (*en banc* 1988).

37. *Id.*

38. A study by the Citizen's Committee on Biomedical Ethics revealed that while 10% of those respondents between the ages of 15-29 had a living will, 35% of those over 65 had one. The Citizens' Committee on Biomedical Ethics, *Your Health, Your Choices, Whose Decisions?* at 13 (1988) (available from The Citizens' Committee on Biomedical Ethics, Inc., Summit, N.J.).

39. *Cruzan*, 760 S.W.2d at 408, *petition for cert. filed*, 57 U.S.L.W. 3636 (U.S. Mar. 13, 1989) (No. 88-1503), *cert. granted*, 109 S. Ct. 3240 (1989).

the Missouri Supreme Court,⁴⁰ knows she would not want to be sustained in this condition.⁴¹ The Missouri decision, however, stripped them of any input into their daughter's care and condemned them to a thirty year bedside vigil in order to protect unnamed and unspecified others.⁴²

Along with over 20 other *amici*, representing 49 different individuals and groups, the Society for the Right to Die argued that Nancy Cruzan has a right to an individualized medical decision consistent with her constitutional rights to self-determination, privacy and liberty.⁴³ These rights were not obliterated when the emergency medical team "saved" her at the scene of the automobile accident.

While other courts have grappled with the question of standards for deciding medical care for incompetent patients, no other court renounced individuality by handing over the

40. *Cruzan*, 760 S.W.2d at 412.

41. *Id.* at 422.

42. The court seemed to be very concerned with a generalized group of "others": "[a]nd we must remember that we decided this case not only for Nancy, but for many, many others who may not be surrounded by the loving family with which she is blessed." *Id.* at 412.

43. Those who filed were Evangelical Lutheran Church in America; SSM Health Care System; St. Joseph Health System; Mercy Health System; Catholic Health Corporation; Rev. James J. McCartney, O.S.A., Ph.D.; Rev. Kevin O'Rourke, O.P., J.C.D.; Center for Health Care Ethics; St. Louis University Medical Center; AIDS Civil Rights Project; The National Hospice Organization; General Board of Church and Society of the United Methodist Church; American Geriatrics Society; McConnell Family; Barbara Burgoon and Ruth Fields (National Senior Citizens Law Center); Senior Citizens Law Project--Legal Aid Bureau; Legal Services for Senior Citizens--Legal Aid Bureau; the American Nurses Association and the American Association of Nurse Attorneys; Society of Critical Care Medicine, Presbyterian-University Hospital and the Trustees of the University of Pennsylvania; American Academy of Neurology; American Hospice Organization; American Hospital Association; Wisconsin Bioethicists and Other Health Professionals; Missouri Hospitals, Hospital Ethics Committees, Medical Schools, Hospital Chaplains, Hospice Organizations and Law Professors; Colorado Hospital Association, Association of Senior Citizens, Inc., Center for Health Policy, University of Colorado at Denver, Children's Health Corporation, Colorado Chapter--AA Family Physicians; Colorado Hospital Association, Colorado Medical Society; Craig Hospital; Professor Frank March; ACLU Foundation of Colorado; Colorado Department of Social Services; Rose Medical Center; Spalding Rehabilitation Hospital, and the Swedish Medical Center; National Academy of Elder Law Attorneys; American Medical Association; American Association of Neurological Surgeons, and Missouri State Medical Association; Concern for Dying; Society for the Right to Die; and the American College of Physicians.

power to decide to the state.⁴⁴ The Missouri Supreme Court crossed the constitutional line, by not merely regulating medical decisionmaking, but forbidding a particular medical decision, in violation of Nancy Cruzan's constitutional rights.

II. NANCY CRUZAN HAS A CONSTITUTIONAL RIGHT TO AN INDIVIDUALIZED DECISION ABOUT HER MEDICAL TREATMENT

The medical situation which confronts Nancy Cruzan (long term maintenance in a permanently unconscious state) is new, but the rights sought to be enforced on her behalf are long-standing and fundamental. The Supreme Court articulated the right of self-determination as far back as 1891: "[n]o right is held more sacred, or is more carefully guarded by the common law, than the right of control of his own person, free from all restraint or interference by others, unless by clear and unquestionable authority of law."⁴⁵ When the government compels medical treatment it violates "the most comprehensive of rights and the right most valued by civilized men,"⁴⁶ which is the "right to be let alone."⁴⁷

The right to control one's medical course and be free of unwanted treatment is a fundamental personal right "implicit in the concept of ordered liberty," which is "deeply rooted in this Nation's history and tradition."⁴⁸ As stated by the Washington Supreme Court: "[t]he decision by the incurably ill to forego medical treatment and allow the natural

44. *Cf.*, *In re Jobes*, 108 N.J. 394, 529 A.2d 434 (1987) (surrogate decision-maker may exercise substituted judgment on behalf of patient, and determine whether the patient would want continued artificial feeding, taking into account everything known) with *In re Westchester County Medical Center, in the matter of Mary O'Connor*, 72 N.Y.2d 517, 531 N.E.2d 607 534 N.Y.S.2d 886 (1988) (petitioner must show that the patient had made a specific choice to forego medical treatment while competent).

45. *Union Pacific Railway Co. v. Botsford*, 141 U.S. 250, 251 (1891).

46. *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

47. *Id.*

48. *Bowers v. Hardwick*, 478 U.S. 186, 191-92 (1986) (quoting *Palko v. Connecticut*, 302 U.S. 319 (1937) and *Moore v. City of East Cleveland*, 431 U.S. 464 (1977)).

processes of death to follow their inevitable course is so manifestly a 'fundamental' decision in their lives, that it is virtually inconceivable that the right to privacy would not apply to it.⁴⁹ The federal constitutional dimension of the right to refuse medical treatment has been recognized by numerous state and federal courts.⁵⁰

At issue in Nancy Cruzan's case is whether the government can compel medical treatment in violation of two interests long recognized as worthy of constitutional protection. The first is the interest in the protection of the bodily integrity of the individual, of which it has been said that forced surgery "damages the individual's sense of personal privacy and security."⁵¹ The second unconstitutional intrusion arises as a result of Nancy's incompetence, and is the substitution of the state as decision-maker for the patient who can no longer express her own wishes, entering into the usually sacrosanct realm of family privacy.⁵²

49. *In re Colyer*, 99 Wash. 2d 114, 120, 660 P.2d 738, 742 (1983) (quoting *In re Eichner*, 73 A.D.2d 431, 459, 426 N.Y.S.2d 517 (1980), *aff'd sub nom. In re Storar*, 52 N.Y.2d 363, 420 N.E.2d 363, 438 N.Y.S.2d 266, *cert. denied*, 454 U.S. 858 (1981)).

50. *See, e.g.*, *McConnell v. Beverly Enterprises*, 209 Conn. 992, 701, 553 A.2d 596, 600 (1989); *Gray v. Romeo*, 697 F. Supp. 580, 585 (D.R.I. 1988); *Rasmussen v. Fleming*, 154 Ariz. 207, 214, 741 P.2d 674, 682 (1987); *In re Farrell*, 108 N.J. 335, 348, 529 A.2d 404, 410 (1987); *Brophy v. New England Sinai Hosp., Inc.*, 398 Mass. 417, 430, 497 N.E.2d 626, 633 (1986); *Bartling v. Superior Court (Gleddale Adventist Medical Center)*, 163 Cal. App. 3d 186, 195, 2098 Cal. Rptr. 220, 225 (Ct. App. 1984); *Leach v. Akron General Medical Center*, 68 Ohio Misc. 1, 426 N.E.2d 809, 814 (Ct. Com. Pl. 1980); *John F. Kennedy Memorial Hospital, Inc. v. Blutworth*, 452 So.2d 921, 924 (Fla. 1984); *In re L.H.R.*, 253 Ga. 439, 446, 321 S.E.2d 716, 722 (1984); *In re Colyer*, 99 Wash. 2d 114, 120, 660 P.2d 738, 742 (1983), *modified*, *In re Guardianship of Hamlin*, 102 Wash. 2d 810, 689 P.2d 1372 (1984); *In re Severns*, 425 A.2d 156, 158 (Del. Ch. 1980); *Superintendent of Belchertown State School v. Saikewicz*, 373 Mass. 728, 739, 370 N.E.2d 417, 424 (1977); *In re Quinlan*, 70 N.J. 10, 38-42, 355 A.2d 647, 662-64, *cert. denied sub nom. Garger v. New Jersey*, 429 U.S. 922 (1976), *overruled in part*, *In re Conroy*, 98 N.J. 321, 486 A.2d 1209 (1985).

51. *Winston v. Lee*, 470 U.S. 753, 762 (1985); *see also Rochin v. California*, 342 U.S. 165, 174 (1951) (forced stomach pumping "offensive to human dignity").

52. *See Michael H. v. Gerald D.*, 109 S. Ct. 2333 (1989) (Presumption that a child born to a married woman living with her husband is the child of the marriage, and a child does not have a due process right to maintain a filial relationship with the natural father and the husband); *Lehr v. Robertson*, 463 U.S. 248 (1983) (If only one parent has established a custodial relationship with the child, the Equal Protection Clause does not prevent the state from giving the parents different legal rights); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (Fundamental right to marital privacy); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (The

The Supreme Court has recognized the limits of government intrusion in the basic areas of individual liberty, family privacy and bodily integrity in the context of forced surgical examination,⁵³ forced stomach pumping,⁵⁴ marriage,⁵⁵ contraception,⁵⁶ procreation,⁵⁷ child rearing and education,⁵⁸ and family relationships.⁵⁹ Mandating a particular form of medical treatment to an incompetent patient over the objections of her family is a similarly offensive and a potentially limitless exercise of government power.

Our choices about how to deal with incurable and irreversible sickness are as personal and fundamental as our decisions about how to rear children or who to marry. Decisions to forgo medical treatment can be premised on such varying rationales as a religious belief in spiritual life after death, a personal desire to spare one's family prolonged agony, an abhorrence of dependence or helplessness or a specific choice to leave one's money for the education of grandchildren, rather than the profits of a nursing home. The protection of these intensely personal, ethical and religious values, usually formed and fostered within the family, is firmly embedded within our constitutional values. The Supreme Court recently stated that these cases finding a protected liberty interest "rest . . . upon the historic respect--indeed, sanctity would not be too strong a term--traditionally accorded to the relationships that develop within the unitary family."⁶⁰ This unbroken line of cases beginning with *Meyer v. Nebraska*,⁶¹

First and Fourteenth Amendments guarantee the right to educate one's children as one sees fit).

53. *Union Pacific Railway v. Botsford*, 141 U.S. 250 (1891).

54. *Rochin*, 342 U.S. at 174.

55. *Loving v. Virginia*, 388 U.S. 1 (1967).

56. *Griswold*, 381 U.S. at 479; *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

57. *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

58. *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

59. *Prince v. Massachusetts*, 321 U.S. 158 (1944).

60. *Michael H. v. Gerald D.*, 109 S. Ct. 2333, 2342 (1989).

61. *Meyer*, 262 U.S. at 399-401.

and *Pierce v. Society of Sisters*,⁶² consistently respect a "private realm of family life which the state cannot enter."⁶³

Nancy Cruzan's incompetency does not render her any less of a human being entitled to an individualized decision about her care, made by the people who knew her and love her. As every other court has held, the right to refuse treatment is not lost merely because the "nongognitive and vegetative condition of the patient prevents a conscious exercise of the choice to refuse further extraordinary treatment."⁶⁴ The Missouri Supreme Court, by ordering unlimited treatment for all incompetent patients, refused to recognize that patients are individuals with a history and a value system of their own:

[m]edical choices are private, regardless of whether a patient is able to make them personally or must rely on a surrogate. They are not to be decided by societal standards of reasonableness or normalcy. Rather it is the patient's preferences-formed by his or her unique personal experiences-that should control.⁶⁵

The right to a personalized decision, carried out by one's family or loved ones, is supported both by medical ethics and public opinion.⁶⁶ The medical establishment, represented by the American Medical Association, the American Academy of Neurology and the American College of Physicians, among

62. *Pierce*, 268 U.S. at 534-35.

63. *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494, 499 (1977).

64. *John F. Kennedy Memorial Hospital, Inc. v. Bludworth*, 452 So. 2d 921, 924 (Fla. 1984). See also *Superintendent of Belchertown State School v. Saikewicz*, 373 Mass. 728, 370 N.E.2d 417 (1977); *In re Conservatorship of Drabick*, 200 Cal. App. 3d 185, 245 Cal. Rptr. 840 (Cal. Ct. App. 1988), cert. denied, 109 S. Ct. 399 (1988).

65. *In re Peter*, 108 N.J. 365, 373, 529 A.2d 419, 423 (1987).

66. See *infra* notes 67-72 and accompanying text.

others, speak with one voice on this issue.⁶⁷ The other amicus briefs filed in the case further demonstrated that unanimity, since groups as wide ranging as the American Hospital Association, the Lutheran Church, the American Nurses Association, and many others filed as well.⁶⁸

An overwhelming majority of citizens similarly believe strongly that the right to make medical decisions includes a right to forgo life sustaining treatment and that choices about these issues should remain within the family.⁶⁹ A 1986 American Medical Association poll indicated that 73% of the 1,510 respondents favored "withdrawing life support systems, including food and water, from hopelessly ill or irreversibly comatose patients if they or their family request it."⁷⁰ A

67. The American Medical Association has issued an Opinion stating, in part: Even if death is not imminent but a patient is beyond doubt permanently unconscious, and there are adequate safeguards to confirm the accuracy of the diagnosis, it is not unethical to discontinue all means of life-prolonging medical treatment. . . . The social commitment of the physician is to sustain life and relieve suffering. Where the performance of one duty conflicts with the other, the preferences of the patient should prevail. If the patient is incompetent to act in his own behalf and did not previously indicate his preferences, the family or other surrogate decisionmaker, in concert with the physician, must act in the best interest of the patient. . . .

American Medical Association Council, *Withholding or Withdrawing Life-Prolonging Medical Treatment*, in Current Opinions of the Council on Ethical and Judicial Affairs, Opinion 2.18 (1986). The statement of the American Academy of Neurology provides:

[T]he decision to discontinue [the artificial provision of fluid and nutrition] should be made in the same manner as other medical decisions, i.e., based on a careful evaluation of the patient's diagnosis and prognosis, the prospective benefits and burdens of the treatment, and the stated preferences of the patient and family.

American Academy of Neurology, *Position of the American Academy of Neurology on Certain Aspects of the Care and Management of the Persistent Vegetative State Patient*, 39 NEUROLOGY 123, 125 (1989). The brief submitted by the American College of Physicians concluded, "[t]he question before the Court today is whether Nancy Cruzan's right to bodily integrity, which includes her right to refuse life-sustaining medical treatment, is outweighed by some compelling state interest. The answer is no." Brief of American College of Physicians as *Amicus Curiae* in Support of Petitioners at 28, *Cruzan v. Harmon*, 109 S. Ct. 495 (1989).

68. See *supra* note 43.

69. See *infra* notes 70-72.

70. American Medical Association, *Public Opinion on Health Care Issues-1986*, Chicago, Illinois (1986). See *In re Jobs*, 108 N.J. 394, 418 n.11, 529 A.2d 434, 446 n.11 (1987) (citing American Medical Association Public Opinion Poll on Life Support Withdrawal Issues 1986))

teleconference poll moderated by Ted Koppel revealed that 79% of those polled believe that quality of life determinations should be considered in the decision of whether to use life-sustaining technology, and 70% believe that the immediate family, not the courts, should decide in the case of an incompetent patient.⁷¹ A very recent survey conducted by the Colorado Graduate School of Public Affairs revealed that 85% of those surveyed would not want to have their life maintained with artificial feeding if they became permanently unconscious and could not eat normally.⁷²

III. THE STATES HAVE PROTECTED PATIENT CHOICE THROUGH STATUTES AND COURT DECISIONS

In contrast to Missouri's foreclosure of patient choice, other states have been extremely protective of the individual's right to die without unwanted medical treatment. Forty-one states and the District of Columbia have living will laws, which permit an individual to execute a document to express his or her own wishes regarding death-prolonging treatment.⁷³

(analyzed in *Poll Backs Ending Life Support in Some Cases*, *N.Y. Times* Nov. 29, 1986, at 32, col. 1).

71. 90% in *Poll Back Patients' Right to Die*, *N.Y. Times*, Dec. 2, 1986, at C10, col. 2.

72. Fort Collins Coloradoan, Sept. 29, 1988, at 1. The New Jersey Supreme Court noted the public's support for private decisionmaking in *Jobes*, 108 N.J. at 418 n.11, 529 A.2d at 446 n.11.

73. States with "Living Will" (also called "natural death," "right to die," or "rights of the terminally ill") statutes are: Alabama Natural Death Act, ALA. CODE § 22-8A-1 to -10 (1984); Alaska Rights of the Terminally Ill Act, ALASKA STAT. § 18.12.010(c) (1986); Arizona Medical Treatment Decision Act, ARIZ. REV. STAT. ANN. § 36-3201 (1986); Arkansas Rights of the Terminally Ill or Permanently Unconscious Act, ARK. STAT. ANN. § 20-17-201 (1987); California Natural Death Act, CAL. HEALTH & SAFETY CODE §§ 7185-7195 (West 1989); Colorado Medical Treatment Decision Act, COLO. REV. STAT. § 15-18-103(7) (1989); Connecticut Removal of Life Support Systems Act, CONN. GEN. STAT. §§ 19a-570-575 (West 1989); Delaware Death with Dignity Act, DEL. CODE ANN. tit. 16, §§ 2501-09 (1983); Florida Life Prolonging Procedure Act, FLA. STAT. ANN. §§ 765.01-15 (West 1986); Georgia Natural Death Act, GA. CODE ANN. §§ 31-32-1 to -12 (1984); Hawaii Medical Treatments Decisions Act, HAW. REV. STAT. § 327D-1 to -27 (1988); Idaho Natural Death Act, IDAHO CODE §§ 39-4501-4508 (1989); Illinois Living Will Act, ILL. ANN. STAT. ch. 110 1/2, paras. 701 to 710

Such statutes typically define the conditions under which the document becomes effective, which are usually that the patient must be in a "terminal condition."⁷⁴ The definition of "terminal" varies, sometimes requiring "imminent" death,⁷⁵ with or without life-sustaining treatment, and sometimes including the "permanently unconscious."⁷⁶ These statutes either list the

(Smith-Hurd Supp. 1989); Indiana Living Wills and Life Prolonging Procedures Act, IND. CODE ANN. §§ 16-8-11-1-22 (Burns 1989); Iowa Life Sustaining Procedures Act, IOWA CODE ANN. § 144A.2(5) (West 1989); Kansas Natural Death Act, KAN. STAT. ANN. 65-28, 101-109 (1985); Kentucky Living Will Act, KY. ACTS, ch. 122 (H.B. 113)(1990) Louisiana Life-Sustaining Procedures Act, LA. REV. STAT. ANN. §§ 40:1299.58.1.10 (West 1989); Maine Living Wills, ME. REV. STAT. ANN. tit. 22 §§ 2925 - 2931 (1985); Maryland Life-Sustaining Procedures Act, MD. HEALTH-GEN. CODE ANN. §§ 5-601 to -614 (1988); Minnesota Adult Health Care Decisions Act, MINN. STAT. § 145B.03 (1989); Mississippi Withdrawal of Life Saving Mechanisms Act, MISS. CODE ANN. §§ 41-41-101-121 (1988); Missouri Uniform Rights of the Terminally Ill Act, MO. REV. STAT. §§ 459.010.055 (1986); Montana Living Will Act, MONT. CODE ANN. § 50-9-101 (1987); Nevada Withholding or Withdrawal of Life Sustaining Procedures Act, NEV. REV. STAT. §§ 449.540 to .690 (1986); New Hampshire Terminal Care Document Act, N.H. REV. STAT. ANN. §§ 137-H:1:16 (1988); New Mexico Right to Die Act, N.M. STAT. ANN. §§ 24-7-1 to -11 (1986); North Carolina Right to Natural Death Act, N.C. GEN. STAT. §§ 90-320-322 (1985); North Dakota Uniform Rights of Terminally Ill Act, N.D. CENT. CODE § 23-06.4 (1989); Oklahoma Natural Death Act, OKLA. STAT. ANN. tit. 63, § 3103 (West 1989); Oregon Rights with Respect to Terminal Illness Act, OR. REV. STAT. §§ 127.605 127.650 (1989); South Carolina Death with Dignity Act, S.C. CODE ANN. §§ 44-77-10-160 (Law. Co-op. 1988); Tennessee Right to Natural Death Act, TENN. CODE ANN. §§ 32-11-101-110 (1988); Texas Natural Death Act, TEXAS HEALTH & SAFETY CODE § 672.001 (Vernon 1989); Utah Personal Choice and Living Will Act, UTAH CODE ANN. §§ 75-2-1101-1118 (1988); Vermont Terminal Care Document Act, VT. STAT. ANN. tit. 18 §§ 5251-5262 (1987); Natural Death Act of Virginia, VA. CODE ANN. §§ 54.1-2981.2992 (1989); Washington Natural Death Act, WASH. REV. CODE ANN. §§ 70.122.010 .905 (1989); West Virginia Natural Death Act, W. VA. CODE §§ 16-30-1-10 (1985); Wisconsin Natural Death Act, WIS. STAT. ANN. §§ 154.01.15 (West 1989) Wyoming Living Will Act, WYO. STAT. §§ 35-22-101-109 (1988).

74. See, e.g., Oregon's definition of a terminal condition as "[a]n incurable condition caused by injury, disease or illness which, regardless of the application of life-sustaining procedures would within reasonable medical judgment produce death, and where the application of life-sustaining procedures serve only to postpone the moment of death of the patient." Oregon Rights with Respect to Terminal Illness Act, OR. REV. STAT. § 127.605(6) (1989).

75. See, e.g., Maryland Life-Sustaining Procedures Act, MD. ANN. CODE § 5-601(g) (Supp. 1990), which defines a "terminal condition" as "[a]n incurable condition of a patient caused by injury, disease, or illness which, to a reasonable degree of medical certainty, makes death imminent and from which, despite the application of life-sustaining procedures, there can be no recovery." *Id.*

76. See, e.g., Arkansas Rights of the Terminally Ill or Permanently Unconscious Act, ARK. STAT. ANN. §§ 20-17-201(7) (9) (11) (Supp. 1989), which defines a "qualified patient" as either "terminally ill" or "permanently unconscious" and permits individuals "of sound mind of eighteen (18) or more years . . . to execute a declaration to indicate their treatment choices in either or both conditions." *Id.* at 20-17-202(a).

medical procedures that fall within the definition of "life-prolonging" treatments⁷⁷ or provide general definitions such as "any medical procedure or intervention which, in the judgment of the attending physician if applied to a qualified patient, would serve only to prolong the dying process."⁷⁸ The legislation frequently includes specific witnessing procedures⁷⁹ and other execution requirements.⁸⁰ As a practical matter, the inclusion of clear immunity from civil or criminal liability for the health care providers who honor the documents is a feature that adds immeasurably to acceptance of the documents by the health care community.⁸¹

An alternative method of statutory protection for the right to refuse treatment is the creation of a durable power of attorney for health care decisions. Twenty-six jurisdictions allow the appointment of an individual to make decisions regarding life-sustaining treatment upon the incompetence of the principal, either by an explicit statute or by judicial

77. See, e.g., Illinois Living Will Act, ILL. ANN. STAT. ch. 110 1/2, para. 702(d) (Smith-Hurd Supp. 1989):

'Death delaying procedure' means any medical procedure or intervention which, when applied to a qualified patient, in the judgment of the attending physician would serve only to postpone the moment of death. In appropriate circumstances, such procedures include, but are not limited to, assisted ventilation, artificial kidney treatments, intravenous feeding or medication, blood transfusions, tube feeding and other procedures of greater or lesser magnitude that serve only to delay death

Id.

78. Arizona Medical Treatment Decisions Act, ARIZ. REV. STAT. ANN. § 36-3201(4) (1986). See also Nevada Withholding or Withdrawal of Life-Sustaining Procedures Act, NEV. REV. STAT. § 449.570 (Supp.1988). "[L]ife-sustaining procedure" means a medical procedure which utilizes mechanical or other artificial methods to sustain, restore or supplant a vital function. The term does not include medication or procedures necessary to alleviate pain.

Id.

79. See, e.g., Oklahoma Natural Death Act, OKLA. STAT. ANN. tit. 63, § 3103(B) (West Supp. 1989), which specifies that witnesses may not be under twenty-one years of age, related to the declarant by blood or marriage, financially responsible for the medical care of the declarant, entitled to any portion of the estate, the attending physician, an employee of the physician or health care facility, another patient in the same health care facility, or a person who has a claim against the estate. *Id.*

80. Some statutes require that the document be notarized. See, e.g., Hawaii Medical Treatment Decisions Act, HAW. REV. STAT. § 327D-3 (Supp. 1988).

81. See generally Cohen, "Living Wills and Health Care Proxies," 3 MURPHY'S WILL CLAUSES Ch. 20 (1988).

interpretation.⁸² The statutes range from providing a total grant of authority to the agent⁸³ to permitting only certain circumscribed types of decisions.⁸⁴ Use of both living wills and durable powers of attorney for health care, an option available in many states, allows an individual to make known his or her own wishes known regarding artificial life support and permits the individual to indicate who would be best suited to communicate those treatment preferences to the health care providers, interpreting and supplementing the instructions if necessary.

While organizations such as the Society for the Right to Die advocate advance planning to ensure respect of individual treatment choices, it is common wisdom that people do not like to contemplate their own death.⁸⁵ Many people delay writing a property will, and die intestate, so it is not surprising that the available data indicates that a relatively small number of people (9%) execute advance directives or living wills and formally address the more emotional decision about how they would wish treatment decisions that precede

82. ARIZ. REV. STAT. ANN. § 14-5501-5502 (1975), as interpreted by Rasmussen v. Fleming, 154 Ariz. 207, 741 P.2d 674 (1987); CAL. CIV. CODE § 2430-2444 (West 1989); COL. REV. STAT. § 15-14-501 (1987), as interpreted by *In re Rodas*, No. 86PR139 (Colo. Dist. Ct. Mesa County Jan. 22, 1987, as modified, April 3, 1987) (Buss, J.); D.C. CODE ANN. § 21-2201-2213 (1989); HAW. REV. STAT. §§ 551D-2, 327D-26 (1989); ILL. ANN. STAT. ch. 110 1/2, § 804-1 (Smith-Hurd 1988); IOWA CODE ANN. § 633.705 (West 1988); ME. REV. STAT. ANN. tit. 18-A, § 5-501 (Supp. 1987); MD. EST & TRUSTS CODE ANN. § 13-601 (1989), MD. HEALTH-GEN. CODE ANN. § 20-107(d) (1990); NEV. REV. STAT. § 449.800-.860 (1987); N.J. STAT. ANN. § 46: 2B-8, -9 (West 1989) as interpreted by *In re Peter*, 108 N.J. 365, 529 A.2d 419 (1987); N.Y. GEN. OBLIG. LAW § 5-1501 (McKinney 1989), as interpreted by *In re Westchester County Med. Center* (O'Conner), 72 N.Y.2d 517, 631 N.E.2d 607, 534 N.Y.S.2d 886 (1988); OHIO REV. CODE ANN. § 1337.11-.17 (Anderson 1989); OR. REV. STAT. § 127.505-.585 (1989); R.I. GEN. LAWS § 23-4.10-2 (1987); TEX. HEALTH & SAFETY CODE ANN. § 4590H-1 (Vernon 1990); VT. STAT. ANN. tit. 14, § 3451-3467 (1988).

83. See, e.g., Vermont Durable Powers of Attorney for Health Care Act, VT. STAT. ANN. tit. 14, §§ 3451 to 3467 (Supp. 1988).

84. See, e.g., Ohio Power of Attorney Act for Health Care, OHIO REV. STAT. ANN. §§ 1337.11 - 1337.17 (Supp. 1989) (S.B. 13, signed June 28, 1989) (limits decision making by an agent to situations where death is "imminent," regardless of the application of life-sustaining procedures, and also forbids any decisions to withhold artificial nutrition and hydration unless the provision unless the provision of artificial feeding is painful or it could not be assimilated by the patient).

85. D. MEYERS, MEDICO-LEGAL IMPLICATIONS OF DEATH AND DYING at 277 (1981).

their death to be handled, when they can no longer speak for themselves.⁸⁶

In response to the fact that most people do not have living wills, but will nonetheless be the subject of medical decisions when incompetent, thirteen states have enacted statutory procedures which, like the laws of intestacy, fill the gap between the theory of advance planning and the everyday reality of preferring to avoid thoughts of death.⁸⁷

Those states have enacted statutory surrogate decision-making provisions which authorize certain individuals to make treatment decisions on behalf of incompetent patients.⁸⁸ The list of individuals, in an order of priority, reflects a legislative determination of the surrogates most people would choose,

86. Emmanuel, *The Medical Directive: A New Comprehensive Advance Care Document*, 261 J. A.M.A. 3288 (1989).

87. Arkansas Rights of the Terminally Ill or Permanently Unconscious Act, ARK. STAT. ANN. § 20-17-214 (1987); Connecticut Removal of Life Support Systems Act, CONN. GEN. STAT. § 19a-571 (West Supp. 1989); Florida Life Prolonging Procedure Act, FLA. STAT. ANN. § 765.07 (West 1986); Iowa Life Sustaining Procedures Act, IOWA CODE ANN. § 144A.7 (West Supp. 1986); Louisiana Declarations Concerning Life-Sustaining Procedures Act, LA. REV. STAT. ANN. § 40:1299.58.5 (West Supp. 1989); Maine Uniform Rights of the Terminally Ill Act, ME. REV. STAT. ANN. tit. 18a, §§ 5-70 to 714 (H.B. 1497, signed April 17, 1990); New Mexico Right to Die Act, N.M. STAT. ANN. § 24-708.1 (1986); North Carolina Right to Natural Death Act, N.C. GEN. STAT. ANN. § 90-322 (1985); Oregon Rights with Respect to Terminal Illness Act, OR. REV. STAT. § 97.083 (1985); Texas Natural Death Act, TEX. REV. CIV. STAT. ANN. art. 4590h-§ 4C (Vernon Supp. 1989); Utah Personal Choice and Living Will Act, UTAH CODE ANN. § 75-2-1105(2) (Supp 1989); Virginia Natural Death Act, VA. CODE § 54:1-2986 (1988); District of Columbia, Health Care Decisions Act of 1988, D.C. CODE ANN. § 11 (1988); *See also* Uniform Rights of the Terminally Ill Act, § 7, 9A U.L.A. 456 (as amended 1989).

88. *Cf.*

When an Incompetent Person who has not Executed a Document under the Right to Die Act, N.M. STAT. ANN. §§ 24-7-1 to 24-7 (1978), is certified as terminally ill or in an irreversible coma under the procedures described in § 24-7-5, a physician may remove maintenance medical treatment from that person when all family members who can be contacted through reasonable diligence agree in good faith that the patient, if competent, would choose to forego that treatment.

New Mexico Right to Die Act, N.M. STAT. ANN. §24-7-8.1 (1986), with

In the absence of a durable power of attorney for health care and provided that the incapacity of the principle has been certified in accordance with § 21-2204 of the Dist. of Columbia Health Care Decisions Act of 1988, the following individuals . . . shall be authorized to grant, refuse or withdraw consent on behalf of the patient with respect to the provision of any health-care service, treatment, or procedure.

District of Columbia Health Care Decisions Act of 1988, D.C. CODE ANN. § 21-2210 (1988).

and guides the health care team to the family or others who should be consulted on questions of life sustaining treatment.⁸⁹ Much like the law of disposition of property, those individuals who wish to vary the legislative presumption can leave their own instructions by executing a living will or durable power of attorney for health care.

State courts (but for Missouri) have supplemented these statutory rights by developing a body of case law that relies on common law, federal and/or state constitutional principles and has consistently endorsed various forms of advocacy by family members on behalf of incompetent patients.⁹⁰ While living wills and durable powers of attorney provide mechanisms for the simpler and less controversial decisions, the courts have vigorously protected patients' rights to decline artificial life support outside these statutory schemes.⁹¹

Twenty-eight jurisdictions have case law finding that the state had no interest which would outweigh an individual's right to forgo artificial life support.⁹² Depending on the state,

89. Arkansas sets the priority list as follows: 1) the legal guardian of the patient, if one has been appointed; 2) the parent of the patient, for an unmarried patient under the age of eighteen; 3) the patient's spouse; 4) the patient's adult child, or, if there is more than one, then a majority of the patient's children participating in the decision; 5) the parents of a patient over the age of eighteen; 6) the patient's adult sibling, or if there is more than one, then a majority of the patient's adult siblings [articipating in the decision; 7) persons standing *in loco parentis* to the patient; and 8) a majority of the patient's adult heirs at law who participate in the decision. Arkansas Rights of the Terminally Ill or Permanently Unconscious Act, ARK. CODE ANN. § 20-17-214 (Supp. 1987).

90. See, e.g., *Rasmussen v. Fleming*, 154 Ariz. 207, 741 P.2d 674 (1987); *Conservatorship of Drabick*, 200 Cal. App. 3d 185, 245 Cal. Rptr. 840 (Cal. Ct. App. 1988), *rev. denied* (July 28, 1988), *cert. denied*, 109 S. Ct. 399 (1988), *reh'g denied*, 109 S. Ct. 828 (1988); *McConnell v. Beverly Enterprises*, 209 Conn. 692, 553 A.2d 596 (1989); *Corbett v. D'Alessandro*, 487 So. 2d 368 (Fla. Dist. Ct. App.), *rev. denied*, 492 So. 2d 1331 (Fla. 1986); *In re Gardner*, 534 A.2d 947, (Me.1987); *Brophy v. New England Sinai Hosp., Inc.*, 398 Mass. 417, 497 N.E.2d 626 (1986); *In re Jobes*, 108 N.J. 394, 529 A.2d 434 (1987); *Gray v. Romero*, 697 F. Supp. 580 (D. R.I. 1988).

91. *Id.*

92. Since the 1976 *Quinlan* case, twenty-eight jurisdictions have issued "right-to-die" rulings authorizing the termination of life support for patients in a variety of circumstances. See, e.g., Arizona: *Rasmussen*, 154 Ariz. at 207, 741 P.2d at 674; California: *Drabick*, 200 Cal. App. 3d at 185, 245 Cal. Rptr. at 840; Colorado: *In re Rodas*, No. 86PR139 (Colo. Dist. Ct. Mesa County Jan. 22, 1987, *as modified*, April 3, 1987) (Buss, J.); Connecticut: *McConnell*, 209 Conn. at 692, 553 A.2d at 596; Delaware: *Severns v. Wilmington Medical Center*, 425 A.2d 156 (Del. Ch. 1980); District of Columbia: *Tune v. Walter Reed Army Medical Hospital*,

this body of law is at varying stages of development. For example, New Jersey's Supreme Court has addressed decision-making for the competent,⁹³ the permanently unconscious,⁹⁴ and the minimally conscious patient.⁹⁵ It has developed a judicially mandated role in the decision-making process for prognosis or ethics committees within hospitals, and has also provided for an oversight role for the State Ombudsman for nursing home residents over the age of sixty.⁹⁶

An initial ruling in Massachusetts implying that court approval was needed for all refusal of life-support decisions⁹⁷ was refined, so that court authorization is only required if the medical treatment proposed offers some hope of leading to a

602 F. Supp. 1452 (D.D.C. 1985); Florida: John F. Kennedy Memorial Hospital, Inc. v. Bludworth, 452 So. 2d 921 (Fla. 1984); Georgia: *In re L.H.R.*, 253 Ga. 439, 321 S.E.2d 716 (1984); Hawaii: *Wilcox v. Hawaii*, No. 860116 (5th Cir. 1986); Illinois: *In re Estate of Longeway*, No. 67318 (Ill. Sup. Ct. Nov. 13, 1989); Iowa: *Morgan v. Olds*, 417 N.W.2d 232 (Iowa Ct. App. 1987); Louisiana: *In re PVW*, 424 So. 2d 1015 (La. 1982); Maine: *In re Gardner*, 534 A.2d 947 (Me. 1987); Massachusetts: *Brophy*, 398 Mass. at 417, 497 N.E.2d at 626; Michigan: *In re Culham*, No. 87-340537-AZ (Mich. Cir. Ct. Oakland County Dec. 15, 1987) (Breck, J.); Minnesota: *In re Torres*, 357 N.W.2d 332 (Minn. 1984); New Jersey: *In re Jobes*, 108 N.J. 394, 529 A.2d 434 (1987); New York: *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); North Dakota: *In re Bayer*, No. 4131 (N.D. Burleigh County Ct. Feb. 5, 11, and Dec. 11, 1987) (Riskedahl, J.); Ohio: *Leach v. Akron General Medical Center*, 68 Ohio Misc. 1, 426 N.E.2d 809 (Ct. Com. Pl. 1980); Oregon: *Evans v. District Attorney of Douglas County*, No. E82-2173 (Ore. Cir. Ct. Douglas County Dec. 13, 1982); Pennsylvania: *In re Jane Doe*, 16 Phila. 229 (Pa. Ct. Com. Pl. 1987); Rhode Island: *Gray v. Romeo*, 697 F. Supp. 580 (D.R.I. 1988); Tennessee: *Jane Doe v. Wilson*, No. 90-364-II (Tenn. Ch. Ct. Davidson County Feb. 16, 1990) (Williams, J.); Texas: *In re Guardianship Estate of Peterson*, No. E117,982 (Texas Dist. Ct. Jefferson County, Aug. 4, 1983); Virginia: *Hazelton [sic] v. Powhatan Nursing Home, Inc.*, 6 Va. Cir. Ct. Op. 414 (Aspen 1987) (Va. Cir. Ct. Fairfax County 1986) (Sept. 2, 1986) (Fortkort, J.), *appeal denied*, No. 860814 (Va. Sept. 2, 1986); Washington: *In re Guardianship of Grant*, 109 Wash. 2d 545, 747 P.2d 445 (1987), *modified*, 757 P.2d 534 (1988); Wisconsin: *In re Guardianship of Welch*, No. 89GN30 (Wis. Cir. Ct. Eau Claire County June 21, 1989).

93. *In re Farrell*, 108 N.J. 335, 529 A.2d 404 (1987).

94. *See Jobes*, 108 N.J. at 394, 529 A.2d at 434; *In re Quinlan*, 70 N.J. 10, 355 A.2d 647, *cert. denied sub nom. Garger v. New Jersey*, 429 U.S. 922 (1976), *overruled in part*, *In re Conroy*, 98 N.J. 321, 486 A.2d 1209 (1985).

95. *Conroy*, 98 N.J. at 321, 486 A.2d at 1209; *In re Peter*, 108 N.J. 365, 529 A.2d 419 (1987).

96. *See Quinlan*, 70 N.J. at 10, 355 A.2d at 647, *cert. denied sub nom. Garger v. New Jersey*, 429 U.S. 922 (1976), *overruled in part*, *Conroy*, 98 N.J. 321, 486 A.2d at 1209 (1985); *In re Peter*, 108 N.J. 365, 529 A.2d 419 (1987).

97. *Superintendent of Belchertown State School v. Saikewicz*, 373 Mass. 728, 370 N.E.2d 417 (1977).

"remission of symptoms enabling a return towards a normal functioning integrated existence."⁹⁸ Other courts have clearly held that judicial approval is not required, absent some conflict between the interested parties.⁹⁹

The state judicial, legislative and health care systems are going to have to continue to establish the procedural framework for exercising the right to forgo medical treatment. Workable procedures to address the use of medical technology for the hopelessly ill will consistently be refined. As the states seek to accommodate the interests of all concerned, most have been mindful of the spirit expressed by the Florida Second District Court of Appeal when it established a process under which life support could be ended:

[T]he remedy exists to fulfill a right of privacy. Thus, the procedures to invoke and enforce this right should be as private as the state's competing interests can permit for such a delicate decision.

We obviously do a poor job of protecting the patient's right of privacy by discussing the details of her medical condition and the nature of her family structure in a highly publicized decision which will be preserved for posterity.¹⁰⁰

The Missouri Supreme Court stood alone when it refused to acknowledge that a procedure was needed, and that forbidding the Cruzan's decision was not a solution. This departure from national medical and legal standards raises the specter of a new and macabre type of forum shopping--transferring

98. *In re Dinnerstein*, 6 Mass. App. Ct. 466, 380 N.E.2d 134 (1978).

99. See *Conservatorship of Drabick*, 200 Cal. App. 3d 185, 245 Cal. Rptr. 840 (Cal. Ct. App. 1988), *appeal denied* (Cal. July 28, 1988), *cert. denied*, 109 S. Ct. 399 (1988); see also *In re Torres*, 357 N.W.2d 332 (Minn. 1984); *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).

100. *In re Browning*, 543 So. 2d 258, 268-69 (Fla. Dist. Ct. App. 1989), *appeal filed*, Case No. 74,1747 (1989).

patients across state lines so they will be allowed to die.

IV. THE STATE'S LEGITIMATE INTEREST
IN PREVENTING ABUSE CANNOT
UNCONSTITUTIONALLY BURDEN THE
RIGHT TO FORGO TREATMENT

The Missouri Supreme Court's view of the State interest in the preservation of life was defined as "unqualified," so that no individual could compete.¹⁰¹ Four state interests were articulated in the case law early in its development and have been repeatedly recited: (1) the preservation of life; (2) the protection of third parties; (3) the prevention of suicide and (4) the protection of the ethical integrity of the medical profession.¹⁰² Despite their constant recitation, no other state court has ever found one of these interests to prevail.¹⁰³

When it reversed the lower court decision, the Missouri Supreme Court saw the state's interest in the preservation of life as outweighing any privacy or liberty rights that Nancy Cruzan might have.¹⁰⁴ By a 4-3 vote, it twisted the state's

101. *Cruzan v. Harmon*, 760 S.W.2d 408, 422 (Mo. 1988) (en banc).

102. See, e.g., *Superintendent of Belchertown State School v. Saikewicz*, 373 Mass. 728, 741, 370 N.E.2d 417, 425 (1977); *Rasmussen v. Fleming*, 154 Ariz. 207, 216-18, 741 P.2d 683 (Ariz. 1987); *In re McAfee*, 385 S.E.2d 651, 652 (Ga. 1989); *In re Gardner*, 534 A.2d 947, 955, (Me. 1987); *In re Farrell*, 108 N.J. 335, 348-49, 529 A.2d 404, 410-11 (N.J. 1987); *Gray v. Gray v. Romeo*, 697 F. Supp. 580, 588 (D. R.I. 1988).

103. Since their initial articulation in 1977, considerable attention has been paid to the issue of withholding and withdrawing treatment, and these states interests are now not necessarily the best articulation of governmental concerns. National organizations such as the American Medical Association and the American Academy of Neurology have taken public policy stances that clarify their position only within the last few years. As previously noted, it is now clear that the ethical integrity of the medical profession is fostered by honoring patients wishes to forgo treatment, and that it is ethically appropriate to withhold or withdraw tube feeding from the permanently unconscious, consistent with their own previously stated wishes or their family's request. See generally *Wanzer, The Physician and the Hopelessly Ill Patient: A Second Look*, 320 NEW ENG. J. MED. 844 (1989). None of the other traditional state interests are implicated here. Nancy has no dependents, so there are no third parties to be protected. Nor is the State's interest in the prevention of suicide an issue. As the courts have repeatedly held, forgoing life sustaining medical treatment cannot be considered suicide. See, e.g., *In re Farrell*, 108 N.J. 335, 350, 529 A.2d 404, 411 (1987).

104. *Cruzan*, 760 S.W.2d at 424.

interest in *preventing* abuse and created a situation in which continued forced treatment constitutes a more egregious form of abuse, with no concomitant state justification or benefit.¹⁰⁵

The state should protect its citizenry from abuse by regulating the way decisions are made, but cannot demand that patients accept its view of the appropriate medical decisions. Patients need protection from decisions made in ignorance or bad faith, but those protections can be provided institutionally, with courts as a last resort.¹⁰⁶ A rule of law which speaks to eliminating all potential abuses by requiring unwanted treatment unfairly burdens the vast majority of well-meaning families, and does not take into account the checks and balances within the medical world. Attending physicians are required to conform to nationally accepted ethical standards, institutional committees review cases, confirming opinions can be sought, and judicial review in cases of conflict is always a possibility.¹⁰⁷

105. The court's concern with the potential for abuse for the general population of incompetent patients appeared a number of times in the decision.

The state's concern with the sanctity of life rests on the principle that life is precious and worthy of preservation without regard to its quality. This latter concern is especially important when considering a person who has lost the ability to direct her medical treatment. In such a circumstance, we must tread carefully, with due regard for those incompetent persons whose wishes are unknowable but who would, if able, choose to continue life-sustaining treatment. Any substantive principle of law which we adopt must also provide shelter for those who would choose to live -- if able to choose -- despite the inconvenience that choice might cause others.

Id. at 419. Similarly, "[w]ere quality of life at issue, persons with all manners of handicaps might find the state seeking to terminate their lives. Instead, the state's interest is in life; that interest is unqualified." *Id.* at 420.

106. Areen, *The Legal Status of Consent Obtained from Families of Adult Patients to Withhold or Withdraw Treatment*, 258 J. A.M.A. 229, 234 (1987); Rhoden, *Litigating Life and Death*, 102 HARV. L. REV. 375, 443-45 (1988).

107. Institutional methods of resolving disputes have been recognized by both the courts and the bioethical and legal literature. See *supra* note 106; *In re Jobes*, 108 N.J. 394, 422-23, 529 A.2d 434, 448-49 (1987); *In re Colyer*, 99 Wash. 2d 114, 127, 660 P.2d 738, 746 (1983); *Guidelines on the Termination of Treatment and the Care of the Dying*, HASTINGS CENTER 31-33 (1987). Dispute resolution mechanisms are also present within many institutions; one-half to three-quarters of all hospitals now have ethics committees, as do some nursing homes. U.S. Congress, Office of Technology Assessment, *Life Sustaining Technologies and the Elderly*, 63 (1987). See *supra* note 106. One-half to three-quarters of all hospitals now have ethics committees, as do some nursing homes. U.S. Congress: Office of Technology

By finding such an unrestricted state interest, the Missouri Supreme Court did not merely regulate the decision-making process for Nancy Cruzan; it decided that Nancy Cruzan must accept treatment.¹⁰⁸ To withstand constitutional scrutiny, a limitation on an individual's privacy or liberty rights must be "necessary to achievement of a *compelling* state interest."¹⁰⁹ The Missouri Supreme Court's description of the state interest in the "preservation of life," carried to its conclusion, means that as a society, we would have to maintain all biological existence indefinitely.¹¹⁰ The court purported to limit the rights of Nancy Cruzan to forgo treatment on three separate grounds: her condition, the treatment at issue, and the evidence of her wishes.¹¹¹ None of these reasons meets the "compelling state interest" test,¹¹² and each unduly burdens a fundamental right to self determination, privacy and liberty.¹¹³ By ordering treatment for Nancy Cruzan in contravention of her family's view of what her wishes would be, Missouri crossed the constitutional line which protects the citizenry from governmental interference in these extraordinarily personal and troubling dilemmas.

Assessment, Life Sustaining Technologies and the Elderly 63 (1987).

108. *Cruzan*, 760 S.W.2d at 424.

109. *Eisenstadt v. Baird*, 405 U.S. 438, 447 n.7 (1972) (emphasis added).

110. As one commentator noted,

[e]liminating quality of life considerations from decisions about life-sustaining treatment permits treatment to proceed regardless of the pain it inflicts, how burdensome it becomes, or how futile it proves to be. Once initiated, treatment must continue until death is imminent, leaving patients the option to refuse useless care only, because the state's disinterest in quality of life requires it to remain indifferent to the patient's experience of treatment. Patients thereby become things and the individual's interest in a natural death is subsumed under a quest for perpetual life.

Scofield, *The Calculus of Consent*, Hastings Center Report (Jan./Feb. 1990).

111. *Cruzan*, 760 S.W.2d at 422-24.

112. See *supra* note 109.

113. See *supra* note 50.

A. The Missouri Supreme Court Unconstitutionally Burdened the Right to Forgo Medical Treatment by Limiting the Exercise of the Right to Certain Medical Conditions

Nancy Cruzan lies in a persistent vegetative state, a condition which the Missouri Supreme Court found distinguished the rights at issue from those of competent patients or the terminally ill.¹¹⁴

Yet, the Missouri court's view of a persistent vegetative state is at odds with other jurisdictions.¹¹⁵ As the New Jersey Supreme Court stated, it is "difficult to conceive of a case in which the state could have an interest strong enough to subordinate a patient's right to choose not to be artificially sustained in a persistent vegetative state."¹¹⁶ While the state has a legitimate and important interest in protecting its most vulnerable and helpless citizens, "the greater risk of abuse lies in disregarding such specifically declared personal decisions and in imposing life-sustaining procedures upon the patient contrary to his express will."¹¹⁷ Any concept of the sanctity of life, and interest in the preservation of life, must also "encompass a recognition of an individual's right to avoid

114. *Cruzan*, 760 S.W.2d at 415. The use of the term "terminally ill" is frequently and frustratingly inaccurate. The Missouri Supreme Court described Nancy Cruzan as not terminally ill, in contrast to Karen Quinlan and Brother Fox, the patient in *In re Eichner (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). *Cruzan*, 760 S.W.2d at 415. In fact, all three patients were diagnosed as being in persistent vegetative states, which the American Academy of Neurology, the relevant authority, states does not constitute a terminal illness. Position of the American Academy of Neurology on certain aspects of the Care and Management of the Persistent Vegetative State Patient, 39 NEUROLOGY 125 (1989).

115. *See supra* note 10.

116. *In re Peter*, 108 N.J. 365, 380, 529 A.2d 419, 427 (1987) (patient had a medical durable power of attorney, the appointed agent stated that the patient had directed him to refuse life-sustaining treatment in these circumstances, and there were nine reliable accounts of the patient's disinclination for this type of treatment).

117. *In re Gardner*, 534 A.2d 947, 955 (Me. 1987) (patient previously had stated orally that people kept alive in artificially vegetative states lost their dignity, and he would rather die) ("[a]lthough Gardner is now in a condition that prevents him from making and communicating a decision as to his care, the trial justice found by clear and convincing evidence after an extensive hearing that Gardner had prior to his accident made a 'declaration of intent and desire that he not be maintained on the nasogastric tube"). *Id.* at 952.

circumstances in which the individual himself would feel that efforts to sustain life demean or degrade his humanity."¹¹⁸

The Missouri Court repeatedly stated that it was not interested in making quality of life determinations.¹¹⁹ Yet, the state's interest in the preservation of life permitted Missouri to make a determination about what constitutes an acceptable quality of life for Nancy Cruzan. In effect, the Missouri Supreme Court found that for Nancy Beth Cruzan, a persistent vegetative state was an acceptable quality of life. As the New Jersey Supreme Court held:

The privacy that we accord medical decisions does not vary with the patient's condition or prognosis. The patient's medical condition is generally relevant only to determine whether the patient is or is not competent, and if incompetent, how the patient, in view of that condition, would choose to treat it were she or he competent.¹²⁰

Even an excellent prognosis, albeit irrelevant for Nancy, does not justify overriding a competent patient's desires.¹²¹ Choices are for the patient, not the doctors or the state: "[i]f the patient's right to informed consent is to have any meaning at all, it must be accorded respect even when it conflicts with the advice of the doctor or the values of the medical profession as a whole."¹²²

118. *Brophy v. New England Sinai Hosp., Inc.*, 398 Mass. 417, 434, 497 N.E.2d 626, 635 (1986).

119. *Cruzan v. Harmon*, 760 S.W.2d 408, 419-20, 422, 424 (Mo. 1988) (*en banc*).

120. *Peter*, 108 N.J. at 373, 529 A.2d at 423; *see also In re Conroy*, 98 N.J. 321, 355, 486 A.2d 1209, 1226 (1985).

121. *Public Health Trust of Dade County v. Wons*, 451 So. 2d 96, 100 (Fla. 1989) (competent Jehovah's Witness had lawful right to refuse blood transfusion, without which she would probably die).

122. *Conroy*, 98 N.J. at 352-53, 486 A.2d at 1225 (where a minimally conscious patient was held to have the right to forgo artificial feeding if the patient had previously made that specific choice, or if there was some evidence that the patient would not want the feeding,

B. The Missouri Supreme Court Unconstitutionally Refused to Allow Patients the Right to Forgo Artificial Feeding

An attempt to justify burdening Nancy Cruzan's privacy and liberty interests by distinguishing between tube feeding and other forms of treatment, also will not withstand constitutional scrutiny. Feeding undeniably has special symbolic and emotional connotations, but subjective attitudes have no place in a debate about whether a person should be treated against her will:

Analytically, artificial feeding by means of a nasogastric tube or intravenous infusion can be seen as equivalent to artificial breathing by means of a respirator. Both prolong life through mechanical means when the body is no longer able to perform a vital bodily function on its own. Furthermore, while nasogastric feeding and other medical procedures to ensure nutrition and hydration are usually well tolerated, they are not free from risks and burdens; they have complications that are sometimes serious and distressing to the patient.¹²³

Feeding tubes have been found by some states to be "intrusive treatment as a matter of law."¹²⁴

Tube provision of feeding formula is acknowledged by the medical profession, and most courts, as a form of care that may be legally and ethically withdrawn if to do so is in

and the treatment would only prolong suffering or if the burdens of the treatment outweighed the benefits).

123. *Id.* at 373, 486 A.2d at 1236 (citations omitted).

124. *Brophy v. New England Sinai Hosp., Inc.*, 398 Mass. 417, 425, 497 N.E.2d 626, 636 (1986).

accordance with the patient's wishes.¹²⁵ With the exception of Missouri and a recent intermediate court¹²⁶ every court to have considered the issue has held explicitly that tube feeding is medical treatment that may be withdrawn.¹²⁷

The courts, holding that artificial feeding should be treated like other medical procedures, have relied on the wide range of medical and ethical authorities which also conclude that it is appropriate to withhold or withdraw artificially supplied nutrition and hydration, when to do so is consistent with the patient's wishes.¹²⁸

125. See, e.g., *In re Conservatorship of Drabick*, 200 Cal. App. 3d 185, 195, 245 Cal. Rptr. 840, 845 (Cal. Ct. App. 1988), cert. denied, 109 S.Ct. 399 (1988); *McConnell v. Beverly Enterprise-Connecticut, Inc.*, 209 Conn. 692, 704-06, 553 A.2d 596, 603-04 (1989); *In re Gardner*, 534 A.2d 947, 954 (Me. 1987).

126. *Couture v. Couture*, No. 11679 (Ohio Ct. App. Montgomery Co., August 21, 1989) (court held that because the Ohio durable power of attorney statute did not permit refusal of artificial feeding, the guardianship statute could not be interpreted to permit the same decision to be made).

127. See, e.g., *Corbett v. D'Alessandro*, 487 So. 2d 368 (Fla. Dist. Ct. App.), review denied, 492 So. 2d 1331 (Fla. 1986); *Conservatorship of Drabick*, 200 Cal. App. 3d 185, 245 Cal. Rptr. 840 (Cal. Ct. App. 1988), review denied, (Cal. July 28, 1988), cert. denied, 109 S. Ct. 399 (1988); *McConnell v. Everly Enterprises*, 209 Conn. 692, 553 A.2d 596 (1989); *In re Gardner*, 534 A.2d 947 (Me. 1987); *Delio v. Westchester County Medical Center*, 129 A.D.2d 1, 516 N.Y.S.2d 677 (2d Dep't 1987); *Brophy v. New England Sinai Hospl. Inc.*, 398 Mass 417, 497 N.E.2d 626 (1986) *In re Conroy*, 98 N.J. 321, 486 A.2d 1209 (1985); *Gray v. Romeo*, 697 F. Supp. 580 (D. R. I. 1988). A Washington Supreme Court decision upholding the right to reject tube feeding was modified when one Justice changed her vote a year later. *In re Guardianship of Grant*, 109 Wash. 2d 545, 747 P.2d 445 (1987), modified, 757 P.2d 534 (1988). She joined a concurring opinion which stated it was not necessary to reach the issue of whether artificial feeding could be withheld since the patient did not yet require tube feeding. The concurring opinion stated that the court should await action from the legislature on that issue. An intermediate Appellate Court decision from Ohio looked to a recently enacted durable power of attorney statute which does not permit refusal of artificial feeding, and found that guardians were creations of the legislature, and should not have greater powers than appointed agents. *Couture v. Couture*, No. 11679 (Ohio Ct. App. Montgomery County Aug. 21, 1989).

128. *Drabick*, 200 Cal. App. 3d at 195, 245 Cal. Rptr. at 845; *McConnell*, 209 Conn. at 704-06, 553 A.2d at 603-04; *Gardner*, 534 A.2d at 954. See, e.g., *Guidelines on the Termination of Life-Sustaining Treatment and the Care of the Dying* HASTINGS CENTER at 61 (1987); American Medical Association Counsel on Ethical and Judicial Affairs, *Withholding or Withdrawing Life-Sustaining Medical Treatment*, in *Current Opinions of the Council on Ethical and Judicial Affairs of the American Medical Association* 12-13 (1986); President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, *Deciding to Forego Life-Sustaining Treatment: A Report on the Ethical, Medical and Legal Issues in Treatment Decisions* at 90 (1983).

Arguments that tube feeding is "normal" or "basic" care, which must always be provided, have very little factual basis. Fearmongers who suggest that permitting the removal

In addition to the medical and ethical consensus surrounding this issue, through living will legislation, many state legislatures have addressed the question of artificial feeding. Ten statutes indicate that tube feeding can be withdrawn under certain circumstances.¹²⁹ Twelve statutes associate it with comfort care,¹³⁰ and generally can be read as allowing patients to forgo artificially supplied sustenance if it is not necessary for comfort.¹³¹ Fourteen statutes make no mention of artificial feeding thereby permitting interpretation so as to authorize its withdrawal consistent with medical

of tube feeding in isolated cases will lead to widescale abuse of the vulnerable elderly deliberately overstate the facts. Indeed, the very small number of nursing home patients who receive tube feeding is an indication of how unusual this form of treatment is. Available estimates are that 2%-5% of nursing home residents receive tube feeding. U.S. Congress, Office of Technology Assessment, *Life Sustaining Technologies and the Elderly* at 12 (1987). Data from the 1985 National Nursing Home Survey indicates that approximately 26,000 nursing home residents were tube fed (2% of the total nursing home population). Industry estimates were slightly higher: 53,400 (about 4%). *Id.* at 297. Thus, somewhere between 26,000 and 54,000 nursing home residents are receiving tube feeding at any given time. *Id.*

129. Alaska Rights of Terminally Ill Act, ALASKA STAT. § 18.12.010(c) (1986); Arkansas Rights of the Terminally Ill or Permanently Unconscious Act, § 20-17-20(b) (Supp. 1987); Colorado Medical Treatment Decision Act, COLO. REV. STAT. § 15-18-103(7) (1989); Idaho Natural Death Act, IDAHO CODE § 39-4504 (Supp. 1989); Illinois Living Will Act, ILL. ANN. STAT. ch. 110 1/2, § 702(d) (Smith-Hurd Supp. 1989); Minnesota Adult Health Care Decisions Act, s. 28, Chapter 145B, § 145B.03 (1989); Montana Living Will Act, MONT. CODE ANN. § 50-9-202(2) (1987); North Dakota Act, H.B. No. 1481 § 8(3) (signed April 12, 1989); Oregon Rights with Respect to Terminal Illness Act, OR. REV. STAT. § 97.050(3) (1984); Tennessee Right to Natural Death Act, TENN. CODE ANN. § 32-11-103(5) (Supp. 1988).

130. "Comfort care" is synonymous with "palliative care," which has been defined as "medical, surgical and other interventions to alleviate suffering, discomfort, and dysfunction, whether physical or not, but not to cure." *Guidelines on the Termination of Life-Sustaining Treatment and the Care of the Dying* HASTINGS CENTER at 140 (1987).

131. Arizona Medical Treatment Decision Act, ARIZ. REV. STAT. ANN. § 36-3201(4) (1986); Florida Life Prolonging Procedure Act, FLA. STAT. ANN. § 765.03(3) (West 1986); Hawaii Medical Treatment Decisions Act, HAW. REV. STAT. § 327D-2 (Supp. 1988); Indiana Living Wills and Life Prolonging Procedures Act, IND. CODE ANN. § 16-8-11-4 (Burns Supp. 1989); Iowa Life-Sustaining Procedures Act, IOWA CODE ANN. § 144A.2(5) (West 1989); Maryland Life-Sustaining Procedures Act, MD. HEALTH-GENERAL CODE ANN. § 5-605 (Supp. 1988); New Hampshire Terminal Care Document Act, N.H. REV. STAT. ANN. § 137-H:2II (Supp. 1988); Oklahoma Natural Death Act, OKLA. STAT. ANN. tit. 63 § 3102(4) (West Supp. 1989); South Carolina Death with Dignity Act, S.C. CODE ANN. § 44-77-20(2) (Law. Co-op. Supp. 1988); Utah Personal Choice and Living Will Act, UTAH CODE ANN. § 75-2-1103(6) (Supp. 1988); West Virginia Natural Death Act, W. VA. CODE § 16-30-2(3) (1985); Wyoming Act, WYO. STAT. § 3-22-101(iii) (1988). Oklahoma has a separate statute addressing the use of tube feeding. Hydration and Nutrition for Incompetent Patients Act, 63 Pub. Health & Safety § 3080 (1987).

ethics.¹³² Of the six states whose statutes provide that artificial feeding is *not* a medical procedure which may be rejected under the statute,¹³³ three have had supplemental case law vindicating the patient's common law or constitutional right to forgo that treatment.¹³⁴ The Maine case specifically held that the living will statute is not the exclusive means of exercising and defining the right to refuse medical treatment.¹³⁵

State courts have gone to considerable lengths to interpret refusal of treatment statutes in a manner consistent with federal and state constitutional rights. The Connecticut experience exemplifies this interplay of judicial and legislative input. The Connecticut Supreme Court interpreted its Removal of Life Support Systems Act so as to provide "functional" guidelines for the exercise of the common law and

132. Alabama Natural Death Act, ALA. CODE §§ 22-8A-1 to-10 (1984); California Natural Death Act, CAL. HEALTH & SAFETY CODE §§ 7185 -95 (West 1989); Delaware Death with Dignity Act, DEL. CODE ANN. tit. 16, §§ 2501 to 2509 (1983); District of Columbia Natural Death Act of 1981, D.C. CODE ANN. §§ 6-2421 to -2430 (1988); Kansas Natural Death Act, KAN. STAT. ANN. §§ 65-28,101 to -28,109 (1985); Louisiana Life-Sustaining Procedures Act, LA. REV. STAT. ANN. §§ 40:1299.58.1 to -.10 (West 1989); Mississippi Withdrawal of Life Saving Mechanisms Act, MISS. CODE ANN. §§ 41-41-101 to -121 (1988); Nevada Withholding or Withdrawal of Life Sustaining Procedures Act, NEV. REV. STAT. §§ 449.540 to 690 (1986); New Mexico Right to Die Act, N.M. STAT. ANN. §§ 24-7-1 to -11 (1986); North Carolina Right to Natural Death Act, N.C. GEN. STAT. §§ 90-320 to -322 (1985); Texas Natural Death Act, TEXAS HEALTH & SAFETY CODE ANN. § 672.001 (Vernon 1989); Vermont Terminal Care Document Act, VT. STAT. ANN. tit. 18, §§ 5251-5262 (1987); Natural Death Act of Virginia, VA. CODE ANN. §§ 54.1-2981 -2992 (1989); Washington Natural Death Act, WASH. REV. CODE ANN. §§ 70.122.010 to -.905 (1989).

133. Connecticut Removal of Life Support Systems Act, CONN. GEN. STAT. § 19a-570(1) (Supp. 1989); Georgia Living Wills Act, GA. CODE ANN. § 31-32-2(5) (1985 & Supp. 1989); Kentucky Living Will Act, KY ACTS ch. 122 (H.B. 113)(1990); Maine Living Wills Act, ME. REV. STAT. ANN., tit. 22, § .2921(4) (Supp. 1988); Missouri Life Support Declarations Act., MO. ANN. STAT. § 459.010(3) (Vernon Supp. 1989); Wisconsin Natural Death Act, WISC. STAT. ANN § 154.01(5) (West 1989).

134. Connecticut Removal of Life Support Systems Act, CONN. GEN. STAT. § 19a-570(1) (Supp. 1989), as interpreted by *Mc Connell v. Beverly Enterprises*, 209 Conn. 692, 553 A.2d 596 (1989); Georgia Living Wills Act, GA. CODE ANN. § 31-32-2(5) (1985 & Supp. 1989), as supplemented by *In Re Jane Doe*, No. D56730 (Ga. Super. Ct. Fulton County July 13, 1988); Maine Living Wills Act, ME. REV. STAT. ANN. tit. 22, § 2921(4) (Supp. 1988), as supplemented by *In re Gardner*, 534 A.2d 947 (Me. 1987); Missouri Life Support Declarations Act, MO. ANN. STAT. § 459.010(3) (Vernon Supp. 1989); Wisconsin Natural Death Act, WIS. STAT. ANN. § 54.01(5) (West 1989).

135. *In re Gardner*, 534 A.2d 947, 952 n.3 (Me. 1987) (the Maine living will act does not limit the court's power to read Maine Common law more broadly). See also *In re Jane Doe*, No. D56730 (Ga. Super. Ct. Fulton County July 13, 1988).

constitutional rights of self determination which have received almost universal recognition.¹³⁶ The statutory definition of "life support systems" is "[a]ny mechanical or electronic device, *excluding the provision of nutrition or hydration*, utilized by any physician or licensed medical facility in order to replace, assist or supplement the function of any human vital organ or combination of organs which prolongs the dying process."¹³⁷ Nonetheless, the Connecticut Supreme Court found that the right to refuse treatment, including tube feeding, was of constitutional dimension, and that the statute had been enacted to provide a means of its exercise.¹³⁸ The Court stated that its Act, read in its entirety, "[i]mplicitly contemplates the possible removal from a terminally ill patient of artificial technology in the form of a device such as a gastrostomy tube, but it does not under any circumstances, permit the withholding of normal nutritional aids such as a spoon or straw."¹³⁹ Thus, the Connecticut Court made what could be considered a strained interpretation of the statute so as to find it consistent with a constitutionally protected right.

Similarly, the Court of Appeals in Florida, which has a statute associating artificial feeding with comfort care,¹⁴⁰ held that although the legislation did not permit the removal of artificial feeding, patients nonetheless retained their constitutional and common law rights to refuse that form of medical treatment.¹⁴¹ The Court noted that the Act had a provision stating that it was supplemental to existing rights and

136. *McConnell v. Beverly Enterprises-Connecticut, Inc.*, 209 Conn. 692, 705, 553 A.2d 596, 603 (1989).

137. Connecticut Removal of Life Support Systems Act, CONN. GEN. STAT. § 19a-570 (Supp. 1989) (emphasis added).

138. *McConnell*, 209 Conn. at 705, 553 A.2d at 603.

139. *Id.*

140. "The term 'life-prolonging procedure' does not include the provision of sustenance or the administration of medication, or performance of any medical procedure deemed necessary to provide comfort care or to alleviate pain." Life-Prolonging Procedure Act of Florida, FLA. STAT. ANN. § 765.03(3) (1986).

141. *Corbett v. D'Alessandro*, 487 So. 2d 368 (Fla. Dist. Ct.App.), *review denied*, 492 S. 2d 1331 (Fla. 1986).

law and that since the rights at issue were constitutional, they could not be limited by legislation.¹⁴²

Likewise, in 1987, courts in Colorado¹⁴³ and Maine¹⁴⁴ held that even if their state's living will acts did not authorize removal of a feeding tube, they were cumulative with existing law and the right to refuse tube feeding is protected by either common law,¹⁴⁵ or constitutional law.¹⁴⁶ Missouri is the only state to ignore the language in the living will statute¹⁴⁷ that the rights of the act are cumulative, and to find instead that its legislature cut off the rights of patients to forgo treatment not enunciated in the statute.¹⁴⁸

The provision of artificial feeding against an individual's wishes can be extraordinarily intrusive and abusive treatment:

The naso-gastric tube continues to pose significant hazards while it is in place. It may cause vomiting and aspiration of the gastric contents, producing a serious aspiration pneumonia. It may irritate the mucosal surfaces, causing bleeding, sometimes severe. Many patients need to be restrained forcibly and their

142. *Corbett v. D'Allesandro*, 487 So. 2d 368, 372 (Fla. Dist. Ct. App. 1980), *review denied*, 492 So.2d 1331 (1986).

143. *In re Rodas*, No. 86PR139 (Colo. Dist. Ct. Mesa County Jan. 22, 1987), *as modified*, Apr. 3, 1987.

144. *In re Gardner*, 534 A.2d 947, 952 (Me. 1987).

145. *Id.*

146. *Rodas*, No. 86PR139.

147. Nothing in sections 459.010 to 459.055 shall be interpreted to increase or decrease the right of a patient to make medical decisions regarding use of medical procedures so long as the patient is able to do so, nor to impair or supersede any right or responsibility that any person has to effect the withholding of withdrawal of medical care in any lawful manner. In that respect, the provisions of sections 459.010 to 459.055 are cumulative.

MO. ANN. STAT. § 459.055 (Vernon 1990).

148. Missouri's reliance on its Living Will statute to justify foreclosing rights is particularly ironic in Nancy Cruzan's case, because her accident was on January 11, 1983, before the passage of the statute. See MO. ANN. STAT. § 459.055 (Vernon 1990) (The statute was enacted in 1985).

hands put into large mittens to prevent them from removing the tube, a thought which all patients with any degree of consciousness seem to have. These restrained patients may develop pneumonia and serious bedsores because of lack of activity and fixed positions.¹⁴⁹

To carve out an exception to the individual's right to control treatment for this one form of medical care is more than an unreasonable burden on its exercise; in many cases, such as Nancy Cruzan's, it forbids its exercise. As noted above, in other circumstances, this form of treatment can be painful and degrading. Emotional arguments based on the symbolic importance of "food and water" which are at odds with national medical standards and can be violent intrusions on individual dignity do not meet "the compelling state interest" test.¹⁵⁰

C. The Right to Have an Individualized Decision Should Not Be Burdened by Requiring Unrealistically Definitive Evidence of the Patient's Wishes to Forgo Life Support

The Missouri Supreme Court implied that to be effective, the evidence of an individual's wishes to forgo treatment must show that the patient made a precise and detailed decision to refuse life support under the very circumstances at issue.¹⁵¹ The result is that the Missouri Court banned the Cruzan family from any input into Nancy Cruzan's care. The evidentiary standards for the right to forgo treatment cannot be so "unduly burdensome" as to preclude its exercise.¹⁵² A requirement of "clear and convincing"

149. D. MAJOR, *The Medical Procedures For Providing Food And Water: Indications And Effects*, BY NO EXTRAORDINARY MEANS (page #?) (J. Lynn ed. 1986).

150. *Eisenstadt v. Baird*, 405 U.S. 438, 447 n.7 (1972).

151. *Cruzan v. Harmon*, 760 S.W.2d 408, 424 (Mo. banc 1988) (*en banc*).

152. *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 453 (1983) (O'Connor, J., dissenting).

evidence of the patient's previously informed personal choice will do just that.

Informed consent was developed as a doctrine to protect the liberty interest of competent people to *not* be treated without their informed permission.¹⁵³ As the Missouri Supreme Court itself noted, for incompetent patients, the same level of information is impossible: "[i]t is definitionally impossible for a person to make an informed decision--whether to consent or to refuse--under hypothetical circumstances."¹⁵⁴ To require such an impossible standard is to shift the burden so that all patients *must* receive treatment because they can never knowingly reject it in advance.

Some form of "substituted judgement" is the only workable standard which protects the patient's constitutional right to a decision: it is the "only practical way to prevent destruction of the right."¹⁵⁵ The substituted judgement doctrine "is intended to ensure that the surrogate decision-maker effectuates as much as possible the decision that the incompetent patient would make if he or she were competent."¹⁵⁶ This approach allows a surrogate decision-maker to decide the patient's course of care, taking into account everything known about the patient, including his or her personal value system, prior statements regarding medical conditions and situations, the patient's attitudes toward the impact of the medical condition on the family and loved ones, plus any and all philosophical, theological and ethical beliefs which might be relevant.¹⁵⁷ Indeed, a substituted judgement allows an approximation of personal choice and its proper exercise could lead to a request for continued treatment, even

153. See generally P. Applebaum, INFORMED CONSENT, LEGAL THEORY AND CLINICAL PRACTICE at 135-63 (1987).

154. *Cruzan*, 760 S.W.2d at 417.

155. *In re Quinlan*, 70 N.J. 10,41, 355 A.2d 647,664, cert. denied sub nom. Garger v. New Jersey, 429 U.S. 922 (1976), overruled in part, *In re Conroy*, 98 N.J. 321, 486 A.2d 1209 (1985).

156. *In Re Jobes*, 108 N.J. 394, 414, 529 A.2d 434, 444 (1987).

157. *Id.* at 415, 529 A.2d at 444.

against medical advice.

A substituted judgment that Nancy Cruzan would choose to forgo treatment does not make the exercise of the rights any less personal:

[If the patient's] treatment is determined solely as a matter of medical technology [, her] life is prolonged because it is possible, not because anyone purporting to speak for [her] has decided that this is the best or the wisest course . . . human beings are not the passive subjects of medical technology. . . . While [the patient's] coma precludes [her] participation, it is still possible for others to make a decision that reflects [her] interests more closely than would a purely technological decision to do whatever is possible. *Lacking the ability to decide, [she] has a right to a decision that takes [her] interests into account.*¹⁵⁸

158. *In re Conservatorship of Drabick*, 200 Cal. App. 3d 185, 208, 345 Cal. Rptr. 840, 854-55 (Cal. Ct. App. 1988), *review denied* (Cal. July 28, 1988), *cert. denied*, 109 S. Ct. 399 (1988) (emphasis added) (conservator of incompetent person in vegetative state with no hope of recovery is authorized to decide, considering medical advice and conservatee's best interests, that medical treatment in form of artificial life support should be withdrawn and conservatee permitted a natural death); *See, e.g., Rasmussen v. Fleming*, 154 Ariz. 207, 741 P.2d 674 (1987) (public fiduciary as guardian of nursing home patient in chronic vegetative state had implied statutory authority to exercise patient's right to refuse medical treatment); *McConnell v. Beverly Enterprises*, 209 Conn. 692, 553 A.2d 596 (1989) (action brought by comatose terminally ill patient's husband and children seeking injunctive and declaratory relief from life support services being provided to patient by private nursing home was authorized by Removal of Life Support Systems Act); *In re Severns*, 425 A.2d 156 (Del. Ch. 1980) (incompetent may exercise his or her right to privacy by substituted judgment of one acting on his or her behalf, and guardian may be authorized to carry out previously expressed intent of infirm person); *John F. Kennedy Memorial Hosp., Inc. v. Blutworth*, 452 So. 2d 921 (Fla. 1984) (right of patient who is irreversibly comatose to refuse extraordinary life sustaining measures, may be exercised either by his or her close family members or by guardian appointed by the court, on behalf of the patient under the "doctrine of substituted judgment"); *Brophy v. New England Sinai Hosp., Inc.*, 398 Mass 417, 497 N.E.2d 626 (1986) (substituted judgment of patient in persistent vegetative state that artificial maintenance of his nutrition and hydration be discontinued would be honored by authorizing guardian to remove ward from present hospital to care of other physicians who would honor patient's wishes); *In re Torres*, 357 N.W.2d 332 (Minn. 1984) (where conservatee's best interests are no longer served by maintenance of life supports, probate court may, by reason of both constitutional and

Under the Missouri Supreme Court's decision, it is not only medical technology which has dictated that Nancy Cruzan be treated, but it is also the State of Missouri, usurping the role of the family to speak for the patient.

The vast majority of state courts which have reached the issue have protected the constitutional rights of its citizens by endorsing family decision-making,¹⁵⁹ and the substituted judgment approach.¹⁶⁰

statutory authority, empower conservator to order removal of the life supports); *In re Jobes*, 108 N.J. 394, 529 A.2d 434 (1987) (right of patient to refuse life-sustaining medical treatment may be exercised by patient's family or close friend); *In re Conroy*, 98 N.J. 321, 486 A.2d 1209 (1985) (where a patient is deemed incompetent, a surrogate may determine when life-sustaining treatment should be withdrawn if doing so effectuates the incompetent patient's wishes or would be in his/her best interests under either the subjective, limited-objective, or pure-objective test); *Gray v. Romeo*, 697 F. Supp. 580 (D.R.I. 1988) (husband of patient in a persistent vegetative state had authority to remove wife's feeding tube and life support based on patient's right to control fundamental medical decisions that affect her body, a right of self-determination which is grounded in the liberties protected by the fourteenth amendment's due process clause); *In re Coyer*, 99 Wash. 2d 114, 660 P.2d 738 (1983), *modified*, *In re Guardianship of Hamlin*, 102 Wash. 2d 810, 689 P.2d 1372 (1984) (guardian had authority to consent to withdrawal of life-support systems where all physicians who examined ward agreed with diagnosis that he was in persistent vegetative state with no prospect of regaining cognitive functions).

159. *Gray*, 697 F. Supp. at 580 (where the husband of patient in a persistent vegetative state had authority to remove wife's feeding tube and life support based on patient's right to control fundamental medical decisions that affect her body. The district court held this to be a right of self-determination which is grounded in the liberties protected by the fourteenth amendment's due process clause.); *McConnell*, 209 Conn. at 692, 553 A.2d at 596 (action brought by comatose terminally ill patient's husband and children seeking injunctive and declaratory relief from life support services being provided to patient by private nursing home was authorized by Removal of Life Support Systems Act); *Coyer*, 99 Wash. 2d at 114, 660 P.2d at 738.

160. *See, e.g.*, *Rasmussen v. Fleming*, 154 Ariz. 207, 741 P.2d 674 (1987) (public fiduciary as guardian of nursing home patient in chronic vegetative state had implied statutory authority to exercise patient's right to refuse medical treatment); *Conservatorship of Drabick*, 200 Cal. App. 3d at 185, 245 Cal. Rptr. at 840 (conservator of incompetent person in vegetative state with no hope of recovery is authorized to decide, considering medical advice and conservatee's best interests, that medical treatment in form of artificial life support should be withdrawn and conservatee permitted a natural death); *In re Severns*, 425 A.2d 156 (Del. Ch. 1980) (incompetent may exercise his or her right to privacy by substituted judgment of one acting on his or her behalf, and guardian may be authorized to carry out previously expressed intent of infirm person); *Bludworth*, 452 So. 2d at 921 (right of patient who is irreversibly comatose to refuse extraordinary life sustaining measures, may be exercised either by his or her close family members or by guardian appointed by the court, on behalf of the patient under "doctrine of substituted judgment"); *Brophy*, 398 Mass. at 417, 497 N.E.2d at 626 (substituted judgment of patient in persistent vegetative state that artificial maintenance of his nutrition and hydration be discontinued would be honored by authorizing guardian to remove ward from present hospital to care of other physicians who would honor patient's wishes); *In re*

Consistent with the constitutionally protected realm of family life,¹⁶¹ it is those closest to the patient who should make the treatment decisions, not the state. Family members are usually the appropriate parties to make substituted judgment decisions because "[a]most invariably the patient's family has an intimate understanding of the patient's medical attitudes and general world view and therefore is in the best position to know the motives and considerations that would control the patient's medical decisions."¹⁶² In this case, the Cruzans can speak for Nancy Cruzan and assert what they believe she would want, based on their lifetime experience with her, as well as her own clear statements on the issue.¹⁶³ They are guided by her specific conversations about the life support decisions she did encounter¹⁶⁴ and are unanimous in their belief that Nancy would be appalled at her condition,¹⁶⁵ and would choose to forgo the artificial feeding which merely sustains her existence.¹⁶⁶

Only New York¹⁶⁷ and Maine,¹⁶⁸ and in limited

Torres, 357 N.W.2d 332 (Minn. 1984) (where conservatee's best interests are no longer served by maintenance of life support, probate court may, by reason of both constitutional and statutory authority, empower conservator to order removal of the life supports); *Jobes*, 108 N.J. at 394, 529 A.2d at 434 (right of patient in irreversibly vegetative state to determine whether to refuse life-sustaining medical treatment may be exercised by patient's family or close friend); *Conroy*, 98 N.J. at 321, 486 A.2d at 1209 (where a patient is deemed incompetent, a surrogate may determine when life-sustaining treatment should be withdrawn if doing so effectuates the incompetent patient's wishes or would be in his or her best interests under either subjective, limited-objective, or pure-objective test).

161. See *supra* notes 51-72.

162. In *Matter of Jobes*, 108 N.J. 394, 415, 529 A.2d 434, 445 (1987).

163. The trial court found Nancy Cruzan's statements to be clear and convincing evidence of her wishes. *Cruzan v. Harmon*, 760 S.W.2d 408, 411 (Mo. 1988) (en banc). While in this case the patient provided the requisite level of evidence of her wishes, the substituted judgment standard is a more realistic approach in the majority of cases. *Id.* at 425-26.

164. Nancy's roommate testified that "she would not want to continue her present existence with hope as it is." *Id.* at 424.

165. *Cruzan*, 760 S.W.2d at 443. "The trial court in no way limited its finding on Nancy's intentions to the single conversation Nancy had with her friend Athena Comer." *Id.*

166. The trial judge based his conclusion that Nancy Cruzan would chose to forgo artificial feeding on three full days of evidence. *Id.* at 443.

167. *In Re Westchester County Medical Center (O'Connor)*, 72 N.Y.2d 517, 534, 531 N.E.2d 607 (1988).

168. *In Re Gardner*, 534 A.2d 947, 952 (Me. 1987).

circumstances, New Jersey,¹⁶⁹ have required that the patient's decision be demonstrated by clear and convincing evidence before the right to forgo life sustaining treatment can be exercised. Each of these courts specifically did so on common law grounds alone,¹⁷⁰ implicitly recognizing the danger of cutting off constitutional rights by an unreasonably stringent evidentiary standard. New York's clear and convincing standard has been singled out and criticized for its overly restrictive consequences.¹⁷¹

The governmental interest in protecting the vulnerable from abuse is not furthered by burdening medical decision-making with unmeetable and unreasonable standards. The fact that frequently there is no written information or directly relevant oral information about patient preferences does not

169. *In re Conroy*, 98 N.J. 321, 486 A.2d 1209 (1985) (clear and convincing evidence that the patient would have refused the treatment under the circumstances involved when the incompetent patient is minimally conscious; less strong evidence required if there is some trustworthy evidence that the patient would not want the treatment, and the burdens of the patient's continued life with the treatment outweigh the benefits of that life, and the treatment would merely prolong the patient's suffering).

170. *In Re Westchester County Medical Center (O'Connor)*, 72 N.Y.2d 517, 529, 531 N.E.2d 607, 612 (1988); *Gardner*, 534 A.2d at 951; *Conroy*, 98 N.J. at 346-47, 486 A.2d at 1221.

171. See *In re Hier*, 18 Mass. App. 200, 464 N.E.2d 959 (Ct. App.), *review denied*, 392 Mass. 1102, 465 N.E.2d 261 (1984); *Conservatorship of Drabick*, 200 Cal. App. 3d 185, 245 Cal. Rptr. 840, 856-857, *review denied* (Cal. July 28, 1988), *cert. denied*, 109 S. Ct. 399 (1988); Rhoden, *Litigating Life and Death*, 102 HARV. L. REV. 375, 390-91 (1988); *A Patient's Last Rights--Termination of Medical Care--an Analysis of New York's In re Storar*, 46 ALBANY L. REV. 1380 (1982); Note, *In re Storar, the Right to Die and Incompetent Patients*, 43 U. PITT. L. REV. 1087 (1982). As a dissenting New York Judge recently stated regarding New York's clear and convincing standard:

In short, [the patient] expressed her wishes in the only terms familiar to her, and she expressed them as clearly as a lay person should be asked to express them. To require more is unrealistic and for all practical purposes, it precludes the right of patients to forego life-sustaining treatment . . . Judges, the persons least qualified by training, experience or affinity to reject the patient's instructions, have overridden [the patient's] wishes, negated her long held values on life and death, and imposed on her and her family their ideas of what her best interests require.

Westchester County, 72 N.Y.2d at 551, 631 N.E.2d at 626, 534 N.Y.S.2d at 905 (emphasis added). The restrictive nature of the clear and convincing evidence standard has the effect of either encouraging secretive decision-making in violation of the law, forcing clear-cut cases into court or mandating treatment for patients for whom it is medically inappropriate, but for whom evidence at the clear and convincing level is not available. *New York Times*, Nov. 13, 1988, at 12, col. 1.

mean that a decision can be avoided; it means that the decision will invariably be to treat. Those incompetent patients who failed to leave a clear and convincing record of their wishes are not "protected" from bad decisionmaking by the presumption of continued treatment. The governmental interest in preventing abuse can be met by less restrictive means. Families or loved ones who do not act in good faith can be challenged, and those situations which are not resolved within the health care institution can be taken to court.¹⁷² Decisions to treat should not be by default, because of a human failing to anticipate the precise details of one's medical future. Substituted judgement allows decisions to withhold or withdraw life sustaining treatment to be made on an individual basis, consistent with the constitutional rights at stake.

V. CONCLUSION

The Supreme Court's resolution of *Cruzan v. Missouri Department of Health*¹⁷³ will set the stage for the right-to-die issue for the next decade. The dilemmas raised by this case are not going to disappear, and the Court's decision will determine whether the solutions will be best found in the courts--federal or state--or the legislatures. The unanimity of opposition from the medical establishment to the Missouri answer to the problem implies that workable decisionmaking procedures will be developed. Whether the federal constitution will guarantee that those procedures respect individual rights of privacy, liberty and self-determination remains to be seen.

172. See generally MEYERS, MEDICAL-LEGAL IMPLICATIONS OF DEATH AND DYING 479-481 (1981).

173. Supreme Court Docket No. 88-1503.