TO BE OR NOT TO BE: EXAMINING THE RIGHT TO DIE

Though shalt not kill; but needest not strive officiously to keep alive.
A.H. Clough,
The Latest Decalouge (1863)

Today, modern medicine has become able not only to extend life, but to alter its very nature. The use of extraordinary medical means to prolong life has led society only recently to consider a host of issues unknown to the generations before us. In the seminal case of *In re Quinlan*,[1] the New Jersey Supreme Court stated that, "the law, equity and justice must not themselves quail and be helpless in the face of modern technological marvels presenting questions hitherto unthought of."[2] More and more, however, these issues are being thought of and thought of quite deeply.

This Note will examine the "right to die"[3] controversy. It will briefly outline the developments with respect to the competent patient's right to refuse medical treatment. This Note will then focus on the more controversial and value-laden issues regarding the withdrawal of life-sustaining equipment. This note specifically addresses how the law attempts to deal with the incompetent individual who is unable to determine his or her own fate yet fails to meet the brain death criteria.[4] Most significantly, it will examine the impact of the Supreme Court decision, and subsequent judicial opinions, which allowed Nancy Cruzan's parents to end her life. Finally, it will analyze the future of the right to die issue and the legacy of the Cruzan family's struggle to allow their daughter to "die with dignity."

I. THE HISTORY OF THE RIGHT TO DIE

There has been a dichotomy of opinion and results concerning the two distinct fact situations in the right to die cases. In the first situation, the patient is competent to make his own decision.[5] In the second situation, the patient is deemed incompetent and a court appointed guardian seeks a court order that would empower him to make all medical decisions for the patient.[6]

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1. 355 A.2d 647 (N.J. 1976), *cert. denied sub nom.* Garger v. New Jersey, 429 U.S. 922 (1977).
2. *Id.* at 665.
3. The term "Right to Die," as used in the context of this Note, specifically refers to the right to refuse or to terminate treatment. I reject the notion that any such right should include the right to kill oneself or to assist another in killing herself.
4. *See* Ad Hoc Committee of the Harvard Medical School to Examine the Definition of Brain Death, *A Definition of Irreversible Coma*, 205 J.A.M.A. 337 (1968).
5. *See, e.g.* Bartling v. Superior Court, 209 Cal. Rptr. 220 91984); Satz v. Perlmutter, 362 So.2d 160 (Fla. Dist. Ct. App. 1978), *aff'd.*, 379 So.2d 359 (Fla. 1980); Lane v. Candura, 376 N.E.2d 1232 (1978); In re Quackenbush, 383 A.2d 785 (Morris County Ct. 1978).
6. *See, e.g.*, John F. Kennedy Mem. Hosp., Inc. v. Bludworth, 452 So. 2d 921 (Fla. 1984); In re Torres, 357 N.W. 2d 332 (Minn. 1984); In re Conroy, 457 A.2d 1232 (N.J. Super. Ct. Ch. Div.), *rev'd.* 486 A.2d 1209 (N.J. 1985); In re Coyler, 660 P.2d 738 (Wash. 1983); Leach v. Akron Gen. Med. Center, 68 Ohio Misc. 1, (1980); Superintendent of Belchertown State Sch. v. Saikewicz, 370 N.E.2d 417 (Mass. 1977), *modified sub nom.* In re Storar, 420 N.E.2d 64 (N.Y. 1981).

In 1914, Justice Cardozo declared the modern philosophical foundation for the respect of patient choice when he wrote, "every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault, for which he is liable in damages."[7] Cardozo's words reflect one of the earliest and arguably most persuasive opinions recognizing the importance of the patient's right of self-determination.[8] He fashioned the remedy based on assault and battery for those persons who were improperly given medical therapy against their will. The right to accept or refuse medical treatment, therefore, has its origins in the common law, serving to protect a person's interest in his or her own bodily integrity.[9]

Recently, however, the courts have turned from a battery theory toward a negligence one, focusing on the patient's lack of informed consent as a basis for action.[10] Moreover, since 1973, the common law doctrine has been augmented by a line of cases holding that the constitutional right of privacy is sufficiently broad so as to cover medical treatment.[11] If the competent adult patient consents to the administration of treatment, such consent usually goes unquestioned and the procedure is executed without further debate, ethically or legally.

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7. Schloendorff v. Society of New York Hospital, 105 N.E. 92, 93 (N.Y. 1914). Even prior to *Schloendorff*, courts generally upheld a patient's battery action against a physician for unauthorized treatment based upon the common law theories of fraud and misrepresentation. *See, e.g.*, State v. Housekeeper, 16 A. 382 (Md. 1889); W. Page Keeton, et. al., *Prosser & Keeton on the Law of Torts*, § 32, at 190-91 (5th. Ed. 1984).

8. Even earlier case law recognizing a patient's right to be free from unwanted health care treatment exists. *See* Slater v. Baker & Stapleton, 95 Eng. Rep. 860 (K.B. 1767).

9. The wording used by many of the courts in these earlier cases reflects the influence on the notions of liberty and the individual espoused by John Stuart Mill. *See, e.g.*, Mill's well-known postulate that "[o]ver himself, over his own body and mind, the individual is sovereign." John Stuart Mill, *On Liberty, in Selected Writings of John Stuart Mill* 129 (New. Am. Libr. ed. 1968).

10. The Doctrine of Informed Consent dictates that:

> Surgeons and other doctors are . . . required to provide their patients with sufficient information to permit the patient himself to make an informed and intelligent decision to submit to a proposed course of treatment or surgical procedure. Such a disclosure should include the nature of the pertinent ailment or condition, the risks of the proposed treatment or procedure, and the risks of any alternative methods of treatment, including the risks of failing to undergo any treatment at all.

Keeton et. al., *Supra* note 6, § 32.

The foundation for the doctrine of informed consent was laid in the 1957 case of Salgo v. Leland Stanford Junior University Board of Trustees, 317 P.2d 170 (Cal. Dist. Ct. App. 1957). Here, the court held that "[a] physician violates his duty to his patient and subjects himself to liability if he withholds any facts which are necessary to the proposed treatment." 317 P.2d at 181.

See also Canterbury v. Spence, 464 F.2d 772 (D.C. Cir.), (applying District of Columbia Law), *cert. denied*, 409 U.S. 1064 (1972); David W. Louisell & Harold Williams, *Medical Malpractice* § 22.01 at 594.44 (1981).

11. *See*, e.g., Roe v. Wade, 410 U.S. 113, 153 (1973), wherein Justice Blackmun, writing for the majority, declared: "The right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Id.* at 153.

See also In re Yetter, 62 Pa. D. & C.2d 619, 623-24 (1973) (upholding the right of a state mental institution inmate to refuse surgery for breast cancer):

> [T]he constitutional right of privacy includes the right of a mature competent adult patient to refuse to accept medical recommendations that may prolong one's life . . . in short, the right of privacy includes the right to die.

In the situations wherein a patient refuses to give his or her consent to important or life sustaining treatment, however, the courts have been somewhat reluctant to yield total authority. Thus, a competent patient's decision to accept or refuse medical care sometimes has been overridden. These cases typically involve a determination that the state's interest in preserving life is paramount to the individual's right to privacy[12] and to the protection of dependent minors,[13] either directly or indirectly.

Thus, with respect to the right of the competent adult patient to refuse any life-sustaining treatment, the debate usually focuses on the conflicting interests of the state and the individual. Generally, in deciding whether to allow a patient to refuse medical care, the courts will carefully consider a number of factors including: the degree to which the patient is suffering, the patient's chance of survival with such extraordinary care, and the existence of dependents.

Thus far, based on constitutional, legislative and judicial precedent, the courts have presumed that the adult competent patient does indeed have a right to refuse life-sustaining care.

II. THE RIGHTS OF THE INCOMPETENT PATIENT

A. The Case of Karen Ann Quinlan

The question of whether life-support equipment may be withdrawn from an incompetent, comatose patient was first addressed in the landmark case of *In re Quinlan*.[14] Karen Quinlan, age 20, tragically suffered a cardiac arrest that led to the destruction of much of her brain tissue. At the emergency room, the doctors resuscitated her and kept her major organs performing by use of a highly advanced life support machine. Though technically "alive," doctors diagnosed her as being in a "chronic persistent vegetative state."[15]

Karen Quinlan laid in a New Jersey hospital with no reasonable chance for recovery and without the ability to make any treatment decisions for herself. Karen's father sought to be appointed his daughter's guardian and requested the

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12. *E.g.*, John F. Kennedy Mem. Hosp. v. Heston, 279 A.2d 670 (N.J. 1971) (treatment ordered to save patient's life despite known objects based on religious beliefs).

13. Application of President and Directors of Georgetown College, Inc., 331 F.2d 1000 (D.C. Cir.), *cert. denied sub nom.* Jones v. President and Directors of Georgetown College, Inc., 377 U.S. 978 (1964). In this case, physicians at the Georgetown University Medical Center applied to the federal district court for permission to administer a blood transfusion to a patient. The Court of Appeals reviewed the district court's order so authorizing the hospital to administer the needed blood transfusions to a patient who opposed the procedure on religious grounds, and whose husband was unwilling to authorize the procedure. The court found the order proper because, *inter alia*, the patient was the mother of a seven-month old child, and the state as "parens patria" would not allow the parent to abandon the child, even on religious grounds, 331 F.2d 1008.

14. 355 A.2d 647.

15. 355 A.2d at 654. The chronic persistent vegetative state is a phrase that describes a body "[w]hich is functioning entirely in terms of its internal controls. It maintains temperature. It maintains heart beat and pulminary ventilation. It maintains digestive activity. It maintains reflex activity of muscles and nerves for low level conditioned responses. But there is no behavioral evidence of either self-awareness or awareness of the surroundings in a learned manner." In re Jobes, 529 A.2d 434, 438 (N.J. 1987).

court's permission to have her respirator removed.[16] With this petition before them, the New Jersey Supreme Court faced the ultimate question of whether an incompetent patient has the right to refuse life-sustaining treatment. The court held that Mr. Quinlan should be his daughter's guardian and should also be permitted to have her respirator removed, even though the justices realized that such action would in all likelihood cause Karen to die.[17]

The most important aspect of the *Quinlan* opinion was the court's holding that an incompetent person's right to refuse medical therapy is grounded in the right to privacy.[18] Moreover, the exercise of Karen's constitutional right here could not be waived merely because she lost conscious function.[19] In so ruling, the court expounded a test which has come to be known as the "Substituted Judgment Test." Its name derives from the premise that the court appointed guardian would exercise the patient's rights, protecting his or her rights, thereby, effectively allowing the guardian to "don the mental mantle of the incompetent."[20]

Since the New Jersey Supreme Court first announced the "Substituted Judgment Test," many other states have dealt with the rights of incompetent individuals to discontinue the use of life support mechanisms. Most have followed the rationale which the New Jersey Supreme Court announced in *Quinlan* and have adopted the substituted judgment test.[21] Other states, however, have turned to a more objective means of implementing a balancing test.[22]

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16. *Id.* at 657.

The lower court had appointed neither Mr. nor Mrs. Quinlan as their daughter's guardian, because it believed their personal anguish would prevent them from effectively making day-to-day decisions on the future care and treatment of Karen. 348 A.2d 801, 824 (N.J. Super. Ct. Ch. Div. 1975), *rev'd.*, 355 A.2d 647 (N.J. 1976).

17. 355 A.2d at 671-72. The court deemed Mr. Quinlan capable of full guardianship because "his strength of purpose and character" far outweighed his feelings of grief and sorrow. The court noted, however, that the decision to terminate life support mechanisms would require the consensus of "the guardian and family of [the patient], the responsible attending physicians and the hospital's ethics committee." *Id.* at 671.72.

These entities did reach a consensus of opinion and decided that it was in Karen's best interests to have her respirator removed. Karen survived the removal of life-support systems but remained in a deep coma. Her parents did not seek to have her nutrition and hydration discontinued. She died on June 11, 1985. Andrew H. Malcom, *The End of the Quinlan Case, but Not the Issue It Raised*, N.Y. Times, June 16, 1985, at D22.

18. The court found that the privacy right is "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 in certain circumstances." *Id.* at 663 (citing Roe v. Wade, 410 U.S. 113, 153 (1973)).

This constitutional right announced in *Quinlan* is not absolute; it must be weighed against several countervailing state interests, including:

1) the interest in the preservation of life;
2) the protection of the interests of innocent third parties;
3) the prevention of suicide; and
4) maintaining the ethical integrity of the medical profession.

In re Conroy, 486 A.2d 1209, 1223 (N.J. 1985).

19. 355 A. 2d at 663.

20. Superintendent of Belchertown State Sch. v. Saikewicz, 370 N.E.2d 417, 431 (Mass. 1971) (quoting In re Carson, 545, 241 N.Y.S.2d 288, 289 (Sup. Ct. 1962)).

21. *See* e.g., Superintendent of Belchertown State Sch. v. Saikewicz, 370 N.E.2d 417, 435 (Mass. 1977) (holding that all persons, whether competent or incompetent, have a right to refuse medical treatment in certain instances based on its application of the Quinlan court's rationale).

22. Courts have adopted two further alternative approaches to the "substituted judgment test" to enable decision making for incompetent patients.

Throughout this emotional debate the United States Supreme Court has remained silent on the right to die controversy, refusing to grant certiorari in a number of cases.[23] The High Court appeared satisfied to defer judgment on the issues to the state courts. That was until another young woman, this time in Missouri, slipped into the persistent vegetative state after a tragic automobile accident. The litigation which ensued led to a series of judicial decisions reaching, though not culminating, in an extensive opinion by the United States Supreme Court.[24]

B. The Case of Nancy Beth Cruzan

"The court, by clear and convincing evidence, finds that the intent of . . . [Nancy Cruzan], if mentally able, would be to terminate her nutrition and hydration."[25] With those words, a county probate judge in Missouri empowered Nancy Cruzan's parents to remove the gastrointestinal tube which had provided her food and water for nearly eight years. On December 26, 1990, on the twelfth day after the feeding and hydration tube had been removed from her stomach, Nancy Beth Cruzan died, bringing an end to the nation's foremost right to die case.

It all began on January 11, 1983, when Nancy was an unknown twenty-five year old woman returning home in her old Nash Rambler from a night shift job at a cheese factory. Her car veered out of control on an icy two lane road and she was thrown thirty-five feet forward into a ditch. When paramedics arrived, they discovered her without any respiratory nor cardiac function. After restoring her heartbeat and breathing, the paramedics rushed Nancy to a hospital. Having been deprived of oxygen for twelve to fourteen minutes, she suffered permanent and extensive brain damage.[26] After three weeks in a deep coma, she progressed to a persistent vegetative state, a condition from which she never recovered.

Though doctors agreed that she had no chance of regaining her mental facilities, they also determined that she was not brain dead.[27] Nevertheless, Nancy's parents, recognizing that their daughter would not want to continue living in this vegetative state, petitioned the state trial court for permission to

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1) Limited Objective Test: This test allows the discontinuation of care when there is not enough evidence to survive the substituted judgment test. It represents a relaxation of the stringent clear and convincing standard that must be met under the substituted judgment test. For an example of this test, *see* In re Torres, 357 N.W.2d 332 (Minn. 1984).

2) Pure Objective Test: This test is a balancing test that weighs the benefits and burdens encountered by the incompetent individual, thus allowing the judge to order a discontinuation of medical therapy. It is applied when the prognosis of continued incompetence is certain, and the patient never indicated any preference whether to be maintained in such a condition. For an example of this test, *see* In re peter, 529 A.2d 419 (N.J. 1987).

23. *See* e.g., In re Jobes, 529 A.2d 434 (N.J. 1987), *stay denied sub nom.*, Lincoln Park Nursing and Convalescent Home v. Kahn 483 U.S. 1036, 1037 (1987).

24. Cruzan v. Director, Missouri Department of Health, et. al., 110 S.Ct. 2841 (1990).

25. Order issued by Judge Charles Teel of the Jasper County Missouri Probate Court, December 12, 1990. Tamar Lewin, *Nancy Cruzan Dies, Outlived by a Debate Over the Right to Die*, N.Y. Times, Dec. 27, 1990, at A1.

26. 110 S. Ct. at 2844-46.

27. *See supra* note 3.

terminate her artificial hydration and nutrition.[28] The court found that Nancy had a fundamental right under the state and federal constitutions to refuse such extraordinary care.[29] Having found that Nancy did indeed, while competent, express a desire to die if she were ever to enter a persistent vegetative state, the court granted the Cruzan's request.[30]

The Missouri Supreme Court, however, reversed the decision of the lower court.[31] In so doing, the court, sitting en banc, ruled that the Cruzans may not cause their daughter's feeding tube to be removed, concluding that "no person can assume that choice for an incompetent in the absence of the formalities required under Missouri's Living Will statutes or the clear and convincing, inherently reliable evidence absent here."[32] Accordingly, the Missouri Rehabilitation Hospital continued to provide Nancy Cruzan with food and water by way of the gastrointestinal tube, despite the claims of her parents and others that this prolonged care is not what Nancy would have wanted.

The United States Supreme Court granted certiorari to consider the question of whether Cruzan has a right under the U.S. Constitution which would require the hospital to withdraw life-sustaining treatment from her under these circumstances.[33] In a majority opinion written by Chief Justice Rehnquist, the Court affirmed by a 5-4 vote the decision of the Missouri Supreme Court. The Chief Justice recognized the long-standing common law right to refuse medical treatment.[34] Moreover, he explicitly announced that a competent patient has a Constitutionally protected liberty interest under the Fourteenth Amendment to refuse unwanted medical therapy.[35] This right, he acknowledged, included not only the ability to refuse advanced technological care, but also to refuse mere food and water by way of artificial hydration and nutrition.[36]

The Chief Justice, however, narrowed the issue in the case to whether the United States Constitution forbids Missouri from requiring that evidence of the incompetent's wishes as to the withdrawal of treatment be shown by clear and convincing evidence. He reasoned that Missouri's interest in protecting life was sufficiently important so as to permit this heightened evidentiary standard.[37] Furthermore, the majority held that the Missouri Supreme Court did not commit constitutional error in reversing the trial court's determination that such clear and convincing evidence was absent.[38]

The Court also rejected the Cruzan's alternative plea that Missouri must accept the substituted judgment of close family members even in the absence of substantial proof that their views reflect the view of the patient. The Cruzan's

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28. Courts have generally rejected any distinction between artificial feeding and other, more traditional forms of medical treatment. *See, e.g., In re Browning*, 568 So.2d 4 (Fla. 1990); Rasmussen v. Fleming, 741 P.2d 674 (Ariz. 1987); *In re Gardner*, 534 A.2d 974 (Me. 1987).
29. Cruzan v. Hartman, 760 S.W.2d 408, 410 (Mo. 1988) (en banc).
30. *Id.*
31. *Id.*, at 427.
32. *Id.*, at 425.
33. 110 S. Ct. at 2841.
34. *Id.*, at 2846-47.
35. *Id.*, at 2851-52.
36. *Id.*
37. *Id.*, 2852-53.
38. *Id.* at 2853.

argued that the Court has previously upheld the constitutionality of a State's scheme favoring the exercise of family decision making.[39] The majority refused, however, to extend a decision which allowed a State to rely on family decision making into a constitutional requirement mandating the States to recognize and defer exclusively to such decisionmaking.[40] Thus, the Supreme Court affirmed the decision of the Missouri Supreme Court, effectively denying the Cruzan family the right to terminate the life of their daughter, Nancy. The litigation in this matter, however, was not over.

Some five weeks after the Supreme Court opinion in *Cruzan* was published, the Cruzans asked Missouri County Probate Judge Charles Teel for a second hearing, saying they had new evidence that their daughter once indicated to three people that she would rather die than live in her present condition.[41] After a series of hearings, Judge Teel, in a brief opinion, found this new evidence to be credible and that it proves Nancy's intention to a clear and convincing degree.[42] The State Attorney General's Office declined to appeal the Judge's decision. Within twenty four hours, Nancy's parents ordered hospital officials to discontinue her feeding and hydration and let her die, ending Nancy's eight year existence, removed from the world around her.

III. THE LEGACY OF NANCY CRUZAN AND THE FUTURE OF THE RIGHT TO DIE

It is one of the great unanticipated ironies of modern society that the more capable medical technology becomes at reducing health problems and prolonging life, the more we must decide when to prevent that very same technology from unnecessarily prolonging the process of death.[43] For most of America, Nancy Cruzan became an enduring symbol of this conflict of divergent interests. In the end, her family's struggle to have her treatment terminated achieved some remarkable results.

With its decision in the *Cruzan* case,[44] the Supreme Court has again deferred to the States on what truly is an issue of life and death. Grounded in a Fourteenth Amendment liberty interest, the Court has, however, recognized the competent patient's right to refuse medical treatment.[45] Thus, while not affecting their daughter, the Cruzan's have prompted a Supreme Court decision that explicitly

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39. *Id.* at 2854.
40. *Id.*
41. The new evidence, presented to Judge Teel in November, 1990, included testimony from two women who had worked with Cruzan at a small school for deaf and blind children in 1978. They learned of her plight through the publicity generated by the case. Both women told of specific conversations they had had with Cruzan about death and dying, including one in which she agreed that, if she became a "vegetable," she would not want to be fed by force or kept alive by machines. Tamar Lewin, *Nancy Cruzan Dies, Outlived by a Debate Over the Right to Die*, N.Y. Times, Dec. 27, 1990, at A1.
42. Traditionally, the measure of proof in civil cases is by a preponderance of the evidence. Missouri, however, requires decisions concerning the termination of any life support to be by a clear and convincing degree. *See* Edward W. Cleary et al., McCormick on Evidence §340 (3d Ed. 1984).
43. Andrew H. Malcolm, *What Medical Science Can't Seem to Learn: When to Call It Quits*, N.Y. Times, December 23, 1990, at D6.
44. 110 S. Ct. at 2841.
45. *Id.*, at 2846-47.

acknowledges a person's right to refuse medical intervention to prolong his or her life.

More importantly, the case of Nancy Cruzan has brought to the forefront of American thought the reality of what modern medicine can achieve. The highly publicized struggle of Nancy Cruzan's parents will leave a legacy that lives far beyond is effects on their daughter. For many persons, Nancy came to represent the unintended consequences of advanced medical technology, a technology that has come to view death as a failure. In essence, the Cruzan's long battle, like the Quinlan's before them, has served to educate an entire nation about the complexities that comprise the debate over the right to die. Nancy Cruzan's fate made many persons, lawyers and doctors, bioethicists and the clergy, and of course, the "common man," talk openly about the quality of life and the extent to which they would choose, if competent, to have their lives prolonged.[46]

The case has highlighted the importance of leaving written instructions, including living wills and durable power of attorney documents, for relatives and doctors to follow in the event of an incapacitating illness or injury. Moreover, the case has spurred, in part, the Congress of the United States to enact the "Patient Self-Determination Act."[47] This legislation requires hospitals and nursing homes which receive federal funds to explain to patients their right to refuse medical treatment.

These positive effects on American society notwithstanding, the Cruzan's were unable to persuade the United States Supreme Court to state that there is a constitutional basis requiring States to adopt one particular method for deciding whether to terminate medical care for the incompetent patient.[48] This decision by the Court seems justified. It will remove from potential litigants the ability to have their causes argued on constitutional grounds. The net effect should be a greater freedom for the States to formulate their own measures and public policies for dealing with the myriad of issues[49] regarding the decision whether to terminate care for the incompetent individual.

In the final analysis, the results of the medical profession's quest to advance technology for the betterment and advancement of all the world's people's represents one of the great advancements of modern society. The physicians and technicians of today ought to receive our deepest and most sincere gratitude for their efforts.

At the same time, we must respect the very difficult and personal decisions of a permanently incompetent patient's guardian[50] who must decide when, if

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46. Shortly after Nancy's death, a spokesman for the Society for the Right to Die observed, "The Cruzan case has focused national attention on this issue in an unprecedented way. While it's been a horrible agony for the Cruzans . . . we owe them a debt for educating us and giving so much impetus to living wills and legislation that helps people plan ahead." Tamar Lewin, *Nancy Cruzan Dies, Outlived by a Debate Over the Right to Die*, N.Y. Times, December 27, 990, at A1.

47. Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 4206, 104 stat. 1388 (codified in 42 U.S.C. § 1395).

48. 110 S.Ct. at 2854.

49. *See* REPORT OF THE PRESIDENT'S COMMISSION FOR THE STUDY OF ETHICAL PROBLEMS IN MEDICINE AND BIOMEDICAL AND BEHAVIORAL RESEARCH, DECIDING TO FOREGO LIFE-SUSTAINING TREATMENT, 16-18 (1983).

50. The family members of the incompetent patient are the most appropriate individuals to serve

ever, medical intervention no longer comports with the patient's previously expressed desires and intentions with respect to her "right to die." Moreover, in the absence of any such previous expressions of intent, we must respect the guardian's decisions concerning what the patient's choice would have been in light of that patient's moral attitudes, ethical beliefs and value system. Whether the guardian's decisions are justified, and the degree to which such justification should be judged, is a decision that is best left to the individual states to decide.[51] Nonetheless, as a result of Nancy Cruzan's ordeal and her family's efforts on her behalf, "hundreds of thousands of people can rest free, knowing that when death beckons, they can meet it face to face with dignity, free from the fear of unwanted and useless medical treatment."[52]

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in this guardianship capacity based on their unique relationship with the patient and special insight into the patient's likely choices. One commentator has noted that:

Not only are family members most likely to be privy to any relevant statements that patients have made on the topics of treatment or its termination, but they also have longstanding knowledge of the patient's character traits. Although evidence of character traits may seem inconclusive to third parties, closely related persons may, quite legitimately, "just know" what the patient would want in a way that transcends purely logical evidence. Longstanding knowledge, love, and intimacy make family members the best candidates for implementing the patient's probable wishes and upholding her values." Rhoden, *Litigating Life and Death*, 102 Harv. L. Rev. 375, 438 (1988).

51. For a discussion of the constitutional bases and approaches that states might employ in reaching such decisions, *See, generally* Martyn and Bourguignon, *Coming to Terms with Death: The Cruzan Case*, 42 Hastings L.J. 817 (1991).

52. Don Colburn, *When to Let Death Come*, Washington Post, January 1, 1991, at Z1.

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