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The Right to Die: The Broken Road from Quinlan to Schiavo

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*Annette E. Clark**

I. INTRODUCTION

On the thirtieth anniversary of the *Quinlan* case,[1] it seems appropriate to go back in time and revisit the decision that started us down the road to developing what is now a large and complex body of right-to-die jurisprudence in this country. As a longtime bioethics professor, this opportunity to reacquaint myself with one of the seminal cases, to read it in something other than the edited and abbreviated form in which it appears in casebooks, has been an education in and of itself. It is a reminder that we should not lose sight of our beginnings when we try to understand where the path of right-to-die law has taken us and to anticipate where it will lead us next.

The life and death of Karen Ann Quinlan and the Chancery Court and New Jersey Supreme Court decisions that flowed from her sad story provide a remarkable introduction to the right-to-die issues that have developed over the ensuing thirty years.[2] *Quinlan* also provides a useful measure of the law's progress over the last thirty years.[3] The

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1. *In re* Quinlan, 348 A.2d 801, 806 (N.J. Super. Ct. Ch. Div. 1975), *modified and remanded*, 355 A.2d 647 (N.J. 1976).

2. Those issues include: Whether the law should distinguish between the withdrawal of ordinary and extraordinary medical treatment? What is the proper role of religion and religious beliefs in the withdrawal of life-sustaining treatment? What is the best method to determine the wishes of an incompetent individual regarding medical treatment? Should the courts, the medical profession, or loved ones and family members be empowered to make life-and-death decisions for incompetent individuals? Should the law err on the side of sustaining life if we cannot discern what the now-incompetent individual would have chosen, or should courts turn to a best interests analysis? Is the right to refuse treatment a fundamental right protected by the federal Constitution, and if so, does that right continue after an individual becomes incompetent?

3. Evaluating the developments since *Quinlan* helps to determine whether the law and society have continued down the road established in *Quinlan*, found a better path, or become lost somewhere along the way.

United States Supreme Court's decision in the *Cruzan* case, which occurred approximately midway through this thirty-year period, and the very recent developments in the *Schiavo* case provide some enlightening, and perhaps distressing, insights into the question of whether the law and society have moved forward in our right-to-die jurisprudence.[4] This article consequently reviews the *Quinlan* decisions and issues raised in those cases.[5] It also discusses the seminal developments in right-to-die law following *Quinlan.*[6]

II. THE CASE OF KAREN ANN QUINLAN

On April 15, 1975, Karen Ann Quinlan, for reasons still unknown, stopped breathing for two fifteen-minute periods.[7] The lack of oxygen (anoxia) produced significant brain damage, leaving the twenty-one-year-old first in a coma and then in a persistent vegetative state, dependent upon a respirator to breathe.[8] The Quinlan family first authorized the treating neurologist, Dr. Morse, to do everything he could to keep Karen alive.[9] After three months without improvement in her neurological condition and with little hope that she would ever regain any level of cognitive function, however, Karen's parents consulted their local parish priest, who advised them that the Roman Catholic Church's teachings would permit withdrawal of extraordinary medical treatment under these circumstances.[10] Mr. and Mrs. Quinlan then approached hospital officials and sought to have the respirator removed, knowing that doing so would likely result in their daughter's

4. Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261 (1990); *In re* Schiavo, 780 So. 2d 176 (Fla. Dist. Ct. App.), *reh'g denied* (Feb. 22, 2001), *review denied*, 789 So. 2d 348 (Fla. 2001).

5. *See infra* Part II (discussing the issues and opinions of the *Quinlan* case).

6. *See infra* Parts III, IV (analyzing two seminal right-to-die cases post-*Quinlan*: *Cruzan* and *Schiavo*).

7. *In re* Quinlan, 348 A.2d 801, 806 (N.J. Super. Ct. Ch. Div. 1975), *modified and remanded*, 355 A.2d 647 (N.J. 1976). Some commentators, however, have expressed the belief that Ms. Quinlan had been overcome by an ingestion of a combination of alcohol and tranquilizer pills. Robert D. McFadden, *Karen Ann Quinlan, 31 Dies: Focus of the '76 Right to Die Case*, N.Y. TIMES, June 12, 1985, at A1.

8. *Quinlan*, 348 A.2d at 809–12. Karen's physicians described this as a neurological condition consisting of irreversible brain damage with a total lack of any cognitive or cerebral functioning, but with a partially functioning lower brain (brainstem). *Id.* at 811–12. The brainstem continued to regulate such "vegetative" functions as Karen's body temperature, blood pressure, heart rate, and sleep-wake cycles. *Id.* at 812.

9. *Id.*

10. *Id.* at 813. The family consulted with Monsignor Trapasso, who explained to the family that a declaration by Pope Pius XII clarified that the family had no obligation to sustain life when there is no realistic hope of recovery. McFadden, *supra* note 7, at A1.

death.[11] To effectuate their decision, Karen's parents signed the following statement:

> We authorize and direct Doctor Morse to discontinue all extraordinary measures, including the use of a respirator for our daughter Karen Quinlan.
>
> We acknowledge that the above named physician has thoroughly discussed the above with us and that the consequences have been fully explained to us. Therefore, we hereby RELEASE from any and all liability the above named physician, associates and assistants of his choice, Saint Clare's Hospital and its agents and employees.[12]

Even with this authorization and release from liability, Dr. Morse expressly declined to withdraw the respirator, asserting that to do so would deviate from standard medical practice and would require making a "quality of life" determination, which he would not do.[13]

A. The Chancery Court Decision

In response to the doctor's refusal to withdraw Karen's respirator, Mr. Quinlan sought judicial assistance. He petitioned the chancery court to appoint him legal guardian of Karen's person and property because of her incompetency, and asked that the court grant "the express power of authorizing the discontinuance of all extraordinary means of sustaining the vital processes of his daughter."[14]

The chancery court judge placed this case within the framework of equity,[15] with Mr. Quinlan's petition invoking the *parens patriae* power of the court to aid and protect the incompetent Karen Ann Quinlan, and to act in her best interests.[16] In Judge Muir's view, the power of equity called upon the court to do justice in the particulars of this case according to the dictates of societal morality and judicial conscience.[17] Interestingly, he directly equated this judicial conscience and morality, which would ultimately determine whether it was appropriate to authorize the removal of the respirator, with the role of the physician in society and the duty owed by physicians to their patients.[18] In rather

11. *Quinlan*, 348 A.2d at 813. Efforts had been made to wean Karen from the respirator, but these attempts to have her breathe on her own were unsuccessful, leading her physicians to conclude that she would likely be unable to sustain her breathing without the mechanical assistance provided by the respirator. *Id.* at 809.

12. *Id.* at 813–14.

13. *Id.* at 814.

14. *Id.* at 806.

15. *Id.* at 816 (stating that morality and conscience dictates the framework of the case).

16. *Id.*

17. *Id.* at 816–17.

18. *Id.* at 818.

noble terms, he anointed the medical profession as the guardian of morality in life-and-death decision making, charged by society to "do all within [its] human power to favor life against death."[19] Furthermore, the court held Dr. Morse up as a shining example of the profession, attaching great significance to the fact that this "man who demonstrated strong empathy and compassion, a man who has directed care that impressed all the experts" had concluded that medical tradition would not justify the withdrawal of the respirator.[20]

Judge Muir then took up the question of whether or how Karen's own views on the subject of withdrawal of life-sustaining treatment, expressed prior to her incompetency, should factor into the court's determination.[21] If Dr. Morse's views were entitled to instant respect and deference, Karen's prior statements were not. As to testimony that Karen had said at the age of twenty in various conversations with friends and family that she would not want to be kept alive through artificial means, Judge Muir concluded that her statements were merely theoretical, not the expression of a personal choice made under circumstances where her death was a distinct choice (such as would be the case with a living will). Thus, her statements were not sufficiently probative to persuade the court that Karen would elect, if competent, to terminate the respirator.[22]

In the end, Judge Muir concluded that the decision whether Karen should be removed from the respirator was a medical decision, not a judicial one, and that parents, whose own best interests might conflict with the best interests of the incompetent, could concur in the medical treatment decision but could not control it.[23] Furthermore, he held that to the extent that the court played any role as *parens patriae*, protecting Karen's best interests could not include permitting her to die, since life in the sense of biological existence was all that she had remaining to her.[24] Finally, the court concluded that the constitutional right to privacy claimed by Karen's parent on her behalf was weaker than, and trumped by, both the medical profession's duty to provide life-giving care and the judicial obligation to act in Karen's best interests by choosing her life over her death.[25] The court ultimately denied Mr. and Mrs. Quinlan *any* role in medical decision making for their daughter on

19. *Id.*
20. *Id.* at 819.
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.* at 819–20.
25. *Id.* at 821–22.

the grounds that their anguish and inner conflicts would be magnified by having to be involved in the day-by-day medical decisions necessary for her care.[26] Thus, rather than appointing either of the parents, the court chose a virtual stranger as guardian to protect the interests of the person of Karen Ann Quinlan.[27]

B. The New Jersey Supreme Court Decision

The chancery court's decision was obviously the product of a time when the medical profession held great sway. The court's view of physicians as god-like figures who controlled and protected society's morality and conscience through their life-and-death decision-making for their patients is a rather remarkable example of the strength and reach of medical paternalism only three decades ago.[28]

Nevertheless, if the chancery court's opinion was tradition-bound and backward looking, the New Jersey Supreme Court decision only one year later was strikingly prescient and forward-looking. This difference in approach is immediately apparent in the way the state's highest court framed the issue before it:

> The matter is of transcendent importance, involving questions related to the definition and existence of death, the prolongation of life through artificial means developed by medical technology undreamed of in past generations of the practice of the healing arts; the impact of such durationally indeterminate and artificial life prolongation on the rights of the incompetent, her family and society in general; the bearing of constitutional right and the scope of judicial responsibility, as to the appropriate response of an equity court of justice to the extraordinary prayer for relief of the plaintiff. Involved as well is the right of the plaintiff, Joseph Quinlan, to guardianship of the person of his daughter.[29]

Before turning to the transcendent questions and constitutional and legal issues alluded to above, Justice Hughes extensively reviewed the

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26. *Id.* at 824.

27. *Id.* The court appointed Daniel Coburn, Esq., who had acted on Karen's behalf during the guardianship hearing. *Id.* As is typical with guardians *ad litem*, Mr. Coburn likely had no knowledge of Karen Quinlan prior to this proceeding. *Id.*

28. *See* S. Elizabeth Wilborn Malloy, *Beyond Misguided Paternalism: Resuscitating the Right to Refuse Medical Treatment*, 33 WAKE FOREST L. REV. 1035, 1067–68 (1998) (arguing that the court's deference to physicians stems from a misplaced appreciation of medical professionals and their ability to save lives); Alicia R. Ouellette, *When Vitalism is Dead Wrong: The Discrimination Against and Torture of Incompetent Patients By Compulsory Life-Sustaining Treatment*, 79 IND. L.J. 1, 3 (2004) (noting the shift in the past thirty years from medical paternalism to patient autonomy).

29. *In re* Quinlan, 355 A.2d 647, 652 (N.J.), *cert. denied sub nom.* Garger v. New Jersey, 429 U.S. 922 (1976).

evidence of Karen's medical condition and prognosis, and, unlike the chancery court, emphasized the fact that, within the bounds of medical certainty, Karen would never regain cognitive or sapient life.[30] The court also explored the factual foundation regarding Mr. Quinlan's suitability as a guardian for his daughter, finding that he was a loving father, a deeply religious man, and a person of unquestioned moral character.[31]

Turning next to the legal questions before it, the court dispensed quickly with Mr. Quinlan's constitutional claims of free exercise of religion and cruel and unusual punishment, finding neither to be applicable in this case.[32] The New Jersey Supreme Court gave careful and prolonged consideration to the constitutional right of privacy the Quinlans claimed. The court imagined a scenario where Karen Ann Quinlan miraculously regained competence for a time, but with the same grim prognosis of irreversible and permanent brain damage without hope of a cognitive existence. The court had no difficulty reaching the conclusion that, under these hypothetical circumstances, Karen, if competent, would have the right to decide to discontinue the respirator even if the decision resulted in her death, and that no State interest could compel her continued vegetative existence against her will.[33]

It is perhaps not surprising that the court centered this legal right in the developing federal constitutional right to privacy. Citing *Eisenstadt v. Baird,*[34] *Griswold v. Connecticut,*[35] and *Roe v. Wade,*[36] the latter of

30. *Id.* at 655.

31. *Id.* at 657. The court described in some detail the Roman Catholic Church's position on the question of withdrawal of life-sustaining treatment, as reflected in a position statement by Bishop Lawrence B. Casey, spokesperson for the New Jersey Catholic Conference, which was contained within the Conference's *amicus* brief. *Id.* at 658–60. Justice Hughes emphasized that the purpose of this exposition of the Catholic Church's position was only to explore the impact it had on Joseph Quinlan's motivation and purpose in seeking guardianship of his daughter rather than to establish precedent for the court's decision. *Id.* at 660.

32. *Id.* at 661–62. As to the free exercise of religion claim, the court stated that the right to act in accordance with religious beliefs is not free from governmental restraint, that the State's interest in the preservation of human life would outweigh any constitutional right claimed here, and that there existed no independent parental right of religious freedom to support the relief Mr. Quinlan was requesting. *Id.* The court also concluded that the Eighth Amendment protection against cruel and unusual punishment was relevant only to penal sanctions and had never been extended to the correction of societal ills or injustices. *Id.* at 662.

33. *Id.* at 663. Justice Hughes analogized this scenario to that of a competent, terminally ill patient suffering from cancer and in great pain, whose right to refuse resuscitation or a respirator was unquestioned. *Id.*

34. 405 U.S. 438 (1972) (holding that the right to privacy gives an individual the right to be free from unwarranted governmental intrusion into the decision whether to bear a child).

35. 381 U.S. 479 (1965) (holding that the penumbra of the Bill of Rights protects an

which had been decided just three years earlier, the New Jersey Supreme Court stated that the constitutional right of privacy existing in the penumbra of the Bill of Rights was surely broad enough to encompass an individual's decision to decline medical treatment under certain conditions.[37] The court buttressed this conclusion by articulating that the State's legitimate interest in the preservation of human life necessarily weakens and the individual's right to privacy grows as the extent of bodily invasion occasioned by the medical treatment increases and the patient's prognosis dims.[38] Given Karen Quinlan's extremely poor prognosis, at least in terms of cognitive functioning, the high degree of bodily invasion involved in twenty-four hour nursing care, and the use of the respirator and feeding tube, the court asserted that the federal right to privacy would vindicate her choice, were she competent to make it, to choose not to have her life prolonged by extraordinary medical treatment.[39]

The extension of the right to privacy to the realm of refusing life-sustaining medical treatment was an important development in the law, but the New Jersey Supreme Court went one critical step further. It is a step that still reverberates today. The court acknowledged the difficulty of effectuating Karen's right to choose in circumstances where she had been rendered incompetent and where her choice could not be adequately discerned from prior conversations with friends and family.[40] The justices might have concluded that Karen's privacy right could be honored only under circumstances where there was some degree of legal certainty regarding the choice she would have made were she competent, a path that many courts have taken in the intervening years.[41] Instead, the court held that:

> The only practical way to prevent destruction of the right is to permit the guardian and family of Karen to render their best judgment . . . as to whether she would exercise it in these circumstances. If their

individual's privacy interests from governmental intrusion).

36. 410 U.S. 113 (1973) (holding that the constitutional right of privacy is broad enough to include a woman's right to terminate her pregnancy).

37. *Quinlan*, 355 A.2d at 663. The court also referenced but did not discuss the right of privacy that is contained within Art. I, paragraph 1, of the New Jersey Constitution. *Id.*

38. *Id.* at 664.

39. *Id.*

40. The New Jersey Supreme Court concurred in the chancery court's conclusion that Karen's prior statements regarding withdrawal of extraordinary treatment were too remote and impersonal and thus lacked sufficient probative weight to be given legal effect. *Id.* at 653, 664.

41. *See, e.g.*, Matter of Visbeck, 510 A.2d 125, 131 (N.J. Super. Ct. Ch. Div. 1986) (holding that unless the patient, while competent, clearly indicates a personal desire to do so, treatment may not be withheld); *In re* A.C., 573 A.2d 1235, 1247 (D.C. 1980) (holding that whenever possible, the judge should attempt to speak to the patient and ascertain her wishes).

> conclusion is in the affirmative this decision should be accepted by a society the overwhelming majority of whose members would, we think, in similar circumstances, exercise such a choice in the same way for themselves or for those closest to them.[42]

Thus, lacking a sufficient factual basis to make the legal determination of what choice Karen would have made regarding the withdrawal of the respirator, the court ceded its *parens patriae* power to Karen Ann Quinlan's family, and more specifically to Joseph Quinlan, her father and now legal guardian.[43] This decision is exactly one hundred eighty degrees from that of the chancery court, which ceded decision-making power entirely to the medical profession.[44]

In reaching this very different outcome, the New Jersey Supreme Court adopted a contrary view of the medical profession, one somewhat less deferential and slightly more realistic. In addressing the "medical factor," the court ultimately rejected the chancery court judge's proposition that societal morality rests in the hands of physicians, finding instead that the courts have a "nondelegable judicial responsibility" to decide matters before them and to reexamine underlying human rights and values when faced with new questions wrought by advances in medical technology.[45] Furthermore, the court stated that judicial decisions must pay attention not only to current medical standards and practices but also to the common moral judgment of the community.[46] Thus, the court accepted that then-existing medical standards supported Dr. Morse's decision to refuse to withdraw Karen's respirator, but questioned whether physicians sometimes failed to achieve a proper balance between curing the sick and prolonging the dying process for their patients who were being kept alive indefinitely by advances in life-sustaining technology.[47]

Justice Hughes postulated that physicians continued to provide medical treatment to those patients with irreversible conditions and poor prognoses both because of the enormity of the ethical decisions they were called upon to make and also out of concern for potential civil or criminal liability should withdrawal of treatment lead to a patient's

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42. *Quinlan*, 355 A.2d at 664.

43. *See id.* at 669 (holding that Quinlan's right to privacy would be vindicated by her guardian, her father).

44. *In re* Quinlan, 348 A.2d 801, 819 (N.J. Super. Ct. Ch. Div. 1975), *modified and remanded*, 355 A.2d 647 (N.J. 1976).

45. *In re* Quinlan, 355 A.2d 647, 665 (N.J. 1976).

46. *Id.*

47. *Id.* at 667.

death.[48] The New Jersey Supreme Court sought to assist the medical profession with these concerns, by first proposing that hospital ethics committees could share the responsibility in an advisory capacity for difficult ethical decisions.[49] Second, the court reassured physicians that withdrawal of life-sustaining treatment in aid of an individual's privacy right was lawful and could not, therefore, subject the physician to criminal prosecution or liability.[50]

Having completed its constitutional and philosophical exegesis, the court finally took up the question of whether the chancery court had erred in refusing to appoint Mr. Quinlan to be the legal guardian of his daughter's person.[51] Noting that the guardianship statute created an initial presumption in favor of next of kin, Justice Hughes swiftly concluded that Joseph Quinlan's strength of character and purpose made him eminently suited for the position.[52] Rather than directly authorizing the withdrawal of life support, however, the court expressly reserved that power to Mr. Quinlan, as guardian, and Karen's family, as long as the attending physicians and hospital ethics committee agreed that there was no reasonable probability that Karen would ever return to a cognitive, sapient state.[53] In a strange and sad twist of fate, when the respirator was withdrawn at Mr. Quinlan's request following the court's decision, Karen Ann Quinlan survived for an additional nine years, remaining throughout that time in a persistent vegetative state without self-awareness or awareness of her surroundings.[54]

The New Jersey Supreme Court's decision in *Quinlan* was remarkably forward-looking on four grounds. First, it acknowledged that families and health-care providers had regularly been withholding

48. *Id.* at 668.

49. *Id.* at 668–69. Justice Hughes articulated several grounds upon which Ethics Committee consultation would be useful in cases such as *Quinlan*: (1) shared and diffused responsibility with regard to difficult ethical decisions; (2) the addition of diverse views of other professionals such as social workers, theologians, and attorneys to those of physicians; and (3) the likelihood that new courses of action in aid of dying patients could be undertaken with less concern about liability and societal censure if the Ethics Committee stood behind the decision. *Id.*

50. *Id.* at 669–70.

51. *Id.* at 670. The court also held that termination of treatment would not be a criminal act because "the ensuing death would not be homicide but rather expiration from existing natural causes." *Id.*

52. *Id.* at 670–71 ("[W]hile Mr. Quinlan feels a natural grief, and understandably sorrows because of the tragedy which has befallen his daughter, his strength of purpose and character far outweighs these sentiments and qualifies him eminently for guardianship of the person as well as the property of his daughter.").

53. *Id.* at 671–72.

54. McFadden, *supra* note 7, at A1.

or withdrawing life-sustaining treatment in accord with the express or implied wishes of patients without the sanction of civil law.[55]

Second, it recognized that the federal constitutional right to privacy was broad enough to encompass an individual's decision to decline medical treatment, even if that decision would lead to the individual's death.[56]

Third, it refused to rest the decision whether to withdraw life-sustaining treatment exclusively in the hands of the medical profession, holding rather that an incompetent individual's right of privacy could be asserted on her behalf by a guardian, even under circumstances where the court could not discern her wishes based on prior statements while competent.[57]

Finally, it emphasized that in making the decision whether to withdraw treatment in circumstances such as these, the critical inquiry turned not on an individual's chance for mere biological existence but rather on whether there existed a reasonable medical probability that the person could return to a cognitive and sapient life.[58]

III. THE CASE OF NANCY BETH CRUZAN

Had courts followed the path laid down in 1976 by the New Jersey Supreme Court in *Quinlan*, the road over the ensuing three decades might have been a bit smoother. Instead, the United States Supreme Court took up the *Cruzan* case[59] in 1990 and took us down a different and even more difficult path to life-and-death decision making for incompetent individuals.

Nancy Beth Cruzan was a young adult in 1983 when she lost control of her car and was thrown into a ditch, where she lay without respiratory or cardiac function for some twelve to fourteen minutes.[60] Paramedics were able to restore her breathing and heartbeat at the accident site and transported her to the hospital, where she remained in a coma for three weeks, "progressed to an unconscious state in which

55. *Quinlan*, 355 A.2d at 659–60 (citing with approval from Bishop Casey's statement regarding the gap in the law regarding cases such as Karen Quinlan's).

56. *Id.* at 663; *see, e.g.*, Roe v. Wade, 410 U.S. 113 (1993) (holding the right of privacy to be broad enough to include a woman's decision to terminate a pregnancy in some circumstances); Griswold v. Connecticut, 381 U.S. 479 (1965) (finding an constitutional right to privacy exists in the penumbra of the specific guarantees of the Bill of Rights).

57. *Quinlan*, 355 A.2d at 664.

58. *Id.* at 669.

59. Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261 (1990).

60. *Id.* at 266; *see also* WILLIAM H. COLBY, LONG GOODBYE: THE DEATHS OF NANCY CRUZAN 7–9 (2002) (summarizing the events leading to Nancy Cruzan's vegetative state).

she was able to orally ingest some nutrition," and then regressed into a persistent vegetative state in which she would remain for the rest of her life.[61] Nancy was able to breathe on her own[62] but required the surgical insertion of a gastrostomy tube to receive adequate nutrition and hydration.[63]

After several years with no improvement in her neurological condition, Nancy's parents, who were also her coguardians, requested that hospital employees withdraw the feeding tube and allow their daughter to die.[64] The employees refused, so the Cruzans sought a court order authorizing the withdrawal of the feeding tube, which the trial court subsequently granted.[65] The Supreme Court of Missouri reversed, refusing to find a broad right of privacy to refuse life-sustaining medical treatment in either the state or Federal Constitution.[66] The court further held that Missouri's Living Will statute reflected a strong state policy in favor of preserving human life,[67] and that Nancy's parents could not exercise substituted judgment on her behalf to terminate the artificial nutrition and hydration in the absence of clear and convincing evidence that Nancy would have made that choice was she able.[68] The court found that Nancy's statements at the age of twenty-five in a somewhat serious conversation with a friend that if sick or injured she would not want to continue living unless she could live at least halfway normally were insufficiently reliable to meet Missouri's clear and convincing evidence standard for withdrawal of life-sustaining treatment from an incompetent individual.[69]

A. The Majority Opinion

The United States Supreme Court granted certiorari to decide whether Nancy Cruzan had a right under the United States Constitution

61. *Cruzan*, 497 U.S. at 266.

62. *Id.* at 266 n.1.

63. *Id.* at 266.

64. *Id.* at 267–68; *see also* Colby, *supra* note 60 at 45–50 (describing the Cruzan's efforts).

65. *Cruzan*, 497 U.S. at 268.

66. *Id.* (citing Cruzan v. Harmon, 760 S.W.2d 408, 416–17 (Mo. 1988) (en banc)).

67. *Id.* (citing *Harmon*, 760 S.W.2d at 419–20). In *Harmon*, the Missouri Supreme Court discussed at length Missouri's Living Will statute, Mo. Rev. Stat. §§ 459.010–459.055 (1986). The court found that in drafting the statute, the legislature showed "this State's strong interest in life." *Harmon*, 760 S.W.2d at 419. It came to this conclusion by comparing the Missouri statute to the Uniform Rights of the Terminally Ill Act. *Id.* at 419–20. Nonetheless, the statute was inapplicable to Nancy's case because the statute did not take effect until after Nancy's accident. *Id.* at 420. However, the court believed the statute reflected that the policy of Missouri was toward respect of "the sanctity of life." *Id.* at 419–20.

68. *Id.* (citing *Harmon*, 760 S.W.2d at 424–26).

69. *Id.*

to have life-sustaining treatment withdrawn under these circumstances.[70] This was the first case in which the United States Supreme Court was called upon directly to decide whether there existed a federal constitutional "right to die" embodied within the Due Process Clause of the Fourteenth Amendment.[71] In *Cruzan*, the Supreme Court, in a 5-4 decision authored by Chief Justice Rehnquist, ultimately upheld the State's power to require that an incompetent's wishes to have life-sustaining treatment withdrawn be proven by clear and convincing evidence.[72]

Although *Cruzan* has been widely cited for the proposition that competent individuals have a federal constitutional right to die,[73] the majority opinion is notable for the ways in which it explicitly and implicitly limited this right. First, the Court did not expressly hold that even competent individuals have a constitutional right to refuse life-sustaining treatment. Rather, the majority assumed for purposes of this case "that the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition."[74] Second, the majority rejected the characterization of this assumed interest as a privacy right akin to that recognized in *Roe v. Wade*, choosing instead to denominate it a "liberty interest."[75] Although the majority did not say so explicitly, the jurisprudential import of this choice of terminology was that the interest involved was not a fundamental right and thus could be subjected to significant state regulation.[76] Third, the majority, unlike the court in *Quinlan,* thought it highly relevant to the constitutional analysis that Nancy Cruzan was incompetent and therefore unable herself to make a voluntary and informed choice to refuse treatment.[77] Thus, the Court rejected her

70. Cruzan v. Dir., Mo. Dep't of Health, 492 U.S. 917 (1989) (granting certiorari).

71. The question presented in the petition for writ of certiorari was, "Whether a state's interest in life, codefied [sic] in the state 'living will act,' can override all constitutional privacy, liberty and equal protection rights of an incompetent person to reject medical treatment." Petition for Writ of Certiorari to the Missouri Supreme Court, Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261 (1990) (No. 88-1503).

72. *Cruzan*, 497 U.S. at 280.

73. *See, e.g.*, Washington v. Glucksberg, 521 U.S. 702, 742 (1997) (Stevens, J. concurring) (arguing that there are times when the right to die is entitled to constitutional protection).

74. *Cruzan*, 497 U.S. at 279.

75. *Id.* ("Although we think the logic of the cases discussed above would embrace such a *liberty interest*, the dramatic consequences involved in refusal of such treatment would inform the inquiry as to whether the deprivation of that interest is constitutionally permissible.") (emphasis added).

76. *Id.* (citing Youngberg v. Romeo, 457 U.S. 307, 321 (1982), and noting that the liberty interest must be balanced against the relevant state interest).

77. *Id.* at 280; *cf. In re* Quinlan, 355 A.2d 647, 664 (N.J. 1976) ("[W]e have concluded that

parents' claim that an incompetent person should have the same right to refuse life-sustaining treatment as a competent individual, asserting that the position advocated by the Cruzans begged the critical question given that such a right must by necessity be exercised by someone else on their daughter's behalf.[78]

Having characterized the right in question as a mere liberty interest, and having explained the conceptual difficulties inherent in effectuating a liberty interest for someone who cannot claim it for herself, the Court proceeded to balance Nancy Cruzan's constitutional right to die through withdrawal of the feeding tube against Missouri's interest in requiring clear and convincing evidence of her wishes.[79] Chief Justice Rehnquist pointed to two permissible state interests that supported the State's procedural requirement of clear and convincing evidence. First, the heightened evidentiary standard reflected Missouri's legitimate interest in the preservation and protection of human life.[80] The Court held that "a State may properly decline to make judgments about the 'quality' of life that a particular individual may enjoy, and simply assert an unqualified interest in the preservation of human life to be weighed against the constitutionally protected interests of the individual."[81] Further, the Court justified the clear and convincing evidence standard as a procedural safeguard erected by the State to protect the personal element of choice and to ensure that the surrogate's decision to withdraw life-sustaining treatment accurately reflected the wishes of the individual while competent.[82]

In upholding the Missouri Supreme Court's decision that Nancy Cruzan's prior statements were insufficiently probative as to her wishes under these particular circumstances, Chief Justice Rehnquist specifically rejected the proposition that, in the absence of clear and convincing evidence, the State must, as a constitutional matter, repose the final decision with close family members.[83] Thus, the United States Supreme Court in *Cruzan* rejected three of the linchpins of the *Quinlan*

Karen's right of privacy may be asserted on her behalf by her guardian under the peculiar circumstances here present.").

78. *Id.* at 279–80.

79. *Id.* at 280.

80. *Id.* at 281 (stating that the heightened evidentiary standard requires clear and convincing evidence of a patient's wishes).

81. *Id.* at 282.

82. *Id.* at 281–82. The majority also stated that the risk of erroneously terminating life-sustaining treatment was irreversible. That is, once life-support has been terminated, and the patient dies, there is quite obviously no way to reverse this decision. Thus a heightened burden of proof served as insurance against making the wrong decision. *Id.* at 283.

83. *Id.* at 285–86.

decision: (1) that the right to refuse life-sustaining medical treatment was a fundamental privacy right; (2) that to protect and safeguard the right of incompetent individuals to have treatment withdrawn, the court should allow a guardian or other surrogate to make the final decision even in the absence of definitive evidence of the patient's wishes; and (3) that the important inquiry regarding withdrawal of life-sustaining treatment turned not on an individual's chance for mere biological existence but rather the individual's chance of returning to a cognitive and self-aware existence.

B. The Road Not Taken—The Dissenting Opinions

Justice Brennan filed a dissenting opinion, joined by Justices Marshall and Blackmun, disagreeing with the majority opinion at virtually every turn.[84] He termed the right to be free from unwanted medical attention as "deeply rooted in this Nation's traditions."[85] As such, he would have held Nancy Cruzan's right to refuse life-sustaining treatment as fundamental, a right protected by the Federal Constitution despite her incompetency, which could only be overridden by a compelling state need.[86] Justice Brennan spoke eloquently of the personal nature of dying and the interest individuals have in evaluating the potential benefits and the consequences of life-sustaining treatment according to their own values and beliefs.[87] He argued that Missouri's generalized interest in the preservation of human life must by necessity give way to Nancy's particularized interest in self-determination,[88] and that the only legitimate interest the State could assert was that of safeguarding the accuracy of the determination of Nancy Cruzan's wishes.[89]

Justice Brennan objected vehemently to Missouri's application of the clear and convincing evidence standard, particularly the Missouri higher court's exclusion of relevant statements made by Nancy prior to the accident and the opinions of family and friends as to what she would have wanted.[90] He argued that the Missouri court's application of this

84. *See generally id.* at 301 (Brennan, J., dissenting) (arguing that Nancy Cruzan's right to be free from unwanted medical treatment was greater than any interest of the State and was impermissibly burdened by Missouri's biased procedure).

85. *Id.* at 305.

86. *Id.* at 303–05.

87. *Id.* at 309.

88. *Id.* at 314.

89. *Id.* at 315–16.

90. *Id.* at 325 ("The Missouri court's *disdain* for Nancy's statements in serious conversations not long before her accident, for the opinions of Nancy's family and friends as to her values, beliefs and certain choice, and even for the opinion of an outside objective factfinder appointed

"procedural safeguard" evidenced "disdain" for Nancy's views and actually skewed the result away from an accurate determination of the incompetent individual's preferences and beliefs.[91] Finally, he asserted that in circumstances where a State could not discern an incompetent patient's choice, the State must repose the choice whether to withdraw or continue treatment with the person whom the patient herself would most likely have chosen or leave the decision to the individual's family.[92]

Justice Brennan concluded his dissent with a stinging indictment of the role Missouri and the majority had played in the Cruzan tragedy:

> Missouri and this Court have displaced Nancy's own assessment of the processes associated with dying. They have discarded evidence of her will, ignored her values, and deprived her of the right to a decision as closely approximating her own choice as humanly possible. They have done so disingenuously in her name and openly in Missouri's own.[93]

Justice Stevens authored the most philosophical opinion in *Cruzan*, a dissent devoted to exploring the meaning of life and death, including whether the mere persistence of one's bodily functions without cognitive awareness is *life* in any real sense.[94] More than any of the other justices, he personalized the tragedy that had befallen Nancy Cruzan, emphasizing the interest that she and others have in how they will be remembered after their deaths, and that how Nancy died would affect how her life was remembered by those who loved her.[95] He asserted that there was no evidence that she had any personal interest in the perpetuation of her life under these circumstances, that Missouri had arrogated to itself the power to define life, and that the Court, by permitting this usurpation, had placed Nancy Cruzan's life and liberty into disquieting and unnecessary conflict.[96]

C. The Middle of the Road—Justice O'Connor's Concurrence

Justice O'Connor joined the majority opinion in *Cruzan*, but she also authored a separate opinion that is critically important in right-to-die jurisprudence.[97] In this opinion, she emphasized that the giving of

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by the State evinces a *disdain* for Nancy Cruzan's own right to choose.") (emphasis added).

91. *Id.* at 325.
92. *Id.* at 328.
93. *Id.* at 330.
94. *Id.* at 345–46 (Stevens, J., dissenting).
95. *Id.* at 344.
96. *Id.* at 350–51.
97. *Id.* at 287 (O'Connor, J., concurring).

artificial nutrition and hydration through a gastrostomy tube was treatment like any other medical treatment, the administration of which involved intrusion and restraint of the individual.[98] Thus, "the liberty interest guaranteed by the Due 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."[99] She also wrote separately to emphasize that the Court had not been called upon in *Cruzan* to decide whether a State would be constitutionally required to give effect to a decision by a surrogate whom the individual had appointed while still competent.[100] In positing that such a duty might well be required to protect the individual's liberty interest, Justice O'Connor foreshadowed the future importance of the durable power of attorney for health care as a legal mechanism to protect the right of incompetent individuals to have medical treatment withdrawn.[101] Finally, she emphasized that the Court's holding in this case was limited to stating that Missouri's requirement of clear and convincing evidence did not violate the Constitution and that crafting appropriate procedures for safeguarding incompetent individuals' interests in refusing medical treatment was entrusted to the "laboratory" of the States.[102]

D. Cruzan—A Postscript

What followed, from a legal standpoint, was precisely what Justice O'Connor had predicted in her concurring opinion.[103] The various states—not bound by the Constitution to be as protective of an individual's right to have life-sustaining treatment withdrawn as New Jersey under *Quinlan* nor as protective of human life in all its forms as Missouri under *Cruzan*—took a number of different paths in their right-to-die jurisprudence. The states' methods ranged from empowering guardians and other surrogates to make life-and-death decisions for incompetent individuals without judicial oversight to requiring a

98. *Id.* at 288–89.

99. *Id.* at 289.

100. *Id.*

101. *Id.* at 289–90.

102. *Id.* at 292 (quoting New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (relegating to the states the role of protecting an incompetent's liberty interest)).

103. *See supra* Part III.C (discussing Justice O'Connor's concurring opinion in *Cruzan*, in which she foreshadowed the future importance of the durable power of attorney for health care as a legal mechanism to protect the right of incompetent patients to have medical treatment withheld).

judicial proceeding and clear and convincing evidence before allowing medical treatment to be withdrawn.[104]

The public uproar[105] surrounding the Court's holding that the State of Missouri could essentially hold Nancy Cruzan captive because she had not appointed a surrogate decision-maker or adequately conveyed her wishes while still competent spurred many states to enact or update living will and durable power of attorney legislation.[106] For a time, it seemed possible that cases such as *Quinlan* and *Cruzan* might be a thing of the past. If individuals could plan ahead through the execution of advance directives and health care durable powers of attorney, or at least have serious conversations with loved ones about whether they would want life-sustaining treatment continued or withdrawn should they lapse into a coma or persistent vegetative state, we would have no need for the kind of gut-wrenching litigation that marked the years between *Quinlan* and *Cruzan*.[107] Alas, society's attention span is short, particularly when it comes to thinking about such difficult topics as death, dying, and the withdrawal of life-sustaining treatment, and so these issues receded from the national consciousness until the case of Theresa Marie Schiavo leapt onto the public scene at the beginning of the new millennium.

IV. THE CASE OF THERESA MARIE SCHIAVO

On February 25, 1990, Theresa Marie (Terri) Schiavo suffered a cardiac arrest at the age of twenty-seven as the result of a potassium imbalance of unknown cause.[108] Despite being treated by paramedics and rushed to the hospital, she never regained consciousness and was ultimately diagnosed as being in a persistent vegetative state, dependent upon a feeding tube for nutrition and hydration.[109] Michael Schiavo, Terri's husband, was appointed guardian and with the help of Terri's parents, the Schindlers, loved and cared for Terri for years.[110] In the early 1990s, Michael pursued a malpractice lawsuit against Terri's

104. *See, e.g.*, FLA. STAT. § 765.101 et seq. (2005) (permitting advance directives without court involvement).

105. Don J. DeBenedictis, *Cruzan's Death Doesn't Still Debate*, 77 A.B.A. J. 26 (1991).

106. Virginia Young, *Medical Bill Gets Preliminary OK*, ST. LOUIS POST-DISPATCH, Feb. 28, 1991, at 4A (reporting on a bill in Missouri that would allow for individuals to appoint someone to make health care decisions if one were to become incapacitated).

107. *See, e.g.*, *In re* Barry, 445 So. 2d 365 (Fla. Ct. App. 1984) (allowing parents to remove life support from son over state's objections); *In re* O'Brien, 517 N.Y.S.2d 346 (1986) (ordering continuance of life support).

108. *In re* Schiavo, 780 So. 2d 176, 177 (Fla. Dist. Ct. App. 2001).

109. *Id.*

110. *Id.* at 177–78.

physicians for failure to diagnose the potassium imbalance that resulted in a sizable monetary award for her care.[111]

When Michael sought a court order authorizing the withdrawal of her feeding tube almost ten years after Terri's cardiac arrest, the Schindlers questioned his motivation, accusing him of wanting his wife dead so that he could be free to remarry and inherit the remaining money from the malpractice award.[112] Likewise, Michael thought the Schindlers wanted to keep Terri alive because if he were forced to divorce her so that he could marry the woman with whom he had since had two children, the Schindlers would then inherit whatever money remained from the malpractice lawsuit.[113] Thus, each thought the other was divining Terri's wishes regarding withdrawal of life-sustaining treatment through the prism of his or her own monetary self-interest.[114]

Because of the conflict between family members, Michael Schiavo, as Terri's guardian, invoked the Florida trial court's jurisdiction in 1998 and asked the court to serve as Terri's surrogate decision maker with regard to withdrawal of the feeding tube.[115] The trial court concluded, despite conflicting testimony, that there was clear and convincing evidence that Terri would have chosen, if competent, to have the artificial nutrition and hydration withdrawn, a conclusion that was upheld on appeal.[116]

The guardianship court's order authorizing the discontinuation of life-prolonging procedures spawned a legal battle between Michael Schiavo and the Schindlers that spanned more than seven years. This protracted and public dispute produced numerous judicial opinions in both the Florida state courts and the federal court system,[117] a national debate over whether Terri had some cognitive functioning or was really in a persistent vegetative state,[118] and intervention by the Governor of

111. *Id.* at 178.

112. *Id*; *see also Larry King Live: Interview with Mary, Robert Schindler* (CNN television broadcast Sept. 27, 2004) (transcript available at http://edition.cnn.com/TRANSCRIPTS/0409/27/lkl.00.html) (identifying the Schindlers' arguments)

113. *Schiavo*, 780 So. 2d at 178; *see also In re* Schiavo, No. 90-2908GD-003, 2000 WL 34546715 (Fla. Cir. Ct. Feb. 11, 2000) *available at* http://www.miami.edu/ethics/schiavo/021100-Trial Ct Order 200200.pdf (describing the variety of ways in which conflicts of interest could have arose in the *Schiavo* case).

114. *Schiavo*, 780 So. 2d at 177.

115. *Id.*

116. *Id.* at 179–80.

117. All opinions, both federal and state, may be found at University of Miami Ethics Program, http://www.miami.edu/ethics/schiavo_project.htm (last visited Jan. 26, 2006).

118. *See* Ronald E. Cranford, *Facts, Lies and Videotapes: The Permanent Vegetative State and the Sad Case of Teri Schiavo*, 33 J.L. MED. & ETHICS 363, 370 (2005) (discussing the

Florida,[119] the Florida state legislature,[120] and the United States Congress.[121] By the end of March 2005, the Schindlers had exhausted all avenues of appeal and recourse, and Theresa Marie Schiavo died on March 31, 2005, more than ten days after the court order to discontinue life-sustaining procedures was given effect.[122]

V. WHICH WAY FROM HERE?

The unbelievably complex legal maneuverings in the *Schiavo* case are far beyond the purview of this essay and will be left to others with more patience for the mass hysteria and political manipulations that turned one woman's death into a horrifyingly public spectacle. For this article's purposes, the important question posed by Terri Schiavo's death is whether society has learned anything in the thirty years since *Quinlan* was decided, or in the fifteen years since *Cruzan* entrusted the task of crafting appropriate procedures for safeguarding incompetents' liberty interests to the "laboratory" of the States.[123]

Unfortunately, the progress over the last thirty years and the results of the experimentation are less than encouraging. Living wills (advance directives) have proven to be a dismal failure as a mechanism for protecting patient autonomy. The problems are legion: people do not execute them in significant numbers, those who do, do not know what medical treatment they will want or what choices they are making, and having a living will has not been shown to alter patient care.[124]

Durable powers of attorney for health care, now authorized in almost all states, are a much more effective, flexible mechanism for health care decision making for incompetent individuals,[125] but few people seem to know about them or their benefits over advance directives or living

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media's use of videotape in the Schiavo case).

119. Fla. Exec. Order No. 03-201, *available at* http://sun6.dms.state.fl.us/eog_new/eog/orders/2003/october/eo2003-201-10-22-03.html (last visited Jan. 26, 2006).

120. Terri's Law, 2003 Fla. Laws 418.

121. Act for the Relief of the Parents of Theresa Marie Schiavo, Pub. L. No. 109-3, 119 Stat. 15 (2005).

122. University of Miami Ethics Program, *supra* note 117.

123. Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 292 (1990) (O'Connor, J., concurring) (relegating to the states the role of protecting incompetents' liberty interests).

124. *See generally* Angela Fagerlin & Carl E. Schneider, *Enough: The Failure of the Living Will*, 34 HASTINGS CENTER REP. 30 (Mar.–Apr. 2004) (recommending the abandonment of living wills despite their growing popularity).

125. *See id.* at 39 (advocating powers of attorney over living wills because they are simpler, cheaper, can be supplemented by legislation, require little change from the norm, and serve the patient's interests).

wills.[126] This is part of a larger problem, in that we seem to have made little progress in the last several decades in educating the public about the nature of death, the dying process, and the types of decisions that each of us will need to be prepared to make for ourselves and for our loved ones as medical technology continues to advance our ability to keep individuals physically alive if not neurologically intact.

Even more vexing problems remain. As a society, we have yet to decide if surrogate decision makers, whether appointed by the court (guardian) or by the individual when competent (durable power of attorney), should be free to make decisions to withdraw life-sustaining treatment without court oversight. Further, should a surrogate make a decision without proof of clear and convincing evidence of the patient's wishes, or consistent with the surrogate's estimation of the patient's best interests (an objective standard) when the patient's wishes are unclear? At present, there is an enormous disconnect between the kind of evidence courts require to authorize withdrawal of treatment and what is happening every day at patients' bedsides when the family and health care providers are in agreement that life-sustaining procedures should be discontinued. Should we be concerned about parallel decision-making systems, one administered by the courts and the other administered in private at the hospital or nursing home bedside?

No public consensus has been reached concerning what is to be done with incompetent individuals who are not in a comatose or persistent vegetative state, but rather are in a neurological twilight zone termed "minimally conscious." Increasingly sophisticated neuroimaging technology will allow physicians to differentiate disorders of consciousness more precisely,[127] but what will be the legal implications of that knowledge? In the *Schiavo* case, the Schindlers sought to show that their daughter was actually minimally conscious rather than in a persistent vegetative state.[128] Had they been able to so prove, it is difficult to know whether or how that should have changed the outcome in the case.[129]

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126. Anecdotally, the author was interviewed several times on radio during the *Schiavo* maneuverings and was asked numerous times about how individuals could go about getting living wills/advance directives, but was never asked about durable powers of attorney for health care.

127. *See* Joseph J. Fins, *Rethinking Disorders of Consciousness: New Research and Its Implications*, 35 HASTINGS CENTER REP. 22, 22 (Mar.–Apr. 2005)(explaining how advanced technology allows scientists to differentiate disorders of consciousness more precisely).

128. *In re* Schiavo, 800 So. 2d 640, 643–44 (Fla. Dist. Ct. App. 2001).

129. For an example of a case raising this issue, see *In re* Wendland, 28 P.3d 151 (Cal. 2001). In *Wendland*, the court held that the conservator could not withhold artificial nutrition and hydration from a minimally conscious individual without clear and convincing evidence that Mr. Wendland would have so chosen or that to withhold treatment was in his best interests. *Id.* at

VI. CONCLUSION

Rereading *Quinlan* on its thirtieth anniversary has made me long to go back to the road that *Quinlan* started us down but from which our right-to-die jurisprudence seems to have strayed; a road where the right to have medical treatment withdrawn was clearly protected by the Federal Constitution, and where that right could not be lost or appropriated by the State merely because of an individual's incompetency; a road where family members rather than the courts or the medical profession were assumed to be the appropriate decision makers for their loved ones who have suffered irreversible neurological injury; a road where death was viewed as an inevitable part of life rather than something to be avoided at all costs, and where mere biological existence was acknowledged to be something less than a full and meaningful life. Following the road laid out by *Quinlan* would not have solved all of these problems,[130] but it would perhaps have made the laboratory of the states a bit less messy.

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130. For example, the *Quinlan* rationale would not have solved the problem in *Schiavo* where loving family members vehemently disagreed about what choice Terri Schiavo would have made regarding the feeding tube.


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