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# An Incompetent's Right to Withdraw From Treatment: *Cruzan v. Missouri* Department of Health

## I. INTRODUCTION

On December 26, 1990, Nancy Beth Cruzan died in the Missouri Rehabilitation Center in Mt. Vernon, Missouri where she had spent the last five years of her life in a persistent vegetative state.<sup>1</sup> Nancy's death occurred twelve days after doctors, pursuant to a court order obtained by Nancy's parents on December 14, 1990, removed the gastrostomy tube that provided Nancy with artificial nutrition and hydration.<sup>2</sup> The court order was the result of a three year battle fought by the Cruzans in an effort to allow their daughter to die with dignity and prevent her from becoming a victim of modern medical technology.

Nancy Cruzan was just one of the estimated 10,000 Americans today who are being kept alive by life support systems.<sup>3</sup> With the incredible advances that have been made in modern medical technology, doctors are able to keep patients alive through the use of artificial resuscitators, intravenous feeding, and gastrostomy feeding and hydration tubes that are implanted in a patient's stomach and provide the patient with food and water.<sup>4</sup> As a result of these advances, however, many patients are becoming "prisoner[s] of medical technology,"<sup>5</sup> forced to exist under conditions in which most people

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1. N.Y. Times, Dec. 27, 1990, at A18, col. 1.

The term "vegetative state" describes a "type of indefinite deep coma. Although the eyes may be open and occasional random movements of the head and limbs may occur, there are no other signs of consciousness and no response to stimuli. Only the basic body functions, such as breathing, heart beat and body temperature, are maintained." AMERICAN MEDICAL ASSOCIATION ENCYCLOPEDIA OF MEDICINE 1042 (1989).

2. N.Y. Times, Dec. 27, 1990, at A18, col. 1.

3. Minow & Cate, *The Lessons of Sidney Greenspan*, Chi. Tribune, Oct. 17, 1990, at C17.

4. *Cruzan v. Harmon*, 760 S.W.2d 408 (Mo. 1988) (en banc), cert. granted, *Cruzan v. Missouri Dep't of Health*, 109 S. Ct. 3240 (1989).

To insert a gastrostomy tube, a patient must undergo a surgical procedure in which the surgeon makes an opening in the stomach. The tube is either inserted into the stomach or passed through the small intestine. AMERICAN MEDICAL ASSOCIATION ENCYCLOPEDIA OF MEDICINE 478 (1989).

5. *Harmon*, 760 S.W.2d at 423.

would not want to live.<sup>6</sup>

Many doctors feel that they must exhaust every available resource before they can allow a patient to die.<sup>7</sup> However, other medical professionals feel that there is an appropriate time for terminating extraordinary medical treatment.<sup>8</sup> These doctors argue that where a patient has no possibility of recovering from her condition to lead a normal life, the use of extraordinary measures to prolong life is an abuse of the technology modern medicine has given us.<sup>9</sup>

Nancy Beth Cruzan was a victim of such abuse. In 1985, Nancy was involved in a car accident that left her in a persistent vegetative state.<sup>10</sup> Her body was in a deep coma and functioned solely on the basis of its internal controls. Nancy's body was able to maintain its circulation, temperature, and digestive functions. In addition, she retained some reflex activity of nerves and muscles, allowing her to react to low stimuli. However, Nancy remained unaware of her surroundings.<sup>11</sup> A gastrostomy tube providing Nancy with food and water was the only thing that kept her from dying.<sup>12</sup>

In June 1990, the United States Supreme Court upheld a decision by the Missouri Supreme Court that Nancy's gastrostomy tube should be removed.<sup>13</sup> This Note will discuss the differing approaches taken by state courts in addressing the "right-to-die" issue. In addition, the Note will analyze the *Cruzan* opinion and discuss the impact that the *Cruzan* decision will have on the legal community, the medical community, and the individual patient.

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6. There is much debate as to which situations require a doctor to administer extraordinary treatment and which situations allow the doctor to withhold such treatment. A terminally ill patient who has no chance of recovery, but who is forced to remain on life support, can be said to live in a condition under which most people would not want to live. In this scenario, the generally agreed upon procedure is that the doctor can remove the treatment without breaching any duty owed to the patient. Skegg, *The Termination of Life-Support Measures and the Law of Murder*, 41 MOD. L. REV. 423, 425 (1978). This situation contrasts with the scenario in which a patient is healthy, comparatively speaking, except that she is dependent on a respirator because she is a victim of polio. In this situation, it is relatively clear that a doctor would breach her duty of care to the patient if she removed the respirator. *Id.* at 424-45.

7. *California Stories: Final Choices* (PBS television broadcast, 1987) [hereinafter *Final Choices*].

8. The American Medical Association, in its official guidelines for the withdrawal of medical treatment, declares that extraordinary measures to prolong life may be withdrawn when "there is irrefutable evidence that biological death is imminent." Giandola, *The Discontinuation of "Extraordinary" Medical Treatment from a Terminal Patient: A Physician's Civil Liability in New York* 1980 MED. TRIAL TECH. Q. 326, 333 (quoting A.M.A. News, Dec. 1973, at 15, col. 2).

9. *Final Choices*, *supra* note 7.

10. *Harmon*, 760 S.W.2d at 410-11.

11. *Id.* See also *In Re Jobes*, 108 N.J. 394, 403, 529 A.2d 434, 438 (1987).

12. *Harmon*, 760 S.W.2d at 411.

13. *Cruzan v. Missouri Dep't of Health*, 110 S. Ct. 2841 (1990).

## II. BACKGROUND

## A. Sources of the Right to Withdraw from Medical Treatment

It is generally recognized today that a competent person has the right to refuse medical treatment under certain circumstances.<sup>14</sup> However, states differ as to the source of this right. Courts have found the right to withdraw from medical treatment in the first and fourteenth amendments to the United States Constitution and in the common law doctrine of informed consent.<sup>15</sup>

## 1. Free Exercise Clause of the First Amendment

The early cases addressing the right to withdraw from medical treatment looked to the free exercise clause of the first amendment of the United States Constitution.<sup>16</sup> Most of these cases involved Jehovah's Witnesses who, for religious reasons, wished to refuse blood transfusions.<sup>17</sup> They argued that because the first amendment guaranteed their right to practice religion, it also guaranteed their right to refuse medical treatment. In support of this argument, they reasoned that reliance on prayer treatment rather than medical treatment was an integral part of their religion's practices.<sup>18</sup>

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14. *Id.* at 2846-47.

15. *Id.* at 2847-52. The following decisions have dealt with the right to terminate medical treatment: *Gray v. Romeo*, 697 F. Supp. 580 (D.R.I. 1988) (where court looked to due process clause of the federal constitution to allow for termination of treatment); *Barber v. Superior Court*, 147 Cal. App. 3d 1006, 195 Cal. Rptr. 484 (1983) (finding a right to allow termination); *Foody v. Manchester Memorial Hosp.*, 40 Conn. Supp. 127, 482 A.2d 713 (1984) (finding a right to terminate treatment); *In re Severns*, 425 A.2d 156 (Del. 1980) (granting right to terminate treatment); *John F. Kennedy Memorial Hosp. v. Bludworth*, 452 So. 2d 921 (Fla. 1984) (favoring termination); *In re Estate of Longeway*, 133 Ill. 2d 33, 549 N.E.2d 292 (1989) (favoring termination); *In re L.H.R.*, 253 Ga. 439, 321 S.E.2d 716 (1984) (favoring termination); *In re Gardner*, 534 A.2d 947 (Me. 1987) (where right to terminate treatment was granted); *Superintendent of Belchertown State School v. Saikewicz*, 373 Mass. 728, 370 N.E.2d 417 (1977) (where right to refuse treatment was found); *In re Torres*, 357 N.W.2d 332 (Minn. 1984) (allowing removal of life support); *In re Quinlan*, 70 N.J. 10, 355 A.2d 647, *cert. denied*, 429 U.S. 992 (1976) (allowing termination of life support); *Leach v. Akron Medical Center*, 68 Ohio Misc. 1, 426 N.E.2d 809 (1980) (finding constitutional right in allowing termination); *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) (allowing removal of medical support); *In re Hamlin*, 102 Wash. 2d 810, 689 P.2d 1372 (1984) (allowing removal). *But see Cruzan v. Harmon*, 760 S.W.2d 408 (Mo. 1988), *aff'd*, 110 S. Ct. 2841 (1990) (not allowing withdrawal of life support).

16. *See Cruzan*, 110 S. Ct. at 2847 n.2.

17. *Id.* *See also Lyon*, *The Right to Die: An Exercise of Informed Consent, Not an Extension of the Constitutional Right to Privacy*, 58 U. CIN. L. REV. 1367, 1372 (1990) [hereinafter *Lyon*].

18. *Id.* *See also* Application of President and Directors of Georgetown College, 331 F.2d 1000 (D.D.C. 1964), *cert. denied*, 377 U.S. 978 (1964); *John F. Kennedy Memorial*

## 2. Due Process Clause of the Fourteenth Amendment

Other cases identified a right to withdraw from medical treatment in the right to privacy found in the due process clause of the fourteenth amendment.<sup>19</sup> In 1975, the New Jersey Supreme Court decided *In re Quinlan*,<sup>20</sup> the first termination of treatment case. The case involved a young woman, Karen Quinlan, who, for unclear rea-

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Hosp. v. Heston, 58 N.J. 576, 279 A.2d 670 (1971) (denying that first amendment free exercise clause includes a right to refuse treatment); United States v. George, 239 F. Supp. 752 (D. Conn. 1965); Powell v. Columbian Presbyterian Medical Center, 49 Misc. 2d 215, 267 N.Y.S.2d 450 (1965); Public Health Trust v. Wons, 541 So. 2d 96 (Fla. 1989).

The courts have found that the right to withdraw from medical treatment based on religious belief is not absolute. See *Heston*, 58 N.J. at 577-79, 279 A.2d at 672-74. Religious beliefs are protected by the Constitution, but allowable conduct pursuant to them is not absolute; thus, a hospital could give an unconscious patient, who is a Jehovah's Witness, a blood transfusion, over the objection of her family, when it was required by the hospital's ethical standards. *Id.*

In the case of parents who refuse medical treatment for their children based on religious belief, it is particularly true that the right to withdraw from medical treatment is not absolute. In 1868, the British Parliament declared that parents who refused medical treatment for their children based on religious beliefs could be held criminally liable if the child later died as a result. Gathings, *When Rights Clash: The Conflict Between a Parent's Right to Free Exercise of Religion Versus His Child's Right to Life*, 19 CUMB. L. REV. 585, 590 (1989).

Similarly, early American cases took the position that if a child died as a result of her parents denying her medical treatment based on their religious beliefs, the parents could be held criminally liable for the child's death. See *People v. Arnold*, 66 Cal. 2d 438, 426 P.2d 515, 58 Cal. Rptr. 115 (1967), *rev'd in part*, *Walker v. Superior Court*, 47 Cal. 3d 112, 763 P.2d 852, 253 Cal. Rptr. 1, *cert. denied*, 109 S. Ct. 3186 (1989) (holding that parents who treated their child with prayer instead of medical treatment were criminally liable for the child's death).

Today, although most states have enacted statutes that exempt parents who practice faith healing from child neglect liability, these statutes have fallen into disfavor. As a result, many new child abuse regulations define child neglect to include the denial of medical treatment, regardless of whether it was denied based on religious belief. Recent cases upholding criminal convictions of parents for the death of their children due to the denial of medical treatment include: *Hall v. State*, 493 N.E.2d 653 (Ind. Ct. App. 1985) (sustaining a reckless homicide conviction of parents who used prayer treatment for their son instead of medical treatment); *Bergmann v. State*, 486 N.E.2d 653 (Ind. Ct. App. 1985) (affirming conviction of parents for reckless homicide when they used prayer treatment, fasting and scripture reading to treat their child, while refusing medical treatment for bacterial meningitis); and *Funkhouser v. State*, 763 P.2d 695 (Okla. Ct. App. 1988), *cert. denied*, 490 U.S. 1066 (1989) (upholding the second degree murder conviction of parents for failure to provide their child with medical treatment despite their good faith reliance on religious belief for treatment of their child).

19. See *Cruzan*, 110 S. Ct. at 2851.

20. 70 N.J. 10, 355 A.2d 647, *cert. denied*, 429 U.S. 992 (1976). See NEW JERSEY SUPERIOR COURT, IN THE MATTER OF KAREN QUINLAN (1975) (including legal briefs, court proceedings, and the New Jersey Superior Court decision).

Other termination of treatment cases include: *Rasmussen v. Fleming*, 154 Ariz. 207, 741 P.2d 674 (1987) (where right to refuse treatment was found); *Bouvia v. Superior Court*, 179 Cal. App. 1127, 225 Cal. Rptr. 297 (1986); *Corbett v. D'Alessandro*, 487 So. 2d 368 (Fla. App. 1986); *In re Guardianship of Browning*, 568 So. 2d 4 (Fla. 1990) (finding limited right to terminate treatment); *In re Jobs*, 108 N.J. 394, 529 A.2d 434 (1987) (holding that another may exercise right to terminate treatment); *In re Peter*, 108 N.J. 365, 529 A.2d 419 (1987); *Delio v. Westchester County Medical Center*, 129 A.D.2d 1, 516 N.Y.S.2d 677 (1986) (allowing termination of treatment).

sons, stopped breathing one night in the presence of some friends.<sup>21</sup> She was taken to the hospital and resuscitated. However, she had been without oxygen for at least two fifteen minute periods and had suffered extreme brain damage.<sup>22</sup> Her physicians diagnosed her as being in a "persistent vegetative state."<sup>23</sup> Because she had no possibility of recovering, her parents sought to remove the resuscitator that assisted her breathing.<sup>24</sup> When the doctor and medical staff refused to remove it, Karen's father sought a court order to compel the hospital to disconnect the resuscitator.<sup>25</sup>

The New Jersey Supreme Court reversed a lower court decision that had denied the Quinlans' request for an authorization to remove the resuscitator.<sup>26</sup> In reaching its decision, the court found that Karen's right to withdraw from medical treatment rested in her constitutional right to privacy.<sup>27</sup> Although the court acknowledged that the Constitution does not expressly recognize a right to privacy,<sup>28</sup> it looked to the *Griswold*<sup>29</sup> decision which had found a right of privacy in matters of contraception. The *Griswold* court determined that this right existed in "the penumbra of specific guarantees of the Bill of Rights 'formed by emanations from those guarantees that help give them life and substance.'"<sup>30</sup> The New Jersey Supreme Court went on to state that the right set out in *Griswold* was "broad enough to encompass a patient's decision to decline medical treatment under certain circumstances, in much the same way as it is broad enough to encompass a woman's decision to terminate pregnancy under certain conditions."<sup>31</sup>

From that conclusion, the New Jersey Supreme Court attempted to determine whether Karen, under the circumstances of her case, was able to exercise her privacy right to terminate medical treatment.<sup>32</sup> In its decision, the court outlined two major state interests in termination of treatment cases.<sup>33</sup> According to the court, a state

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21. *Quinlan*, 70 N.J. at 20, 355 A.2d at 653.

22. *Id.* at 22, 355 A.2d at 654.

23. *Id.*

24. *Id.* at 22-23, 355 A.2d at 655.

25. *Id.* at 18-19, 355 A.2d at 651.

26. *Id.* at 42-44, 355 A.2d at 671-72.

27. *Id.* at 32-35, 355 A.2d at 662-64.

28. *Id.* at 33-34, 355 A.2d at 663.

29. *Id.*

30. *Id.* (citing *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965)).

31. *Id.* (citing *Roe v. Wade*, 410 U.S. 113, 115 (1973)).

32. *Id.* at 32, 355 A.2d at 662.

33. *Id.* at 33-34, 355 A.2d at 663.

has an interest in preserving the "sanctity of human life," in addition to an interest in defending a physician's right to use her "best judgment" in administering treatment.<sup>34</sup> The court then weighed these interests against Karen's interest in terminating the treatment.<sup>35</sup> Because Karen's chance of recovery was so remote, the court ruled that as a patient's prognosis for recovery faded, the state's interest in preserving life and protecting the physician's right to administer treatment lessened.<sup>36</sup> Thus, Karen's interest in exercising her privacy right to refuse treatment dominated over the state's interests in continuing treatment:

We think that the state's interest *contra* weakens and the individual's right to privacy grows as the degree of bodily invasion increases and the prognosis dims. Ultimately there comes a point at which the individual's rights overcome the State interest. It is for that reason that we believe Karen's choice, if she were competent to make it, would be vindicated by law. Her prognosis is extremely poor, - she will never resume cognitive life. And the bodily invasion is great, - she requires 24 hour intensive nursing care, antibiotics, the assistance of a respirator, a catheter and a feeding tube.<sup>37</sup>

Therefore, the court in *Quinlan* made four important conclusions regarding a patient's right to privacy in termination of treatment cases.<sup>38</sup> First, the right of privacy extends to the right of a patient to refuse treatment in certain circumstances. Second, the court stated that an incompetent patient should not have a lesser right of privacy, and that this right should be exercised on the patient's behalf by a guardian.<sup>39</sup> Third, the court introduced a system whereby a hospital would appoint an ethics committee to ensure that the wishes of a patient are respected and to safeguard that a family's request for termination of treatment was made in good faith.<sup>40</sup> This would reduce the threat of liability to physicians when carrying out a patient's request to terminate treatment.<sup>41</sup> Finally, the court maintained that the decision to terminate treatment would not necessarily be dependent upon a court's ruling in every case.<sup>42</sup> The court concluded that life support could be withdrawn if the patient had no reasonable possibility of recovery and the family requesting the termination of medical treatment consulted with the hospital ethics committee.<sup>43</sup>

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34. *Id.*

35. *Id.* at 33-35, 355 A.2d at 663-64.

36. *Id.* at 35, 355 A.2d at 664.

37. *Id.*

38. *See* Lyon, *supra* note 17, at 1377.

39. *Quinlan*, 70 N.J. at 35, 355 A.2d at 663. *See also* Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 370 N.E.2d 417 (1977) (finding that a severely retarded man with leukemia had the right to refuse chemotherapy and that the right could be exercised on his behalf by a guardian).

40. *Quinlan*, 70 N.J. at 40-41, 355 A.2d at 669.

41. *Id.*

42. *Id.* at 44, 355 A.2d at 672.

43. *Id.*

### 3. Common Law Doctrine of Informed Consent

Another line of cases has looked to the common law doctrine of informed consent in an attempt to resolve situations involving the withdrawal of medical treatment.<sup>44</sup> This doctrine recognizes the right to be free from any bodily invasion or interference.<sup>45</sup> Justice Cardozo set out this principal in *Schloendorff v. Society of New York Hospital*<sup>46</sup> when he stated that "every human being of adult years and sound mind has the right to determine what shall be done with his own body; and a surgeon who performs an operation without his consent commits an assault for which he is liable in damages."<sup>47</sup> This doctrine requires a physician to disclose to the patient any material risks involved in the proposed treatment, and to obtain the patient's consent before the physician may perform treatment.<sup>48</sup> In addition, this doctrine implies "a right to informed refusal."<sup>49</sup>

*In re Storar*<sup>50</sup> is a decision where a court examined the right to refuse medical treatment under the common law doctrine of informed consent. In *Storar*, the Court of Appeal of New York addressed the case of Brother Fox, an eighty-three-year-old monk, who had become

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44. *Rasmussen v. Fleming*, 154 Ariz. 207, 741 P.2d 674 (1987); *Conservatorship of Drabick*, 200 Cal. App. 3d 185, 245 Cal. Rptr. 840, *cert. denied*, 488 U.S. 958 (1988); *In re Guardianship of Browning*, 568 So. 2d 4 (Fla. 1990) (using both right of privacy and informed consent doctrine to support termination right); *In re Estate of Longeway*, 133 Ill. 2d 33, 549 N.E.2d 292 (1989); *In re Gardner*, 534 A.2d 947 (Me. 1987); *In re Conroy*, 98 N.J. 321, 486 A.2d 1209 (1985); *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).

45. *Lyon*, *supra* note 17, at 1385. *See also* *Rasmussen v. Fleming*, 154 Ariz. 207, 741 P.2d 674 (1987).

46. 211 N.Y. 125, 105 N.E. 92 (1914).

47. *Id.* at 129-30, 105 N.E. at 93.

48. *Lyon*, *supra* note 17, at 1386.

49. *In Re Conroy*, 98 N.J. 321, 347, 486 A.2d 1209, 1222 (1985). *See also* Note, *Informed Consent and the Dying Patient*, 83 YALE L.J. 1632, 1648 (1974).

There are exceptions to the doctrine of informed consent. For example, in an emergency situation where a patient's life is in danger, and a decision must be made immediately, if the patient is unable to give her consent to treatment, the physician is authorized to make the decision on the patient's behalf. However, if the patient's family members or guardians are available, the physician should consult with them in making the decision. *Making Health Care Decisions: A Report on the Ethical and Legal Implications of Informed Consent in the Patient-Practitioner Relationship*, 1 PRESIDENT'S COMMISSION FOR THE STUDY OF ETHICAL PROBLEMS IN MEDICINE AND BIOMEDICAL AND BEHAVIORAL RESEARCH 182 (1982). *See also* Buchanan, *Medical Paternalism or Legal Imperialism: Not the Only Alternatives for Handling Saikewicz-Type Cases*, 5 LAW & MED. 97 (1979); Meisel, *The "Expectations" to the Informed Consent Doctrine: Striking a Balance Between Competing Values in Medical Decision Making*, 1979 WIS. L. REV. 413.

50. 52 N.Y.2d 363, 420 N.E.2d 64, 438 N.Y.S.2d 266, *cert. denied* 454 U.S. 858 (1981).



comatose during a hernia operation.<sup>51</sup> The court acknowledged Fox's right to be withdrawn from a respirator because Fox had specifically stated on a number of occasions that he had no desire to have his life prolonged "by medical means if there was no hope of recovery."<sup>52</sup> The court concluded that since there was no state law prohibiting a patient from refusing medical treatment and that a "patient's right to determine the course of his own medical treatment [is] paramount to what might otherwise be the doctor's obligation to provide needed medical care," Brother Fox was entitled to withdraw from the respirator.<sup>53</sup>

In contrast however, some courts that have specifically recognized a common law right to refuse treatment have not allowed incompetent patients to withdraw from treatment because such patients lack the capacity to consent to the withdrawal.<sup>54</sup> These cases have typically relied on three requirements that patients must fulfill before they will be found to have consented to a doctor's termination of treatment. Generally, these decisions have stated that in order to exercise informed consent, the patient must demonstrate: (1) "the capacity to reason and make judgments"; (2) a voluntary decision "without coercion"; and (3) "a clear understanding of the risks and benefits" of the treatment alternatives including non-treatment, and the nature of the disease and its prognosis.<sup>55</sup>

#### *B. Incompetent Patients: How the Courts Protect Their Right to Refuse Treatment*

Incompetent patients pose a difficult problem in treatment withdrawal cases. They should not receive a lesser right of privacy or control over their bodies than a competent patient, yet determining their desires may be impossible since they are incapable of speaking for themselves.<sup>56</sup> Thus, courts impose a strict framework for determining what incompetent patients would decide with regard to treatment termination if they could speak for themselves.

First, courts generally require that an incompetent patient be terminally ill and irreversibly comatose or in a persistent vegetative

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51. *Id.* at 371, 420 N.E.2d at 67, 438 N.Y.S.2d at 269.

52. *Id.* at 379, 420 N.E.2d at 72, 438 N.Y.S.2d at 274.

53. *Id.* at 377, 420 N.E.2d at 71, 438 N.Y.S.2d at 274.

54. *Id.* at 381, 420 N.E.2d at 73, 438 N.Y.S.2d at 275 (holding that a severely retarded man could not withdraw from blood transfusions because he was incompetent to consent to the withdrawal).

55. 760 S.W.2d 408, 417 (Mo. 1988) (en banc), *aff'd*, 110 S. Ct. 2841 (1990) (citing Wanzer, Adelstein, Crawford, Federman, Hook, Moertel, Safar, Stone, Taussig, and Van Eys, *The Physician's Responsibility Toward Hopelessly Ill Patients*, 310 NEW ENG. J. MED. 955, 957 (1984)).

56. *See In re Quinlan*, 70 N.J. 10, 35, 355 A.2d 647, 664 (1976), *cert. denied*, 429 U.S. 992 (1976).

state.<sup>57</sup> Once the first requirement is met, courts will balance a patient's right to withdraw from medical treatment against the state's interests in sustaining treatment.<sup>58</sup> Factors that courts have considered in examining the state's interests include the importance of preserving life and the prevention of suicide; the interests of the patient's family, children, and other innocent third parties; and finally, the state's interest in preserving the ethical integrity of the medical profession.<sup>59</sup>

If the right of the incompetent patient to withdraw from medical treatment outweighs the state's interest in continuing it, the courts have generally employed one of two tests to determine whether the request to terminate medical treatment should be granted.

### 1. The Subjective or Substituted Judgment Test

The first test that a court may employ is the subjective, or substituted judgment test.<sup>60</sup> Under this test, courts appoint a surrogate or guardian to protect the incompetent's right to choose a treatment. The guardian must determine how the incompetent patient would have decided, had she been competent, and execute this choice.<sup>61</sup> Courts differ in the application of this test. Some courts will consider only statements and written documents, such as living wills, that the patient made before she became incompetent.<sup>62</sup> Additionally, these courts will also consider a durable power of attorney, a written document in which the patient, when competent, indicates her wishes as

57. See *In Re Estate of Longeway*, 133 Ill. 2d 33, 47, 549 N.E.2d 292, 298 (1989). See also *Quinlan*, 70 N.J. at 42, 355 A.2d at 671 (requiring there to be no reasonable possibility that the patient will ever emerge from her comatose state to a "cognitive, sapient state," but not requiring a terminal illness).

58. *Longeway*, 133 Ill. 2d at 48, 549 N.E.2d at 299.

59. *Id.*

60. This test originated in the English case of *Ex parte Whitbread*, 35 Eng. Rep. 878 (1816).

For American cases that apply this test, see *In re Severns*, 425 A.2d 156 (Del. 1980); *In re Guardianship of Browning*, 568 So. 2d 4 (Fla. 1990); *In re Guardianship of Barry*, 445 So. 2d 356 (Fla. Dist. Ct. App. 1984); *In re Estate of Greenspan*, 137 Ill. 2d 1, 558 N.E.2d 1194 (1990); *Brophy v. New England Sinai Hosp.*, 398 Mass. 417, 497 N.E.2d 626 (1986); *In re Jobes*, 108 N.J. 394, 529 A.2d 434 (1987); *In re Quinlan*, 70 N.J. 10, 355 A.2d 647, cert. denied, 429 U.S. 992 (1976); *In re Eichner*, 52 N.Y.2d 363, 420 N.E.2d 64, 438 N.Y.S.2d 266 (1981); *In re Delio*, 129 A.D.2d 1, 516 N.Y.S.2d 677 (1987).

61. Rhoden, *Litigating Life and Death*, 102 HARV. L. REV. 375, 384 (1988) [hereinafter Rhoden].

62. Gelfand, *Living Will Statutes: The First Decade*, 1987 WIS. L. REV. 737, 740 n.5 [hereinafter Gelfand]. A living will is a document whereby a patient, while competent, expresses his or her wishes concerning medical treatment in the event he or she becomes incompetent.

to medical treatment, and appoints a guardian to implement these wishes.<sup>63</sup> In the absence of specific statements or written documents made before the patient became incompetent, these courts will examine the "context of the individual's entire prior mental life, including his or her philosophical, religious and moral views, life goals, values about the purpose of life and the way it should be lived and attitudes toward sickness, medical procedures, suffering and death."<sup>64</sup>

This approach was followed in *In re Jobes*.<sup>65</sup> In this case, Nancy Jobes was involved in a car accident which killed her unborn fetus. During the subsequent operation to remove the fetus, Mrs. Jobes suffered oxygen and blood loss to the brain which resulted in irreparable brain damage.<sup>66</sup> The family petitioned to have a nursing home remove a life-sustaining food and hydration system from Mrs. Jobes. The New Jersey Supreme Court concluded that clear and convincing evidence existed which indicated that Mrs. Jobes would never recover and that her condition constituted an irreversible vegetative state.<sup>67</sup> The court then examined evidence of Mrs. Jobes' intent to exercise her right to withdraw from the nutrition and hydration treatment that sustained her.<sup>68</sup> A close friend of Mrs. Jobes testified that Mrs. Jobes had "specifically stated that she would not want to be kept alive on a respirator like a patient suffering from amyotrophic lateral sclerosis whom [her friend] had described to her."<sup>69</sup> In addition, the court considered other similar statements made by Mrs. Jobes, along with testimony by her husband that "if his wife were competent, she would 'definitely' choose to terminate her artificial feeding that sustains her in her present condition."<sup>70</sup> Based on this evidence, the court upheld the family's decision that it was in Mrs. Jobes' best interests to remove the feeding tube.<sup>71</sup> The court reasoned that, although Mrs. Jobes' prior statements did not constitute clear and convincing evidence of her intent to withdraw from treatment, they did represent trustworthy evidence of this intent.<sup>72</sup> This evidence, combined with the Jobes family's "intimate understanding

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63. *Final Choices*, *supra* note 7.

64. *In Re Jobes*, 108 N.J. 394, 415, 529 A.2d 434, 445 (1987) (quoting Newman, *Treatment Refusals for the Critically Ill: Proposed Rules for the Family, the Physician & the State*, 3 N.Y. SCH. HUM. RTS. ANN. 45, 46 (1985)). See also *In re Estate of Greenspan*, 137 Ill. 2d 1, 558 N.E.2d 1194 (1990) (stating that determination of an incompetent patient's intent should be based on a combination of the patient's own statements of intent when competent along with knowledge of the patient's value system).

65. 108 N.J. 394, 529 A.2d 434 (1987).

66. *Id.* at 403, 529 A.2d at 439.

67. *Id.* at 411, 529 A.2d at 441.

68. *Id.* at 412, 529 A.2d at 442.

69. *Id.*

70. *Id.*

71. *Id.* at 427, 529 A.2d at 451.

72. *Id.* at 412-13, 529 A.2d at 443.

of the patient's medical attitudes and general world view," was enough to justify removal of the treatment.<sup>73</sup>

Similarly, in *Gray v. Romeo*,<sup>74</sup> the United States District Court of Rhode Island applied an analogous approach in using the substituted judgment test. The court needed to determine whether Marcia, a severely brain damaged woman, would wish to exercise her right to privacy and withdraw from the gastrostomy tube that provided her with food and hydration.<sup>75</sup> In deciding the case, the court considered evidence presented by Marcia's family concerning conversations Marcia had with her husband and sister-in-law.<sup>76</sup> First, the court focused on a conversation between Marcia and her sister-in-law in which Marcia discussed the Karen Ann Quinlan case.<sup>77</sup> Marcia was disturbed by the fact that Karen had been fed artificially and stated that if she were ever in an irreversibly comatose state, she would not want to be kept alive with a respirator or a feeding tube.<sup>78</sup> Second, the court was impressed by the fact that Marcia's family was able to predict Marcia's intent in a thoughtful and coherent way, with one voice and with no apparent conflict of interest.<sup>79</sup> Finally, the court considered the appointed guardian's impressions of the family's assessment of Marcia's desires.<sup>80</sup> Based on this evidence, the court concluded that the substituted judgment, as made by Marcia's family, expressed Marcia's intent to withdraw from medical treatment.<sup>81</sup>

In contrast, other courts use a more stringent version of the substituted judgment or subjective test.<sup>82</sup> Under this approach, the court searches for a clear expression of the incompetent's intent to withdraw from life sustaining medical treatment.<sup>83</sup> If no clear and express intent is found, the court will not authorize the patient's guardian to terminate treatment on behalf of the patient.<sup>84</sup> Unlike the approach used in *Jobes* and *Gray*, this analysis does not consider

73. *Id.* at 415, 529 A.2d at 445.

74. 697 F. Supp. 580 (D.R.I. 1988).

75. *Id.*

76. *Id.* at 587.

77. *Id.* at 588.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* at 591.

82. See *In re O'Connor*, 72 N.Y.2d 517, 531 N.E.2d 607, 534 N.Y.S.2d 886 (1988); *Cruzan v. Harmon*, 760 S.W.2d 408 (Mo. 1988) (en banc), *aff'd*, 110 S. Ct. 2841 (1990).

83. *O'Connor*, 72 N.Y.2d at 529-30, 513 N.E.2d at 613, 534 N.Y.S.2d at 892.

84. *Id.*

the religious, moral or philosophical views of the patient.<sup>85</sup>

To justify the use of this strict approach, courts reason that "despite its pitfalls, and inevitable uncertainties, the inquiry must always be narrowed to the patient's expressed intent, with every effort made to minimize the opportunity for error."<sup>86</sup>

## 2. The Objective or Best Interests Test

As an alternative to the substituted judgment test, some courts have adopted the objective, or best interests test.<sup>87</sup> This test has two different approaches, depending upon the circumstances of the case. The first approach is the "limited objective test," which is applicable in situations where reliable information exists indicating that the incompetent patient would have exercised her right to refuse treatment.<sup>88</sup> The evidentiary standard used does not necessarily require a clear and convincing indicator of the patient's subjective intent.<sup>89</sup> For example, while evidence of an informally expressed reaction to another's medical treatment would not be enough alone to show the patient's subjective intent to withdraw from treatment, it probably would constitute trustworthy evidence sufficient to satisfy this prong of the limited objective test.<sup>90</sup>

The second prong of the limited objective test requires courts to examine whether there is clear evidence that "the burdens of the patient's continued life with the treatment outweigh the benefits of that life."<sup>91</sup> Therefore, a patient who is suffering and expected to continue to suffer for the remainder of her life can terminate life support when the net burdens of prolonging her life using life support markedly outweigh any benefits, enjoyment or intellectual satisfaction that the patient is likely to experience in the future. The courts factor into this analysis the extent of pain that the patient will suffer both with the life support and after the life support is withdrawn.<sup>92</sup>

This test was applied in *In re Conroy*.<sup>93</sup> In *Conroy*, a family sought to have artificial feeding and hydration tubes removed from Mrs.

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85. *Id.* at 529-31, 513 N.E.2d at 613-14, 534 N.Y.S.2d at 892-93.

86. *Id.* at 530, 513 N.E.2d at 613, 534 N.Y.S.2d at 892.

87. Rhoden, *supra* note 61, at 396. See also Rasmussen v. Fleming, 154 Ariz. 207, 741 P.2d 674 (1987) (en banc); *In re Torres*, 357 N.W.2d 332 (Minn. 1984); *In re Conroy*, 98 N.J. 321, 486 A.2d 1209 (1985); *In re Storar*, 52 N.Y.2d 383, 420 N.E.2d 64, 438 N.Y.S.2d 266 (1981); *In re Grant*, 109 Wash. 2d 545, 747 P.2d 445 (1988) (en banc); *In re Hamlin*, 102 Wash. 2d 810, 689 P.2d 1372 (1984); Pollack, *Life and Death Decisions: Who Makes Them and By What Standards?*, 41 RUTGERS L. REV. 505, 519-20 (1989).

88. *In re Conroy*, 98 N.J. 321, 366, 486 A.2d 1209, 1232 (1985).

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. 98 N.J. 321, 486 A.2d 1209 (1985).

Conroy, an elderly patient with serious physical and mental impairments.<sup>94</sup> In applying the limited objective test, the Supreme Court of New Jersey concluded that the first prong of the test (that there be trustworthy evidence of the patient's subjective intent to withdraw from medical treatment) had been satisfied by testimony from Mrs. Conroy's nephew that Mrs. Conroy feared and avoided doctors and

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94. *Id.* The court in *Conroy* specifically addressed the unique problem of withdrawing life support from incompetent nursing home patients. The court maintained that in these cases, it is inappropriate to apply the decision-making process that *In re Quinlan*, 70 N.J. 10, 355 A.2d 647, *cert. denied*, 429 U.S. 992 (1976), proposed for determining when life support can be withdrawn from a comatose patient in a persistent vegetative state. The decision-making process advocated by *Quinlan* required the patient's guardian, family and doctor, and the hospital's ethics committee to agree to terminate the life support.

However, *Conroy* supported the court's rejection of this decision-making process in the case of elderly nursing home patients by highlighting the differences between such patients and younger, comatose hospital patients. First, the *Conroy* court recognized the fact that nursing home patients are particularly vulnerable since they are usually elderly and inflicted with severe mental and physical disabilities. Also, most nursing home patients will die in nursing homes. Thus, it is more difficult to ensure that the motivations of the person who requests that life support be removed from a patient are in good faith and truly reflect the desires of the patient and how he or she would wish the course of treatment to proceed. *Conroy*, 98 N.J. at 375, 486 A.2d at 1237.

Second, because of their advanced age, many nursing home patients no longer have parents, siblings or children who are still living. Thus, it is impossible for their families to play a role in deciding the course of the patient's treatment. *Id.*

Third, nursing home patients are unlikely to have physicians who play active roles in their lives. Most physicians visit nursing home patients infrequently and usually do not know their patients well enough to be acquainted with their attitudes and desires toward life-prolonging treatment. *Id.* at 375-76, 486 A.2d at 1237-38.

Fourth, most nursing homes do not have ethics committees. In fact, the Senate Report on Aging has documented cases of inhumane treatment of patients by nursing home personnel and unsafe conditions in the homes that constitute fire hazards. *Id.* at 376, 486 A.2d at 1237-38 (citing SENATE SUBCOMM. ON LONG TERM CARE OF THE SPECIAL COMM. ON AGING, NURSING HOME CARE IN THE UNITED STATES: FAILURE IN PUBLIC POLICY, INTRODUCTORY REPORT, S. REP. NO. 1420, 93d Cong., 2d Sess. 16 (1974)).

Finally, nursing homes are not faced with making decisions about the course of a patient's medical care with the same sense of urgency and speed that hospitals must use in their decision-making. This is because nursing homes deal with patients whose conditions are gradually deteriorating. In this situation, decisions regarding treatment "arise more gradually and are foreseeable longer in advance." *Id.* at 377, 486 A.2d at 1238.

For all of these reasons, the court in *Conroy* maintained that the *Quinlan* approach to making the decision to remove a patient from life support could not be applied to a case involving an elderly patient in a nursing home. The court insisted that because of the "special vulnerability of mentally and physically impaired, elderly persons in nursing homes and the potential for abuse with unsupervised institutional decision-making in such homes," *Id.* at 381, 486 A.2d at 1240, the court must appoint a guardian for the patient who will make the decision using the subjective, limited objective or pure objective tests. This will ensure that the decision reflects as accurately as possible, the desires of the patient. *Id.* at 374-77, 486 A.2d at 1237-40.

hospitals and that all she wanted was to have her "bills paid and die in [her] own house."<sup>95</sup>

However, despite the fact that the court found the first prong of the test satisfied, there was insufficient evidence to support the second prong of the test, that the net burdens of prolonging Mrs. Conroy's life markedly outweighed the benefits of keeping her on life support.<sup>96</sup> The court reasoned that there was very little evidence that Mrs. Conroy was suffering or was experiencing intolerable pain while she remained on life support.<sup>97</sup> However, her doctors agreed that if the tube were removed, Mrs. Conroy would definitely experience great pain during the one week between the time they removed the tube and the moment of her death.<sup>98</sup>

The second approach used by some courts in applying the objective test is the "pure objective test."<sup>99</sup> Some courts employ this test when there is no trustworthy evidence to determine the incompetent patient's intent to exercise her right to withdraw from treatment.<sup>100</sup> Thus, the court will look to whether the burdens of a patient's life clearly and markedly outweigh its benefits before it will authorize doctors to withdraw medical treatment.<sup>101</sup> This approach is used frequently when an incompetent patient has never been competent, and thus, has never expressed a desire to exercise any rights, much less a right to withdraw from medical treatment.<sup>102</sup>

*In re Storar*<sup>103</sup> is an example of a decision employing the pure objective approach. John Storar was severely retarded, and although he was fifty-two years old at the time of the trial, he had a mental age of about eighteen months.<sup>104</sup> The case was brought by the Network Development Center where John resided in an effort to obtain an authorization to continue administering the blood transfusions needed to treat John's bladder cancer. John's mother had requested that the doctors terminate the transfusions because they were disa-

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95. *Conroy*, 98 N.J. at 340, 486 A.2d at 1218. The court permitted Mrs. Conroy's guardians to introduce evidence that Mrs. Conroy was a devout Roman Catholic and that the priest of her church deemed that removal of her nasogastric tube would be both ethical and moral. The court allowed the guardians to use this evidence, along with evidence of Mrs. Conroy's fear of hospitals and doctors, to infer that, if competent, she would want the doctors to remove the nasogastric tube and allow her to die. *Id.* See also *In re Estate of Greenspan*, 137 Ill. 2d 1, 558 N.E.2d 1194 (1990) (admitting testimony of rabbi in deciding whether patient should be removed from artificial nutrition and hydration).

96. *Conroy*, 98 N.J. at 386, 486 A.2d at 1243.

97. *Id.*

98. *Id.*

99. Rhoden, *supra* note 61, at 396.

100. *Id.* at 396-98.

101. *Id.* at 396.

102. *Id.* at 396-98.

103. 52 N.Y.2d 363, 420 N.E.2d 64, 438 N.Y.S.2d 266 (1981).

104. *Id.* at 373, 420 N.E.2d at 68, 438 N.Y.S.2d at 270.

greeable to John and because John became disturbed at the sight of blood clots that appeared in his urine immediately following each transfusion.<sup>105</sup>

In determining whether the transfusions should be terminated, the New York Court of Appeals employed the pure objective test since John had always been incompetent to understand or make a decision regarding medical treatment.<sup>106</sup> Thus, the court believed that it was inappropriate to attempt to determine whether John, in the event that he were competent, would want to continue the life-prolonging treatment.<sup>107</sup> Therefore, the court considered the choice with which John was faced based on an objective, reasonable person standard, and concluded that the transfusions should continue.<sup>108</sup> The court found that the transfusions were like food, in that although they would not cure John's cancer, they would prevent him from dying as a result of other treatable causes. The transfusions allowed him to remain alert and function as normally as his retarded condition would allow. Thus, as long as John received the transfusions, he would be able to live his life almost as he had before he contracted cancer. Still, he was forced to continue living with a fatal disease that would inevitably "claim his life."<sup>109</sup>

### C. *The Problem of Terminating Nutrition and Hydration Treatment*

In making a decision to withdraw any life-sustaining treatment, the legal and medical communities, as well as patients' families, are forced to grapple with many difficult religious, medical and legal issues. However, the issue of terminating treatment which provides a patient with food and water poses an even greater problem, for food and water symbolize the most basic requirements of life. Feeding those who cannot feed themselves represents "the most fundamental of all human relationships."<sup>110</sup> Furthermore, death by dehydration and starvation can be a very painful and unpleasant experience for a patient.<sup>111</sup> However, it is generally recognized that a patient who is

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105. *Id.* at 375, 420 N.E.2d at 69, 438 N.Y.S.2d at 271.

106. *Id.* at 380, 420 N.E.2d at 72, 438 N.Y.S.2d at 274-75.

107. *Id.*

108. *Id.*

109. *Id.* at 382, 420 N.E.2d at 73, 438 N.Y.S.2d at 275.

110. *In Re Estate of Longeway*, 133 Ill. 2d 33, 39, 549 N.E.2d 292, 295 (1989) (granting the request of an incompetent patient's guardian to remove a gastrostomy tube from the patient).

111. Death by dehydration can be extremely painful and unpleasant to a patient.



comatose or in a persistent vegetative state is incapable of feeling the pain associated with a death resulting from lack of nutrition and hydration.<sup>112</sup> Furthermore, the American Medical Association recognizes that "life-prolonging medical treatment includes medication and artificially or technologically supplied respiration, nutrition or hydration."<sup>113</sup> Thus, state courts (with the exception of Missouri<sup>114</sup> and one New York court decision<sup>115</sup>) that have addressed the problem of withdrawing artificial nutrition and hydration have treated it as being analogous to any other form of life-sustaining treatment,<sup>116</sup> and have allowed its withdrawal in appropriate circumstances.<sup>117</sup>

### III. THE CRUZAN CASE

On June 25, 1990, the United States Supreme Court decided the case of *Cruzan v. Missouri Department of Health*.<sup>118</sup> This decision marked the first time that the Court directly addressed the issue of a

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The mouth, tongue, lips and nose dry out and crack. In addition, the patient's skin becomes dry and scaly. The eyes roll back into the patient's head, and her stomach dries out, causing her to vomit. Her urine becomes extremely concentrated and burns the bladder, and the patient experiences convulsions when her brain cells begin to dry out. Finally, the patient will die when her respiratory system dries out, causing a thick secretion to block her lungs. *Brophy v. New England Sinai Hosp.*, 398 Mass. 417, 444 n.2, 497 N.E.2d 626, 641 n.2 (1968) (Lynch, J., dissenting in part) (where patient's doctor testified that death by dehydration was "cruel and violent").

112. *Longeway*, 133 Ill. 2d at 41, 549 N.E.2d at 295 (citing AMERICAN ACADEMY OF NEUROLOGY, POSITION OF THE AMERICAN ACADEMY OF NEUROLOGY ON CERTAIN ASPECTS OF THE CARE AND MANAGEMENT OF THE PERSISTENTLY VEGETATIVE STATE PATIENT (adopted Apr. 21, 1988)).

113. *Longeway*, 133 Ill. 2d at 41, 549 N.E.2d at 296 (citing American Medical Association Council on Ethics & Judicial Affairs, Opinion 2.18 (1986)).

114. See *Cruzan v. Harmon*, 760 S.W.2d 408 (Mo. 1988) (en banc), *aff'd*, 110 S. Ct. 2841 (1990).

115. See *In re O'Connor*, 72 N.Y.2d 517, 531 N.E.2d 607, 534 N.Y.S.2d 886 (1988).

116. Courts have found artificial means of providing food and water, including intravenous infusions, gastrostomy tubes and nasogastric tubes, to be medical, life sustaining treatments. However, they have not found spoon and bottle feeding to be such, and thus, have not allowed these feeding methods to be withdrawn. The reasoning for this distinction rests on the belief that gastrostomy tubes, intravenous infusions and nasogastric tubes are highly intrusive to the patient. Thus, their termination "does not deprive the patient of life; rather the inability of the patient to chew or swallow, as a result of his illness, is viewed as the ultimate agent of death." *Longeway*, 133 Ill. 2d at 42, 549 N.E.2d at 296.

117. See *Gray v. Romeo*, 697 F. Supp. 580 (D.R.I. 1988); *Rasmussen v. Fleming*, 154 Ariz. 207, 741 P.2d 674 (1987); *Conservatorship of Drabick*, 200 Cal. App. 3d 185, 245 Cal. Rptr. 840, *cert. denied*, 488 U.S. 958 (1988); *Bouvia v. Superior Court*, 179 Cal. App. 3d 1127, 225 Cal. Rptr. 297 (1986); *Corbett v. D'Allesandro*, 487 So. 2d 68 (Fla. Dist. Ct. App. 1986); *In re Estate of Greenspan*, 137 Ill. 2d 1, 558 N.E.2d 1194 (1990); *In re Estate of Longeway*, 133 Ill. 2d 33, 549 N.E.2d 292 (1989); *In re Gardner*, 534 A.2d 947 (Me. 1987); *Brophy v. New England Sinai Hosp.*, 398 Mass. 417, 497 N.E.2d 66 (1986); *In re Hier*, 18 Mass. App. 200, 464 N.E.2d 959 (1984); *In re Jobs*, 108 N.J. 394, 529 A.2d 434 (1987); *In re Requena*, 213 N.J. Super. 475, 517 A.2d 886 (1986); *In re Delio*, 129 A.D.2d 1, 516 N.Y.S.2d 677 (1987).

118. 110 S. Ct. 2841 (1990).

patient's right to die.<sup>119</sup> In granting the writ of certiorari, the Court agreed to decide whether the United States Constitution allows a state to impose a standard on termination of treatment cases, whereby the family of an incompetent patient would have to show by clear and convincing evidence that the patient, if competent, would choose to withdraw from treatment.<sup>120</sup> Further, the Court agreed to resolve the question of whether a state is required by the Constitution to defer to the judgment of a patient's family when the patient is incompetent to make his or her own medical decisions.<sup>121</sup>

#### A. Facts

On January 11, 1983, Nancy Beth Cruzan was involved in a car accident in which her vehicle overturned.<sup>122</sup> Police found her lying face down in a ditch, having been thrown thirty-five feet from her car.<sup>123</sup> Police could detect no sign of a heart beat or breathing. Paramedics arrived and managed to reinstate her cardiac and respiratory functions. They transported Nancy to the hospital where a doctor diagnosed "a probable cerebral contusion compounded by significant anoxia (deprivation of oxygen) of unknown duration."<sup>124</sup>

Nancy remained comatose for three weeks, after which time she moved into an unconscious state.<sup>125</sup> Although initially she was able to take some food orally, in order to facilitate her feeding, doctors inserted a gastrostomy tube into her stomach. From that point on, she received all nutrition and hydration through the tube.<sup>126</sup>

Nancy's doctors characterized Nancy as being in a persistent vegetative state.<sup>127</sup> Her circulation and respiration continued as it would in a normal thirty year old woman; however, Nancy was completely unaware of her environment except to the extent that her reflexes

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119. *Id.* at 2851. For a discussion addressing the problems of withdrawing nutrition and hydration from handicapped newborns, see Frader, *Forgoing Life Sustaining Food & Water: Newborns in BY NO EXTRAORDINARY MEANS: THE CHOICE TO FORGO LIFE SUSTAINING FOOD AND WATER* (J. Lynn ed. 1986).

120. *Cruzan*, 110 S. Ct. at 2846, 2852.

121. *Id.* at 2846.

122. *Id.* at 2845.

123. *Cruzan v. Harmon*, 760 S.W.2d 408, 411 (Mo. 1988) (en banc), *aff'd*, 110 S. Ct. 2841 (1990).

124. *Id.* At trial, the court recognized that permanent brain damage occurs when the brain has been deprived of oxygen for six minutes. In Nancy's case, doctors estimated that she had been without oxygen for twelve to fourteen minutes. *Id.*

125. *Cruzan*, 110 S. Ct. at 2845.

126. *Id.*

127. *Id.*

“responded to sound and perhaps painful stimuli.”<sup>128</sup> She suffered from anoxia of the brain, characterized by a massive enlargement of the ventricles where cerebrospinal fluid fills the degenerated area of the brain.<sup>129</sup> Nancy’s anoxia was a condition which was permanent, irreversible and ongoing. Nancy was able to grimace in response to sound or pain; however, this represented her highest cognitive brain function. Further, doctors described Nancy as being a “spastic quadriplegic,” and her arms and legs were contracted with irreversible muscular and tendon damage.<sup>130</sup> Finally, Nancy could not chew or swallow enough food and water to meet her daily nutritional needs, and her doctors maintained that she would never again be able to meet those needs sufficiently.<sup>131</sup> However, despite her condition, Nancy’s doctors concluded that Nancy was not dead<sup>132</sup> or terminally ill. In fact, if Nancy had remained on life support, she may have been able to live another thirty years.<sup>133</sup>

When it became obvious that Nancy was never going to recover from her condition to lead a normal life, her parents requested that the gastrostomy tube providing her with food and water be removed, so that Nancy would be allowed to die. Nancy’s doctors refused to comply with this request, and the Cruzans sought a declaratory judgment to have the tube withdrawn.<sup>134</sup>

#### B. *The Lower State Court Decisions*

Once the Cruzans filed their motion, the trial court appointed a guardian *ad litem*<sup>135</sup> to represent Nancy’s interests. The trial court found that Nancy’s liberty interests in withdrawing from the gastro-

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128. *Harmon*, 760 S.W.2d at 411.

129. *Cruzan*, 110 S. Ct. at 2845 n.1.

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.* Section 194.005 of the Missouri Public Health and Welfare Statutes provides:

For all legal purposes, the occurrence of human death shall be determined in accordance with the usual and customary standards of medical practice, provided that death shall not be determined to have occurred unless the following minimal conditions have been met:

(1) When respiration and circulation are not artificially maintained, there is an irreversible cessation of spontaneous respiration and circulation; or

(2) When respiration and circulation are artificially maintained, and there is a total and irreversible cessation of all brain function, including the brain stem and that such determination is made by a licensed physician.

MO. ANN. STAT. § 194.005 (Vernon 1983).

134. *Cruzan*, 110 S. Ct. at 2846.

135. *Harmon*, 760 S.W.2d at 410. A guardian *ad litem* is defined as “a special guardian appointed by the court in which a particular litigation is pending to represent an infant, ward or unborn person in that particular litigation, and the status of the guardian *ad litem* exists only in that specific litigation in which the appointment occurs.” BLACKS LAW DICTIONARY 706 (6th ed. 1990).

tomy tube outweighed any interests that the state had in the preservation of life.<sup>136</sup> The court then applied the substituted judgment test and found that, based on statements Nancy made to a friend when she was competent, it was clear that Nancy would not have wanted to continue living in her present condition.<sup>137</sup> Thus, the trial court held that Nancy's parents could exercise, on Nancy's behalf, her right to refuse medical treatment by requesting that the doctors remove the gastrostomy tube from Nancy.<sup>138</sup> Finally, the trial court stated that to the extent that Missouri statutes<sup>139</sup> reflected the public policy that artificial nutrition and hydration were not included in the types of medical treatment from which a patient could withdraw,

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136. *Harmon*, 760 S.W.2d at 411.

137. *Id.*

138. *Id.*

139. The trial court referred to sections 459.010(3) and 459.055 of Title XXXI of the Missouri Trusts and Estates of Decedents and Persons Under Disability Statutes. Section 459.010(3) provides as follows:

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

MO. ANN. STAT. § 459.010(3) (Vernon Supp. 1991) (emphasis added). Section 459.055 provides:

Sections 459.010 to 459.055 shall be interpreted consistent with the following:

(1) Each person has the primary right to request or refuse medical treatment *subject to the state's interest in protecting innocent third parties, preventing homicide and suicide and preserving good ethical standards in the medical profession.*

(2) Nothing in sections 459.010 to 459.055 shall be interpreted to increase or decrease the right of a patient to make 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 or withdrawal of medical care in any lawful manner. In that respect, the provisions of sections 459.010 to 459.055 are cumulative.

(3) Sections 459.010 to 459.055 *shall create no presumption concerning the intention of an individual who has not executed a declaration to consent to the use or withholding of medical procedures.*

(4) Communication regarding treatment decisions among patients, the families and physicians is encouraged.

(5) *Sections 459.010 to 459.055 do not condone, authorize or approve mercy killing or euthanasia nor permit any affirmative or deliberate act or omission to shorten or end life.*

MO. ANN. STAT. § 459.055 (Vernon Supp. 1991) (emphasis added).

these statutes "violate[d] Nancy Cruzan's right to liberty, due process of law and equal protection under the state and federal constitutions."<sup>140</sup>

The State of Missouri and the guardian *ad litem* appealed the decision of the trial court.<sup>141</sup> Although the guardian *ad litem* believed that it was in Nancy's best interests to have the gastrostomy tube withdrawn, he felt that since this was a case of first impression, he owed Nancy the duty as an attorney to take the case to the highest state court.<sup>142</sup>

The Missouri Supreme Court, in a 4-3 vote, reversed the trial court's decision and denied the Cruzans' request to have their daughter removed from the gastrostomy tube.<sup>143</sup> In reaching its holding, the court refused to acknowledge the existence of a right of privacy under either the state or federal constitutions.<sup>144</sup> Instead, the court looked to the common law right to refuse treatment as a basis for allowing doctors to withdraw the gastrostomy tube from Nancy.<sup>145</sup> However, the court expressly stated that this common law right was not absolute and must be balanced against a very strong state interest in the preservation of life.<sup>146</sup>

In determining whether Nancy's right to withdraw from the treatment outweighed the state's interest in the preservation of life, the court examined various aspects of Nancy's condition. First, the court recognized that Nancy was not terminally ill and could potentially live another thirty years.<sup>147</sup> Second, the court maintained that the gastrostomy tube was not excessively invasive of her body since doctors had testified that, due to her brain damage, Nancy would feel no pain if it were removed and she were allowed to starve to death.<sup>148</sup> Therefore, the court concluded that since Nancy's death was not imminent, and because the gastrostomy tube did not pose an excessive burden of extreme pain or discomfort, her right to refuse treatment was outweighed by Missouri's interest in protecting life.<sup>149</sup>

The court also stated that the conversations between Nancy and her friend, in which Nancy expressed a desire never to be in a condition in which she could not take care of herself, did not represent clear evidence of Nancy's intent to refuse medical treatment.<sup>150</sup> The

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140. *Harmon*, 760 S.W.2d at 410.

141. *Id.* at 410 n.1.

142. *Id.*

143. *Id.* at 424-25.

144. *Id.* at 417.

145. *Id.* at 422.

146. *Id.* at 422-23.

147. *Id.* at 424.

148. *Id.* at 422.

149. *Id.* at 424.

150. *Id.*

court characterized Nancy's statements as mere "informally expressed reactions" to the medical condition and treatment of another.<sup>151</sup> Thus, the court held that a guardian of an incompetent patient could not choose, on the patient's behalf, to withdraw life sustaining treatment without first meeting the requirements set out in Missouri's living will statute<sup>152</sup> or presenting clear and convincing evidence of the incompetent patient's intent.<sup>153</sup> The court insisted that Nancy's parents had failed to present evidence that would satisfy either of these alternatives.<sup>154</sup>

Because the court found no clear and convincing evidence of Nancy's desire to refuse life-sustaining treatment, and because Missouri's strong state interest favored the preservation of life, the Missouri Supreme Court denied the Cruzans' request to have their daughter withdrawn from the artificial nutrition and hydration tube that kept her alive.<sup>155</sup>

### C. *The United States Supreme Court Decision*

The United States Supreme Court agreed to review the decision of the Missouri Supreme Court, and thus granted the writ of certiorari filed by the Cruzans.<sup>156</sup> In a 5-4 vote, the Court upheld the opinion of the Missouri Supreme Court and refused to order doctors to remove the gastrostomy tube from Nancy Cruzan.<sup>157</sup>

#### 1. Chief Justice Rehnquist's Majority Opinion

In deciding *Cruzan*, the Court framed the issue of the case narrowly regarding a constitutional right to die. The Court reiterated its belief that when confronted with "a question of such magnitude and importance . . . it is the [better] part of wisdom not to attempt, by any general statement, to cover every possible phase of the subject."<sup>158</sup> Thus, the issue, as stated by the Court, was whether Nancy Cruzan had a right under the United States Constitution to withdraw from life-sustaining treatment and whether a Missouri law could require that Nancy's parents show by clear and convincing evidence that

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151. *Id.*

152. Missouri's living will statute expressly exempts the removal of nutrition and hydration from a patient. *See supra* note 138.

153. *Harmon*, 760 S.W.2d at 424.

154. *Id.*

155. *Id.* at 426.

156. *Cruzan v. Missouri Dep't of Health*, 492 U.S. 917 (1989).

157. *Cruzan v. Missouri Dep't of Health*, 110 S. Ct. 2841, 2845 (1990).

158. *Id.* at 2851 (citing *Town City Bank v. Nebeker*, 167 U.S. 196, 202 (1897)).

Nancy, if competent, would choose to withdraw from the treatment.<sup>159</sup>

The Court began by affirming the general consensus of the state courts that a competent patient has a right to refuse medical treatment.<sup>160</sup> This right, said the Court, stems from a "constitutionally protected liberty interest" found in the fourteenth amendment's due process clause.<sup>161</sup> The majority maintained that, although other courts had found a right to refuse medical treatment under the fourteenth amendment due process right to privacy, the right to die issue was more appropriately evaluated as a fourteenth amendment liberty interest.<sup>162</sup> The Court then assumed, "for purposes of this case," that the constitutional liberty interest which allows a patient to withdraw from medical treatment also gives a patient the right to withdraw from artificial hydration and nutrition systems.<sup>163</sup>

In upholding the decision of the Missouri Supreme Court, the Court made three specific findings with regard to Nancy Cruzan's case. First, the Court held that in order for an incompetent to be protected from the harm caused by a guardian's incorrect choice regarding whether to continue or terminate life-sustaining treatment, a state may impose an evidentiary standard that requires the guardian to present clear and convincing evidence of the patient's intent.<sup>164</sup> The Court maintained that the state had utilized this evidentiary standard to emphasize the importance of making a decision regarding medical treatment that would reflect, as accurately as possible, the incompetent patient's desires.<sup>165</sup> Further, the Court believed that the imposition of the clear and convincing standard reflected society's belief of "how the risk of error should be distributed between the litigants."<sup>166</sup> Thus, the Court concluded that it would be better to err in favor of keeping Nancy on the life support system since

an erroneous decision not to terminate results in a maintenance of the status quo; the possibility of subsequent developments such as advancements in medical science, the discovery of new evidence regarding the patient's intent, changes in the law, or simply the unexpected death of the patient despite the administration of life-sustaining treatment, at least create the potential that a wrong decision will eventually be corrected or its impact mitigated. An erroneous decision to withdraw life-sustaining treatment, however, is not suscepti-

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159. *Id.* at 2852.

160. *Id.* at 2846-47.

161. *Id.* at 2851. *See also* McKay v. Bergstedt, 801 P.2d 617 (Nev. 1990) (finding that a thirty-one year old mentally competent quadriplegic had a constitutionally protected liberty interest in withdrawing from an artificial respirator).

162. *Cruzan*, 110 S. Ct. at 2851 n.7.

163. *Id.* at 2852.

164. *Id.* at 2854.

165. *Id.*

166. *Id.* (citing Santosky v. Kramer, 455 U.S. 745, 755 (1982); Addington v. Texas, 441 U.S. 418, 423 (1979)).

ble to correction.<sup>167</sup>

Second, the Court determined that the Missouri Supreme Court was justified in its finding that the evidence presented by Nancy's guardians did not constitute "clear and convincing" evidence of Nancy's desire to withdraw from the gastrostomy tube.<sup>168</sup> The Court recognized two interpretations as to what is meant by clear and convincing evidence. The first definition requires "proof sufficient to persuade the trier of fact that the patient held a firm and settled commitment to the termination of life supports under the circumstances like those presented."<sup>169</sup> The second definition requires evidence which "produces in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable [the fact finder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue."<sup>170</sup>

At trial, Nancy's parents had presented evidence of conversations between Nancy and her roommate in which Nancy had said that she would never want to live in a state in which she could do nothing for herself and was completely dependent on others.<sup>171</sup> The Court maintained that the Missouri Supreme Court had not erred in finding that these conversations did not satisfy the clear and convincing standard.<sup>172</sup> The Court found that Nancy's statements were too general and vague.<sup>173</sup> Furthermore, although the statements addressed the issue of the withdrawal of medical treatment, they failed to discuss specifically the withdrawal of hydration and nutrition.<sup>174</sup>

Finally, the Court found that the fourteenth amendment's due process clause did not require states to use the substituted judgment test in determining whether life support treatment should be withdrawn from an incompetent patient.<sup>175</sup> The Court stated that, although the judgment of family members may at times reflect the wishes of an incompetent patient, "there is no automatic assurance that the view of close family members will necessarily be the same as the patient's

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167. *Id.*

168. *Id.* at 2855.

169. *Id.* at 2855 n.11 (citing *In re O'Connor*, 72 N.Y.2d 517, 531, 513 N.E.2d 607, 613, 534 N.Y.S.2d 886, 892 (1988)).

170. *Id.* at 2855 n.11 (citing *In re Jobes*, 172 N.J. 394, 407-08, 529 A.2d 434, 441 (1987)).

171. *Id.* at 2846.

172. *Id.* at 2855.

173. *Id.*

174. *Id.*

175. *Id.*



would have been had she been confronted with the prospect of her situation while competent.”<sup>176</sup> Although family members may act entirely in good faith when they insist that a patient would not have wanted to remain on life support, they are by no means independent and removed from the situation. It remains a possibility that a family member’s desire to release the patient from life support when the prognosis is irreversible will influence that family member’s view of what the patient would have wanted.<sup>177</sup> For this reason, the Court held that Missouri may “choose to defer only to those wishes [of the patient that are clear and convincing], rather than confine the decision to close family members.”<sup>178</sup>

## 2. The Concurring Opinions of Justice O’Connor and Justice Scalia

Justice O’Connor set out two major points in her concurring opinion. First, in accord with the majority, O’Connor recognized that the right of a competent person to refuse medical treatment originates in the liberty interest of the due process clause of the fourteenth amendment.<sup>179</sup> O’Connor, however, would take this a step further than the majority by specifically extending the right to those patients who seek to refuse artificial nutrition and hydration.<sup>180</sup> O’Connor reasoned that “[w]hether or not the techniques used to pass food and water into the patient’s alimentary tract are termed ‘medical treatment,’ it is clear [that like other forms of life support,] they all involve some degree of intrusion and restraint.”<sup>181</sup> Thus, O’Connor concluded that forcing a competent patient to withstand such invasive treatment against her will constituted a burden on the patient’s right to be free to dictate the course of his or her medical treatment.<sup>182</sup> O’Connor maintained that the liberty interest of the due

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176. *Id.* at 2856.

177. *Id.* at 2855-56.

178. *Id.*

179. *Id.* (O’Connor, J., concurring).

180. *Id.* at 2857 (O’Connor, J., concurring).

181. *Id.* (O’Connor, J., concurring).

182. *Id.* (O’Connor, J., concurring).

In support of her premise that mechanisms providing patients with artificial hydration and nutrition are as intrusive as other forms of life sustaining treatment, O’Connor described the nasogastric tube that doctors sometimes use to feed patients artificially. *Id.* (O’Connor, J., concurring). The nasogastric tube is a narrow, plastic tube which is inserted into the stomach by passing the tube into one nostril, down the patient’s esophagus and into her stomach. The physician uses a funnel at the top of the tube to administer nutrition and hydration. AMERICAN MEDICAL ASSOCIATION ENCYCLOPEDIA OF MEDICINE 715-16 (1989). Since a patient’s natural reaction is to attempt to remove the tube and thus relieve the discomfort it causes, patients usually must be physically restrained by placing their hands in large mittens that are tied to the patient’s bed. *Cruzan*, 110 S. Ct. at 2857 (O’Connor, J., concurring) (quoting Major, *The Medical Procedures for Providing Food and Water: Indications and Effects*, in BY NO

process clause "must protect, if it protects anything, an individual's deeply personal decision to reject medical treatment, including the artificial delivery of food and water."<sup>183</sup>

Second, Justice O'Connor emphasized that the majority's decision to uphold the constitutionality of a state law requiring clear and convincing evidence of an incompetent patient's desire to withdraw from medical treatment would not necessarily act as *stare decisis* with regard to future challenges of the same evidentiary standard.<sup>184</sup> Where a state that has enacted a living will or durable power of attorney statute that allows a patient to designate a proxy to make necessary medical decisions for the patient, O'Connor maintained that the Constitution may require that state to honor the proxy's decision, thus precluding the state from requiring the proxy to show by clear and convincing evidence that his or her decision reflects the patient's desires.<sup>185</sup> In support of this assertion, O'Connor pointed out that thirteen states have living will statutes allowing a patient to choose a proxy who will make medical decisions for the patient.<sup>186</sup>

Similarly, all fifty states and the District of Columbia have enacted durable power of attorney statutes.<sup>187</sup> Like a living will, a durable power of attorney allows a patient to choose a surrogate who makes medical decisions on the patient's behalf should the patient become incompetent.<sup>188</sup> O'Connor suggested that if a patient exercises one of these options, and pursuant to state law chooses a surrogate, the state

EXTRAORDINARY MEANS: THE CHOICE TO FORGO LIFE-SUSTAINING FOOD AND WATER 25 (J. Lynn ed. 1986).

O'Connor maintained that the use of both the nasogastric tube and the gastrostomy tube, which must be surgically implanted into a patient's stomach, represent procedures so intrusive that when used against a patient's will, they violate the patient's liberty right to refuse medical treatment. *Cruzan*, 110 S. Ct. at 2857 (O'Connor, J., concurring).

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

184. *Id.* at 2858 (O'Connor, J., concurring). *Stare decisis* is defined as, "[T]o abide by or adhere to decided cases." BLACKS LAW DICTIONARY 1261 (5th ed. 1979).

185. *Cruzan*, 110 S. Ct. at 2858 (O'Connor, J., concurring).

186. *Id.* at 2858 n.4 (O'Connor, J., concurring).

187. *Id.* at 2858 n.3 (O'Connor, J., concurring).

The durable power of attorney statute in California allows a patient to indicate, by initialing a box, the course she desires her medical treatment to take in the event that she becomes incompetent and incapable of giving consent to medical treatment. The patient may choose: (1) that doctors withhold all life support if the burdens of treatment outweigh the benefits; (2) that doctors implement life support unless the patient falls into an irreversible coma; or (3) that doctors prolong life even if the patient lapses into an irreversible coma. In addition, the patient can designate an agent to make medical decisions on the patient's behalf if she becomes incompetent. *Final Choices*, *supra* note 7.

188. *Cruzan*, 110 S. Ct. at 2857-58 (O'Connor, J., concurring).

is obliged to recognize the decision made by the surrogate.<sup>189</sup> If the state fails to do so, it would not be acting in accordance with the patient's intent. Thus, the patient's liberty interest in refusing treatment would be violated.<sup>190</sup>

In contrast, Justice Scalia, in his concurring opinion, took a different stance with regard to the *Cruzan* case. Although he concurred with Rehnquist's majority opinion, Scalia disagreed with both Rehnquist and O'Connor in their assertion that a person's right to refuse treatment is guaranteed by the liberty interest as expressed by the fourteenth amendment.<sup>191</sup> Scalia believed that one cannot maintain a claim of denial of a substantive right without first showing that the right is one that has been "historically and traditionally protected against State interference."<sup>192</sup> Further, Justice Scalia found that any refusal of life-sustaining treatment does not constitute a historically or traditionally protected right.<sup>193</sup> Rather, he equated the refusal of medical treatment with suicide.<sup>194</sup> Scalia noted that throughout history, the prevailing view has been that

[s]uicide was not excused [at English common law] even when committed "to avoid those ills which [persons] had not the fortitude to endure. . . . The life of those to whom life has become a burden - of those who are hopelessly diseased or fatally wounded - nay, even the lives of criminals condemned to death, are under protection of the law, equally as the lives of those who are in the full tide of life's enjoyment and anxious to continue to live."<sup>195</sup>

Therefore, Justice Scalia believed that since suicide is not a right that "is so rooted in our tradition that it may be deemed 'fundamental' or 'implicit in the concept of ordered liberty,'" it is not protected under the due process clause.<sup>196</sup> Justice Scalia felt that the federal courts "have no business in this field" and that the regulation of treatment termination cases should remain in the hands of the states and be determined based on state statutes addressing suicide.<sup>197</sup> Scalia supported this belief in his declaration that

the point at which life becomes "worthless," and the point at which the means necessary to preserve it become "extraordinary" or "inappropriate," are neither set forth in the Constitution nor known to the nine Justices of this Court any better than they are known to nine people picked at random from the Kansas City telephone directory; and hence, . . . even when it is demonstrated by clear and convincing evidence that a patient no longer wishes certain measures to be taken to preserve her life, it is up to the citizens of Missouri to decide, through their elected representatives, whether that wish

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189. *Id.* at 2857 (O'Connor, J., concurring).

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

191. *Id.* at 2860 (Scalia, J., concurring).

192. *Id.* at 2859-60 (Scalia, J., concurring).

193. *Id.* (Scalia, J., concurring).

194. *Id.* at 2860 (Scalia, J., concurring).

195. *Id.* (Scalia, J., concurring) (citing *Blackburn v. State*, 23 Ohio St. 146, 163 (1873)).

196. *Id.* at 2860 (Scalia, J., concurring).

197. *Id.* at 2859 (Scalia, J., concurring).

will be honored.<sup>198</sup> [emphasis in original]

### 3. The Dissenting Opinions of Justice Brennan and Justice Stevens

Justice Brennan disagreed with the majority's approval of Missouri's clear and convincing standard of proving that a patient wishes to withdraw from medical treatment.<sup>199</sup> Brennan found that Nancy Cruzan has a "fundamental right to be free of unwanted artificial nutrition and hydration."<sup>200</sup> Moreover, he did not believe that this right was outweighed by Missouri's generalized interest in the preservation of life.<sup>201</sup> To Justice Brennan, the evidentiary standard implemented by the Missouri Supreme Court represented an "improperly biased procedural obstacle[]" that "impermissibly burden[ed] [Nancy's] right."<sup>202</sup>

In his dissent, Justice Brennan conceded that the right of a patient to be free from medical treatment is not absolute, since the state may have interests in continuing the treatment that outweigh the patient's right to terminate treatment.<sup>203</sup> However, in this case, "no State interest could outweigh the rights of an individual in Nancy Cruzan's position."<sup>204</sup> In support of this statement, Brennan maintained that "Missouri does not claim, nor could it, that society as a whole will be benefitted by Nancy's receiving medical treatment . . . [nor that a] third party's situation . . . [will be] improved . . . [or] harm to others will be averted."<sup>205</sup>

Finally, Justice Brennan criticized the majority for agreeing with the method that the Missouri State Supreme Court employed to determine whether or not Nancy would want to remain on life support.<sup>206</sup> Brennan asserted that the Missouri court's refusal to consider Nancy's own statements and the opinions of her family members in determining Nancy's wishes indicated that Missouri's clear and convincing evidentiary standard could be met only by the

198. *Id.* at 2860 (Scalia, J., concurring) (citing Marzen, O'Dowd, Crone & Balch, *Suicide: A Constitutional Right?*, 24 DUQ. L. REV. 1, 100 (1985) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937))).

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

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

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

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

203. *Id.* at 2869 (Brennan, J., dissenting).

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

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

206. *Id.* at 2863-64 (Brennan, J., dissenting).

presentation of a living will or "equivalently formal directive from the patient when competent."<sup>207</sup> In addressing this point, Brennan argued that "too few people execute living wills or equivalently formal directives for such an evidentiary rule to ensure adequately that the wishes of incompetent persons will be honored."<sup>208</sup> According to Brennan, the preferred method for determining the wishes of an incompetent patient, in the absence of express indications of the patient's desire, is to defer to the proxy appointed by the patient.<sup>209</sup> In the absence of such a proxy, the court should defer to the decision of family members.<sup>210</sup> The role of the state would be to "ensure that the person who makes the decision on the patient's behalf is one whom the patient himself would have selected to make that choice for him . . . [thus,] a state generally must either repose the choice with the person whom the patient himself would most likely have chosen as proxy or leave the decision to the patient's family."<sup>211</sup>

Similarly, Justice Stevens, in his dissenting opinion, agreed with Justice Brennan that Missouri had failed to present a state interest in this case that was strong enough to outweigh Nancy's right to end her life.<sup>212</sup> Justice Stevens maintained that, in order to be "constitutionally permissible, Missouri's intrusion upon [Nancy's] fundamental liberties must, at a minimum, bear a reasonable relationship to a legitimate state end."<sup>213</sup> However, according to Stevens, Missouri's proclaimed state interest in the preservation of life merely represented "an effort to define life's meaning rather than to preserve its sanctity."<sup>214</sup> Stevens attacked the domination of such an interest

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207. *Id.* at 2874-75 (Brennan, J., dissenting).

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

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

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

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

212. *Id.* at 2886 (Stevens, J., dissenting).

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

Unlike the majority, Justice Stevens did not use the rational basis test to determine if Missouri's state interests prevailed over Nancy's interest in choosing to terminate life support. Instead, he imposed a higher standard that the state interest must meet: whether one can reasonably infer that the state actually intends to promote its interest in preserving life by intruding on Nancy's interest in determining her course of treatment. Justice Stevens has advocated the use of this test in some instances as an alternative to the rational basis test, which he views as allowing too much deference to state interests. Under the rational basis test, as long as the state infringing upon the rights of an individual shows some state interest or purpose for doing so, the state interest will prevail over the interests of the individual. *See Note, Justice Stevens' Equal Protection Jurisprudence*, 100 HARV. L. REV. 1146 (1987). *See also* United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 180-81 (1980) (Stevens, J., concurring). In *Fritz*, Stevens explained that his higher standard of evaluating a state's purpose for infringing on an individual's interest requires that the court establish a correlation between the infringement and "either the *actual* purpose of the statute or a legitimate purpose that we may *reasonably presume to have motivated* an impartial legislature." *Id.* (emphasis added).

214. *Cruzan*, 110 S. Ct. at 2886 (Stevens, J., dissenting).

over Nancy's liberty interest stating, "[i]t is not within the province of secular government to circumscribe the liberties of the people by regulations designed wholly for the purpose of establishing a sectarian definition of life."<sup>215</sup>

Thus, although in some cases the preservation of life may be a legitimate state interest, Stevens believed "the Constitution requires that the individual's vital interest in liberty should prevail over the general policy" in Nancy's case.<sup>216</sup> Moreover, Stevens explicitly stated that the "failure of Missouri's policy to heed the interests of a dying individual with respect to matters so private is ample evidence of the policy's illegitimacy."<sup>217</sup>

Justice Stevens also addressed the issue of how the court should evaluate the problem of whether Nancy would have desired to be withdrawn from the gastrostomy tube. The Court, according to Stevens, was correct in concluding that certain controlling facts regarding a patient's desire to either remain on or withdraw from life support must be proven with clarity before life support may be withdrawn.<sup>218</sup> This is necessary to ensure that the ultimate decision to terminate or continue life support will reflect the patient's wishes as accurately as possible.<sup>219</sup>

However, Stevens believed that the Court erred in focusing on the evidentiary standard needed to prove the patient's intent.<sup>220</sup> Instead, Stevens maintained that the focus should be on deciding what facts relating to the patient's desire should be controlling in the ultimate decision to either terminate or continue life support.<sup>221</sup> Resolving the question of what facts should be controlling was apparently quite simple to Stevens. He believed the court should allow the best interests of the incompetent patient to be controlling "especially when buttressed by the interests of all related third parties."<sup>222</sup> In such a situation, these interests would always outweigh "any general state policy that simply ignores [the best] interests [of the patient]."<sup>223</sup> Thus, Stevens concluded that the Court should have held that "the Constitution requires the State to care for Nancy Cruzan's life in a

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215. *Id.* at 2888 (Stevens, J., dissenting).

216. *Id.* at 2891 (Stevens, J., dissenting).

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

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

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

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

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

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

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

way that gives appropriate respect to her own best interest."<sup>224</sup> In this situation, it would mean that the State should have allowed Nancy to die.

#### IV. THE IMPACT OF THE CRUZAN DECISION

In considering the long term impact of the Supreme Court's decision in *Cruzan*, it is important to keep in mind that the Court held, for purposes of this case only, that the Constitution allowed Missouri to require that Nancy's parents show by clear and convincing evidence that she would not have wanted doctors to continue life-sustaining treatment.<sup>225</sup>

In considering this limitation placed on the holding, it appears that the *Cruzan* decision will not have much impact on the future of our society. This reasoning stems from the fact that the Court may, in a future case, decide that a state which allows a patient, pursuant to a living will or durable power of attorney statute, to appoint a surrogate or proxy to make medical decisions on her behalf, but which also requires the proxy to show by clear and convincing evidence that her decision reflects that of the patient, acts in violation of the patient's constitutional liberty interest.

However, despite this reasoning, it is inevitable that the *Cruzan* decision will impact not only future right-to-die cases, but also decisions concerning other legal issues. Furthermore, the decision is likely to have a profound impact on both the medical community and the individual patient.

First, the *Cruzan* decision is likely to impact decisions involving legal issues that are separate from the right-to-die issue. For example, in *Griswold v. Connecticut*,<sup>226</sup> and later in *Roe v. Wade*,<sup>227</sup> the Court found that the right to contraception and a woman's right to an abortion were guaranteed by the privacy right of the due process clause of the fourteenth amendment.<sup>228</sup> However, since the majority in *Cruzan* would not recognize that a right to refuse medical treatment stems from a constitutional right to privacy, it has been argued that the Court was indicating its willingness to deny that a right to privacy exists at all in the Constitution and to "let the 'right to privacy' — announced in *Griswold* and applied in *Roe* wither away."<sup>229</sup>

Next, in specifically addressing future right-to-die cases, one commentator has suggested that the *Cruzan* decision may represent the

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

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

226. 381 U.S. 479 (1965).

227. 410 U.S. 113 (1973).

228. *Griswold*, 381 U.S. at 481-82; *Roe*, 410 U.S. at 153.

229. Taylor, *In Cruzan, Justices Make the Best of a Bad Case*, TEX. LAW., July 30, 1990, at S-8 [hereinafter Taylor] (citations omitted).

first step toward the Court's upholding a state law which requires that life-sustaining measures be continued in all situations, regardless of the patient's desire.<sup>230</sup> This idea is supported by the fact that, although the due process clause protects liberty, it also protects life. Therefore, because there is no distinction in the clause as to the quality of life it protects, it can be argued that the Constitution requires the states to criminally prosecute anyone who contributes to the death of another, even when that person is a doctor who refrains from using life support to prolong the life of a patient who is terminally ill.<sup>231</sup> Therefore, it follows that if the Court so desires, it could rule in a subsequent right-to-die case that "states not only are permitted but also are required by the due process clause to sustain some or even all incompetent patients artificially for as long as possible, regardless of the wishes of their families."<sup>232</sup>

On the other hand, this same commentator has argued that if the Court had found that Nancy was denied a constitutional right to die as a result of an unreasonably burdensome evidentiary standard, this decision could have led to the eventual endorsement of the use of active euthanasia in cases where a patient is confronted with the prospect of a painful death.<sup>233</sup> In the face of this possibility, "[e]ven many right-to-die advocates and medical groups will shrink from active euthanasia as a dangerous perversion of the medical mission."<sup>234</sup>

However, it is possible that the *Cruzan* decision, even without striking down the Missouri law, may still have the effect of causing states to enact legislation that allows active euthanasia. For example, in the state of Washington, the November 1991 ballot will include Initiative 119, which would allow a physician to "aid in dying" a patient who is terminally ill and who executes a written directive for the physician to terminate the patient's life in a "painless and humane manner."<sup>235</sup> The initiative would require that two physicians declare the patient terminally ill or in an irreversible condition that will re-

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230. *Id.*

231. *Id.*

232. *Id.* Euthanasia is defined as "[t]he act or practice of painlessly putting to death persons suffering from incurable and distressing disease as an act of mercy." BLACK'S LAW DICTIONARY 554 (6th ed. 1990). "Active euthanasia" is the "active administration of a death producing agent to accelerate death." Lyon, *supra* note 17, at 1368.

This is distinguished from "passive euthanasia" which is defined as "the withholding of termination of life-sustaining medical treatment to allow a disease to run its natural course." *Id.* Active euthanasia is illegal in all states. Taylor, *supra* note 229.

233. Taylor, *supra* note 229.

234. *Id.*

235. Colen, *A Life and Death Debate*, NEWSDAY, July 31, 1990, at 1 [hereinafter



sult in death within six months. In addition, the request must be made by a "conscious and medically competent qualified patient" at the time the patient desires the "aid in dying."<sup>236</sup> Further, the request must be voluntary, with no evidence of coercion. Understandably, this initiative has caused a great deal of controversy. However, support for the initiative reportedly "snowballed in July [1990] . . . after the *Cruzan* case."<sup>237</sup>

In June 1990, a similar controversy and degree of media attention surrounded the case of Dr. Jack Kevorkian who assisted a woman with Alzheimer's disease to die through the use of a "suicide machine."<sup>238</sup> In addition, the media has directed our attention to organizations like the Hemlock Society that seek to generate public support for legislation promoting active euthanasia or, as the Society calls it, "physician assisted suicide."<sup>239</sup>

Another problem resulting from the *Cruzan* decision is the fact that the Court did not adopt a uniform standard, applicable in all cases, for determining when medical treatment should be terminated. Instead, the Court left this issue to the individual states to set their own standards for deciding when an incompetent patient should forgo medical treatment. The problems resulting from this lack of a uniform standard are reflected in the case of Christine Busalacchi, a twenty year old incompetent patient of the Missouri Rehabilitation Center, where Nancy Cruzan was treated.<sup>240</sup> Like Nancy, Christine is in a persistent vegetative state and only her gastrostomy tube keeps her from dying.<sup>241</sup> Because Christine never expressed her wishes regarding medical treatment,<sup>242</sup> and because the Supreme Court affirmed Missouri's clear and convincing evidentiary standard for determining when an incompetent could withdraw from medical treatment, Missouri courts would be unlikely to grant a request for an order to terminate Christine's treatment. Thus, her father wants to move Christine to Minnesota where he will petition the courts for an order compelling doctors to remove her gastrostomy tube.<sup>243</sup> Minnesota law "gives doctors and family members more leeway in deciding to remove treatment from patients in terminal conditions than is

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Colen]; Beck, *Doctor's Dilemma: How Much Care is Too Much?*, Chi. Tribune, Jan. 7, 1991, at 13C.

236. Colen, *supra* note 231.

237. *Id.*

238. *Id.*

239. *Id.*

240. Chi. Tribune, Jan. 18, 1991, at 10M.

241. Christine was involved in a car accident in May 1987 in which she was seriously injured. Her condition has remained the same since the accident with no sign of improvement. *Id.*

242. *Id.*

243. *Id.*

allowed under Missouri law."<sup>244</sup> However, until now, Missouri courts, by way of a restraining order, have kept Mr. Busalacchi from removing his daughter from Missouri.<sup>245</sup>

Moreover, the debate generated since the *Cruzan* decision reflects the extent of the impact that *Cruzan* has had on a personal level. It affects everyone faced with the possibility of being in Nancy Cruzan's position — lying in a hospital bed in an irreversible vegetative state, connected to life supporting machines that will not allow a natural death. People are beginning to realize that without an executed document stating their wishes regarding the use of life support, the judgment of their families may not be enough to have the life support withdrawn.

Although only ten percent of all Americans have executed living wills,<sup>246</sup> inquiries at law firms about living wills have increased dramatically since the *Cruzan* decision. At one New York City firm, inquiries regarding living wills rose from 20,000 per month before the decision to over 150,000 per month after the decision.<sup>247</sup>

However, there are problems with documents such as living wills and durable powers of attorney. First, despite an increase in awareness, a large percentage of people remain unaware that such documents exist.<sup>248</sup> In recognition of this, there has been some effort to inform the public of its options. For example, a doctor in Hawthorne, California visits senior citizen centers and provides the elderly with information about the California Durable Power of Attorney and how it is executed.<sup>249</sup> Similarly, a Chicago hospital has instituted a policy of asking each patient checking into the hospital to put in writing whether or not life support treatment should be employed if the patient should become incompetent.<sup>250</sup> One Illinois entrepreneur, in response to the *Cruzan* decision, began marketing a do-it-yourself living will kit that will be widely available in K-Mart's and Waldenbooks retail outlets.<sup>251</sup> Further, the *Cruzan* decision has prompted the federal government to enact the Patient Self-Determination Act that will help ensure that hospitals become aware of pa-

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244. *Missouri Court Blocks Man From Moving Brain-Damaged Daughter*, United Press Int'l, Jan. 18, 1991, BC cycle (LEXIS, Nexis library, Omni file).

245. *Id.*

246. Chi. Tribune, Aug. 17, 1990, at 22C.

247. Chi. Tribune, Oct. 17, 1990, at 17C.

248. *Id.*

249. *Final Choices*, *supra* note 7.

250. Chi. Tribune, Jan. 18, 1991, at 10M.

251. Schreiber, *Ex-Printer Has Wills to Succeed*, NEWSDAY, Oct. 22, 1990, at 4.

tients' wishes regarding medical treatment. The Act requires all institutions receiving Medicare and Medicaid funds to give patients information about living wills and durable powers of attorney upon admission. Any information given by the patient that reflects wishes regarding medical treatment must be included in her file. This provision will take effect in November 1991.<sup>252</sup>

Yet, despite these efforts to encourage the execution of living wills and durable powers of attorney, these documents do not always ensure that the patient's choice regarding life sustaining treatment will be given effect. One obstacle may be the particular state's living will statute. Of the thirty-nine states that recognize living wills as valid,<sup>253</sup> a majority do not recognize provisions for the withdrawal of artificial nutrition and hydration.<sup>254</sup>

In addition, there are varying requirements among the states with regard to the point at which the directives in the living will are to be executed. For example, states such as Wisconsin require that the moment of death be imminent before the instructions in the will may be carried out; while other states, including California, maintain that the directives may be employed as long as the medical treatment required will act to postpone death. Still other states, including Alabama, require that death be imminent or the situation hopeless.<sup>255</sup>

Nevertheless, there are indications that the *Cruzan* decision has sparked some states to revise their legislation in an attempt to give patients more freedom to determine the course of their medical treatment. For example, Indiana has proposed two bills that will allow a patient to refuse artificial nutrition and hydration, via a living will.<sup>256</sup> In addition, the Missouri Senate is currently considering a bill that would allow a patient to appoint a proxy who would have

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252. Wash. Post, Jan. 1, 1991, at Z9.

253. Wash. Post, Aug. 12, 1990, at C1.

254. Gelfand, *supra* note 62, at 750.

States that exempt provisions for the withdrawal of food and water include Arizona, Arkansas, Colorado, Connecticut, Georgia, Hawaii, Idaho, Iowa, Maine, Maryland, Missouri, Montana, New Hampshire, Oklahoma, South Carolina, Tennessee and Wisconsin. *Id.* Indiana's living will statute also requires that food and water be provided to comatose patients; however, two new proposed bills would revise current law and allow doctors to remove food and water if the patient is in a vegetative state and requested in a living will that such care be terminated. So far, no hearings have been scheduled for the proposals. Gannett News Service, Jan. 9, 1991 (LEXIS, Nexis library, Omni file).

In addition, most living will statutes exempt pregnant women from executing a document that would allow them to die while pregnant. Mahoney, *Death with Dignity: Is There an Exception for Pregnant Women?*, 57 U. MO. K.C. L. REV. 221, 222 (1989).

255. Gelfand, *supra* note 62, at 743 (citing WIS. STAT. ANN. § 15.01(6) (West 1983 & Supp. 1986); CAL. HEALTH & SAFETY CODE § 7187(f) (West Supp. 1976); ALA. CODE § 22-8A-3(6) (1981)).

256. Gannett News Service, Jan. 30, 1991 (LEXIS, Nexis library, Omni file). See *supra* note 250 and accompanying text.

legal authority to make all decisions regarding medical treatment on behalf of the patient in the event the patient becomes incompetent.<sup>257</sup> Similarly, former Massachusetts' governor, Michael Dukakis, signed a health care proxy law which took effect in January 1991.<sup>258</sup>

The medical community represents another obstacle to the execution of a patient's wishes as they are stated in a living will. Often the living will fails to be included in a patient's chart because the physician or hospital is not told that the patient has executed one.<sup>259</sup> Furthermore, if the physician knows the will exists, he or she may be hesitant to act on it because "its usefulness [may have been] limited by vague terms, such as 'heroic measures' or 'life-prolonging procedures.'"<sup>260</sup> Unfortunately, these terms do not specifically indicate the types of life-sustaining treatment the patient wishes to avoid. Finally, a physician may decide to ignore a directive made by the patient because the doctor opposes the action, viewing it as killing the patient or, perhaps, fearing a malpractice suit because all available life-sustaining options were not exhausted. Thus, physicians, "in an age when medical lawsuits abound, sometimes supersede advance directives in favor of the legally safer path of 'doing everything' for their patients."<sup>261</sup> In the opinion of some, "the *Cruzan* decision is having . . . [the] horrible effect of physicians starting to practice law."<sup>262</sup>

Conversely, a hospital or physician may decide that a patient should be removed from life-sustaining treatment despite the desire of the patient's family for her to remain on life support. This is the scenario of the current controversy in Minnesota where a hospital is seeking a court order to withdraw life support from Helga Wanglie, an elderly patient in a persistent vegetative state.<sup>263</sup> The hospital claims that the removal of Mrs. Wanglie's resuscitator and gastros-

257. Chi. Tribune, Jan. 23, 1991, at 14C.

Joe Cruzan, Nancy's father, ranks among the supporters of this legislation. He testified twice before a legislative committee and stated that family members will comprise most of the people forced to make life or death choices. *Id.*

258. Boston Globe, Jan. 2, 1991, at 41P. Any Massachusetts citizen over eighteen may designate a health care agent by signing a health care proxy form. In addition, two witnesses must sign the form. *Id.*

259. Chi. Tribune, Jan. 18, 1991, at 10M.

260. *Id.*

261. *Id.*

262. Wash. Post, Oct. 16, 1990, at Z7.

263. Colen, *Fight Over Life*, NEWSDAY, Jan. 29, 1991, at 63 (Nassau ed.) This hospital argued that it is not "obligated to provide inappropriate medical treatment which cannot advance a patient's personal interests." *Id.* Thus, the hospital maintained that in Mrs. Wanglie's case, "someone had to take a stand to say, 'Enough!'" *Id.*

tomy tube is in her best interests, despite her family's insistence that Mrs. Wanglie, if competent, would wish to remain on the life support.<sup>264</sup>

Therefore, with the treatment termination problems presented by today's medical technology, it is necessary that the relationship between doctor and patient return to the way it was before this technology was developed. Today, it is typical that a patient will have many different doctors and specialists attending to her condition. As a result, a strong doctor-patient bond is less likely to develop since each of these doctors concentrates only on a segment of the patient's condition. However, in order for a doctor to fully understand the patient's desires and attitudes toward life-sustaining treatment, it is imperative that the doctor become familiar with more than just a patient's physical condition. The doctor must also get to know the patient's value system and personal world view. Thus, the physician, "no matter how specialized his or her training, will have to become a more holistic healer, attentive not only to the specific body part in question but to the total quality of life."<sup>265</sup>

## V. CONCLUSION

Until her death on December 26, 1990, Nancy Cruzan remained in a Mount Vernon, Missouri hospital with her gastrostomy tube in place to prolong her death. Public funds paid for the expense of her treatment, estimated to total \$130,000 per year.<sup>266</sup> However, despite the Supreme Court decision, Nancy's family refused to give up. Mr. and Mrs. Cruzan went back into Jasper County Court in August 1990 and filed another petition to have the life support withdrawn. At the hearing, they presented the testimony of three new witnesses who related their serious conversations with Nancy in which Nancy stated that she would never want to live in a vegetative state.<sup>267</sup> The court determined that this new evidence sufficiently satisfied the state's clear and convincing evidentiary standard necessary to allow doctors to remove Nancy's gastrostomy tube.<sup>268</sup>

Other factors contributing to the Cruzans' successful petition included the fact that the presiding judge was the same judge who ini-

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264. *Id.* The Wanglie family based its contention on conversations between Mrs. Wanglie and her daughter in which Mrs. Wanglie stated that she "wouldn't want her life prematurely shortened if she wasn't able to care for herself." *Id.* In addition, Mr. Wanglie argued that after fifty years of marriage, he knows what her values are and is in the best position to make a decision on her behalf regarding medical treatment. He maintained that both he and Mrs. Wanglie "take the position that human life is sacred." *Id.*

265. Wash. Post, Sept. 4, 1990, at Z6.

266. Wash. Post, Oct. 16, 1990, at Z7.

267. *Id.*

268. Chi. Tribune, Jan. 23, 1991, at 14C.

tially granted the Cruzans' request to withdraw Nancy from life support in 1987.<sup>269</sup> In addition, in September 1990, the court granted a request by the State of Missouri, the Missouri Health Department and the director of the rehabilitation center where Nancy was being treated to withdraw from the case.<sup>270</sup> According to the Missouri Attorney General, the State concluded that with the Supreme Court's ruling on the case in June, Missouri had no interest in the new proceeding.<sup>271</sup> Hence, the Cruzans faced only the guardian *ad litem* in court who, throughout all of the proceedings, remained sympathetic to Nancy's family and believed that it was in Nancy's best interests to be removed from the gastrostomy tube.<sup>272</sup>

Thus, after eight years of living in a vegetative state, Nancy was finally allowed to die.<sup>273</sup> However, many other patients in a similar condition continue to exist on life support machines, unable to withdraw from them and die with dignity. Society must strive to develop policies to deal responsibly with modern medical technology and to safeguard that its use will not continue to be abused.

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269. Wash. Post, Oct. 16, 1990, at Z7.

270. *Id.*

271. *Id.* The press has speculated that the underlying motivation for Missouri's withdrawal from the *Cruzan* case lies in the fact that the people of Missouri support Nancy's family in their desire to have Nancy removed from life support. Moreover, the Missouri Attorney General, William L. Webster, is rumored to be entering the race for governor of Missouri in 1992. *Id.*

272. Nancy's guardian *ad litem* also submitted a brief to the United States Supreme Court prior to its decision in June, recommending that the Supreme Court reverse the Missouri State Supreme Court's decision. *Cruzan v. Missouri Dep't of Health*, 110 S. Ct. 2841, 2853 n.9 (1990).

Additionally, the ACLU argued in an amicus brief that "the decision to forgo life-sustaining treatment is an American liberty, guaranteed by constitutional rights." L.A. Times, Jan. 10, 1991, at E1, col. 2.

273. A public outcry arose when doctors finally removed Nancy's gastrostomy tube. The group that was the most active in protesting the court order was Operation Rescue, an anti-abortion organization. Operation Rescue members attempted to gain entrance to Nancy's hospital room in order to reconnect the gastrostomy tube or feed her manually, despite Nancy's inability to swallow. L.A. Times, Jan. 10, 1991, at E1, col. 2. In addition, approximately 100 members of the group camped outside of the Missouri Rehabilitation Center for the final days of Nancy's life. A number of Operation Rescue members also filed petitions in the Missouri courts in an attempt to obtain an order to reconnect Nancy's tube. These petitions were all denied. *Id.*

