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The Long Dying of Nancy Cruzan

George J. Annas

With the Nancy Cruzan decision,[1] the post-Reagan Supreme Court continued recreating America's legal landscape by transferring traditional rights from its citizens to state legislatures and state officials. Attorneys Bopp and Marzen see *Cruzan* as a cause for celebration.[2] The more common view is that it is a hollow acceptance of the technological imperative that requires all Americans to engage in extensive damage control. Given the composition of the Court, constituted by President Ronald Reagan to overrule *Roe v. Wade*, Bopp and Marzen correctly note that the result in *Cruzan* was "practically inevitable." But its inevitability does not make its consequences any more desirable than the devastation caused by an inevitable tornado or tidal wave. This article summarizes the *Cruzan* case and suggests ways to contain its potentially destructive force.

Nancy Cruzan at the trial Court (I)[3]

On a clear, cool January night in 1983, Nancy Cruzan, then 25 years old, was driving alone when her car went off a Missouri country road and she was hurled into a ditch. She was found lying face down, not breathing, and apparently dead. Paramedics arrived, commenced CPR, and spontaneous respiration was restored after about ten minutes. She never regained consciousness.

Nancy Cruzan's parents were appointed her guardians in January 1984. There was no real dispute about her medical condition. She was in a persistent vegetative state; oblivious to her environment except for reflexive responses to sound and perhaps painful stimuli. Her cerebral cortical atrophy was irreversible, permanent, progressive and ongoing. She could not move her body, and would never recover her ability to swallow. With gastrostomy feeding she was expected to live for 30 years or more. Her medical bills were the responsibility of the state of Missouri.

Ms. Cruzan's parents eventually asked that the gastrostomy feedings be withdrawn, and in 1988 sought a court order when the doctors and hospital refused to carry out their request. The trial court's opinion is not a model of clarity. But Judge Charles E. Teel granted their petition, finding, among other things, that:

> Her expressed thoughts at age twenty-five in somewhat serious conversation with a housemate friend that if sick or injured she would not wish to continue her life unless she could live at least halfway normally suggests that given her present condition she would not wish to continue on with her nutrition and hydration.

Judge Teel authorized "the coguardians to exercise [Nancy's] constitutionally guaranteed liberty to request the withholding of nutrition and hydration" and instructed the coguardians to exercise their legal authority consistent with Nancy's "best interests." The state and the guardian *ad litem* appealed.

The Supreme Court of Missouri

Justice Edward D. Robertson capsulized the court's opinion at the end of the first paragraph: "A single issue is presented: May a guardian order that all nutrition and hydration be withheld from an incompetent ward who is in a persistent vegetative state, who is neither dead...nor terminally ill? Because we find that the trial court erroneously declared the law, we reverse."[4]

It is difficult to discern the basis for the court's decision. It almost immediately noted for example, that this is a "case of first impression" in Missouri, and cited more than 50 cases from 16 other states that had dealt

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with similar situations. It concluded that "nearly unanimously, those courts have found a way to allow persons wishing to die, or those who seek the death of a ward, to meet the end sought." But this erroneously states the question posed by these cases: almost none of the patients involved wished to die, and their guardians did not "seek" their deaths. Rather, the core issue was the right to refuse treatment that was unwanted or intolerably burdensome for the patient. Life was almost always preferred if it could be lived without intrusive and undesirable medical intervention. The Missouri Supreme Court thus decided *Cruzan*, and rendered the uniformity of prior opinions from other states irrelevant, by inventing a new and artificial question. This made the opinion almost impossible to write. Justice Robertson acted like someone asked to write the 50th chapter of a novel who begins by declaring that the first 49 chapters are irrelevant to his endeavor. Instead of doing a reasoned analysis of these cases, and explaining why the principles on which they stand are wrong, the court simply asserted that it had found all of them "wanting." Given the dearth of legal authority to support its characterization of prior cases, it bolstered its conclusion by citing only *Macbeth*: "[We] refuse to eat 'on the insane root which [sic] takes the reason prisoner.'"

This quotation can be more aptly used to demonstrate exactly the opposite of what the court wanted to say. Banquo speaks the words to Macbeth after the witches, who have accurately foretold their futures, vanish. The entire statement is: "Were such things here as we do speak about? Or have we eaten on the insane root that takes the reason prisoner?" The answer, of course, is that the witches were real; Banquo and Macbeth had not "eaten on the insane root." The Missouri court seems to say, however, that the 50 cases from other states "were not there." This leads to the conclusion that the four person majority in this 4 to 3 opinion has itself "eaten on the insane root."

Because the court set *Cruzan* up as a "right-to-die" case rather than a "right to refuse treatment" case, it frequently dealt with irrelevant and misleading issues. For example, it focused on death and terminal illness without an apparent appreciation of the implications of either term. It used the phrase "Nancy is not dead" almost like a mantra in the opinion. Although the court seems to view this as a major discovery, no one was arguing that the law could or should require guardians to provide artificial feeding to corpses.

The court also repeatedly stated that the *Quinlan* case was irrelevant because Karen Quinlan was "terminally ill" even though the New Jersey Supreme Court *never* used that phrase to describe her and this description is factually incorrect. Karen Quinlan was in almost every way identical to Nancy Cruzan: a young woman in a persistent vegetative state who could live indefinitely with mechanical assistance, but who would never regain consciousness. In fact, the only real difference between Ms. Quinlan and Ms. Cruzan is that while Karen had been maintained on both a mechanical ventilator and artificial feeding, Nancy required only the latter.[5] But as the New Jersey Supreme Court held in two subsequent opinions,[6] this is a legally meaningless distinction.

Although the court was skeptical about using the right to privacy as a basis for medical treatment decisions, and about treating artificial feeding as medical care, it ultimately did not reject either view, contrary to the assertions of Bopp and Marzen. Instead it focused almost exclusively on the state's legitimate interest in preserving life, at least when continued care "does not cause pain" and is not particularly "burdensome to the patient," the patient "is not dead" nor "terminally ill," and cannot render a decision because of present incompetence. The court never determines, however, if or how these conclusions apply to antibiotics, CPR, or other medical interventions Ms. Cruzan might need to survive.

A recurring theme was the state's interest in life, regardless of its quality. If there was a holding to the Missouri Supreme Court decision, it was that the state can *never* take quality of life into consideration in acquiescing in a decision to withdraw treatment from an incompetent individual, as long as the individual's life can be medically sustained without pain. This can be gleaned from statements like:

> Were quality of life at issue, persons with all manner of handicaps ***might find the state seeking to terminate their lives***. Instead, ***the state's interest is in life; that interest is unqualified***. (Emphasis added)

This is the central theme of the case, and seems to be the major reason why Bopp and Marzen applaud it so vigorously. Both they and the court are right to want to protect handicapped individuals from being denied proper medical care by the state. But the state of Missouri was not trying to deprive Nancy Cruzan of anything. As other courts have noted, we protect the rights and human dignity of handicapped people not by denying them options, but by trying to afford them the same rights we afford competent people. By treating all handicapped persons like treatable children who just need some simple medical intervention to live a normal life, they make the same mistake the New York Court of Appeals made in *Storar*.[7] In Ms. Cruzan's case, the state protects only her interest in avoiding pain, but ignores her interests in autonomy and personal dignity. Therefore the state degrades and dehumanizes her.

Why have almost all other courts permitted patients or their surrogates to refuse treatment under similar circumstances? The reason is that those courts focused on the liberty interests of handicapped citizens, whereas

the *Cruzan* court focused instead on laying the groundwork for a possible reversal of *Roe v. Wade*. The Missouri Supreme Court, for example, expended great effort criticizing the entire concept of the right of privacy. To argue for the state's unqualified interest in life, the court relied heavily not only on the state's new "Rights of the Terminally Ill Act," but also on its new abortion act. As amended in 1986, its statement of purpose reads:

> It is the intention of the...state of Missouri to grant the right to life to all humans, born and unborn, and to regulate abortion to the full extent permitted by the Constitution of the United States, decisions of the United States Supreme Court, and federal statutes.

The Act defines "unborn child" as "the offspring of human beings from the moment of conception until birth..." and viability as "when the life of the unborn child may be continued indefinitely outside the womb by natural or *artificial life-support systems*." (Emphasis added by the court).

Cruzan was thus transformed into an abortion opinion. The court seemed to say that it would be difficult to explain why the state could permit parents to withdraw artificial life support from their adult daughter, but not from an extracorporeal embryo. Instead of appreciating the distinctions between these cases, the court concluded simply that if life can be supported "indefinitely...by natural or artificial life-support systems" then it *must* be because of Missouri's unlimited interest in "the right to life of all humans."[8] Thus, the court, allegedly protecting Nancy Cruzan, transformed her not just to the status of a child, but to the status of an embryo.

The U.S. Supreme Court opinion[9]

Chief Justice William Rehnquist wrote the opinion of the United States Supreme Court, which was split five to four. Adopting the Missouri Supreme Court's mistake, he mischaracterized the case as one about the "right to die" and the right to cause death: "This is the first case in which we have been squarely presented with the issue of whether the United States Constitution grants what is in common parlance referred to as a 'right to die.'" Without deciding the issue, he said, "for the purposes of this case" the Court would "assume that the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition." Such a right was seen as implicit in previous court decisions based on the liberty interest delineated in the 14th amendment, not on the right of privacy. It should be noted, however, that both rights derive from the same source, and their content in this context is unlikely to be different. The core of the case was determining whether the state could restrict the exercise of the right to refuse treatment by surrogate decision-makers acting on behalf of previously competent patients. In the Court's words, the question was "whether the U.S. Constitution forbids a state from requiring clear and convincing evidence of a person's expressed decision while competent to have hydration and nutrition withdrawn in such a way as to cause death." The Court concluded that the Constitution did not prohibit this procedural requirement. Four basic reasons were given.

The first reason was that this heightened evidentiary standard promotes the state's legitimate interest "in the protection and preservation of human life." The second was that "the choice between life and death is a deeply personal decision...." The third was that abuses can occur in the case of incompetent patients who do not have "loved ones available to serve as surrogate decision-makers." And the fourth reason was that the state may properly "simply assert an unqualified interest in the preservation of human life...."

There is no mathematical formula for the "clear and convincing" standard of proof, which is somewhere between the usual civil standard of "preponderance of the evidence" and the criminal standard of "beyond a reasonable doubt." Courts have described it in this context as "proof sufficient to persuade the trier of fact that the patient held a firm and settled commitment to the termination of life support under circumstances like those presented"[10] and evidence that is "so clear, weighty and convincing as to enable [the factfinder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue."[11] The use of this strict standard of proof was justified primarily by the same argument the Missouri Supreme Court used, that it is better to make an error on the side of continuing treatment:

> 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 susceptible of correction.

In conclusion, the Court held that Missouri could require clear and convincing evidence of Cruzan's wishes before permitting surrogates to authorize the termination of treatment. Even though Nancy Cruzan's mother and

father are "loving and caring parents," Missouri may "choose to defer" only to Nancy Cruzan's wishes, and ignore both the parents' own wishes and their views about what their daughter would want.

Justice Brennan's dissent

Justice William Brennan wrote a dissent for three of the four dissenting members of the Court. Following traditional constitutional jurisprudence, Justice Brennan argued that if a fundamental right of a citizen is at stake, state action restricting it "cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests." He chided the Court for not being more forceful in defining the nature of the liberty interest competent adults have in refusing treatment. Instead of simply assuming the liberty interest to be free of unwanted medical treatment, he clearly characterized it as a "fundamental right," one that "is deeply rooted in this Nation's traditions." To restrict such a right, the state must allege more than a general interest in life, because "the State has no legitimate general interest in someone's life, completely abstracted from the interest of the person living that life, that could outweigh the person's choice to avoid medical treatment."

Second, even if the preservation of life is a legitimate state interest in this context, Justice Brennan asserted that the Missouri restriction is irrational, since it would probably lead to more deaths than would current medical practice. This is because medical measures to sustain life, once begun, cannot now be terminated without clear and convincing evidence of the patient's wishes as long as continued treatment prolongs life. Trials of therapy are thus effectively discouraged by the Missouri rule, a result that is irrational.

Justice Brennan argued that the only legitimate interest the state can assert in Nancy Cruzan's case was an interest in accurately determining her wishes. In his view, the Missouri rules were designed not to determine her wishes, but to frustrate them. By permitting only her own statements as probative of her wishes and by using a "clear and convincing" standard to permit them to be determinative, the state effectively deprived her of all other evidence, including the best judgment of those who knew and loved her, as to what decision she would make (substituted judgment) or what decision would be in her best interests. Instead of furthering the citizen's right to decide, the Missouri rules impose "an obstacle to the exercise of a fundamental right."

Justice Brennan also found the notion of erring on the side of life by preserving the *status quo* untenable. As he noted, the *status quo* proposition itself begs the question: had artificial respiration and feeding not been undertaken in the first place, the *status quo* would have been death from the accident. Moreover, the majority improperly implied that continued existence and treatment in a persistent vegetative state is either beneficial or neutral. Whereas in fact:

> an erroneous decision not to terminate life-support robs a patient of the very qualities protected by the right to avoid unwanted medical treatment...[a] degraded existence is perpetuated; his family's suffering is protracted; the memory he leaves behind becomes more and more distorted.

Finally, Justice Brennan argued that the Missouri rules are simply out of touch with reality: people do not write elaborate documents about all the possible ways they might die and the various interventions doctors might have available to prolong their lives. Friends and family members are most likely to know what the patient would want. By ignoring such evidence of a person's wishes, the Missouri procedure "transforms [incompetent] human beings into passive subjects of medical technology."

Justice Brennan got it right

I think Justice Brennan got it right. But it hasn't escaped my notice that he was in the minority, and that the opinion required Nancy Cruzan to continue to be "treated." It can be argued, as Bopp and Marzen do, that the Court found no fundamental constitutional right to refuse treatment, and did not decide that the artificial provision of fluids and nutrition was the same as other types of medical interventions. This argument can be made, but it is no more persuasive than the argument that Justice Brennan was writing the majority opinion. This is because on the issue of a fundamental constitutional right to refuse life-sustaining treatment, five justices (the four dissenters and Justice O'Connor) explicitly acknowledged this right. There is no holding here, but it is wrong to continue to assert that the Court found that there is no fundamental constitutional right to refuse any and all medical treatment.

The argument that the Court did not decide that fluids and nutrition, artificially delivered, is medical treatment like all other medical treatment is also technically correct (its holding did not require this). But six of the nine Justices explicitly found that there was no distinction to be made, and none of the other three found a constitutionally relevant distinction. Moreover, as previously noted, even the Missouri Supreme Court ultimately did not hold that there was a constitutionally relevant distinction. Thus it is highly unlikely that the Justices will reopen the fluids and nutrition issue in the

future. There will undoubtedly be more litigation, but the result now seems as inevitable as *Cruzan* seemed to Bopp and Marzen: attempts by states to restrict the ability of competent adults to reject artificially-delivered fluids and nutrition, while other similar forms of medical treatment may be refused, will likely be struck down as a violation of equal protection guaranteed by the U.S. Constitution.[12]

The Trial Court (II)

Commenting on the Missouri Supreme Court decision, Thomas Marzen wrote, "So Nancy Cruzan will live—because Missouri Supreme Court Judge Edward Robertson refused to accept reflexively a line of previous decisions authorizing the lethal withdrawal of foods and fluids from people with severe mental disabilities."[13] That prediction, thankfully, turned out to be wrong. Nancy Cruzan died on December 26, 1990, approximately two weeks after Judge Charles E. Teel ruled again (as he had in 1988) that her parents could order the feeding tubes removed from their daughter's body. There were three major differences in the 1990 hearing. First, three of Nancy's friends testified that Nancy had told them she would never want to live "like a vegetable" on medical machines. Second, her attending physician, James C. Davis, testified that continued treatment was no longer in Nancy's best interests. And third, the state of Missouri withdrew from the case, leaving no one with legal standing to oppose the family's petition or appeal the judge's finding that "clear and convincing evidence" demonstrated that Nancy would not have wanted tube feeding continued.

The problem with the Bopp-Marzen position

The problem with the Bopp-Marzen position is that it is exclusively a slippery-slope argument that ignores the current rights of real people in favor of the speculative harms that may be visited on future people. But even with less than a year of history after *Cruzan*, we can observe its destructive results rather than speculate about them. We can observe first that the state of Missouri never had Nancy Cruzan's interests at heart, only its own anti-abortion agenda. When it became clear to Missouri Attorney General William Webster, for example, that most people could distinguish an adult in a permanent coma from an embryo or fetus, he dropped his opposition to the Cruzan family. He announced on national television the day of the oral arguments before the U.S. Supreme Court that he agreed that Nancy's parents should be able to make the decision about her medical treatment themselves. So when the parents went back to court, the state of Missouri had abandoned its hypocritical "unqualified" interest in Nancy's life.

The same state that had in effect used Nancy Cruzan as a human shield to protect its absolutist and vitalist "right to life" ideology (its "unqualified interest in human life"), has since gone one step further. As this article is being written, the state has in effect taken another patient, Christine Busalacchi, hostage and is refusing to permit her father to have her transferred to another physician (in another state) for medical evaluation. Worse, the state has released a videotape of its hostage to the media,[14] a ploy substantially identical to the one used by Iraq with the first prisoner of war pilots it captured. This disgusting invasion of privacy by the state of Missouri has been embraced by the "right to life" movement, which republished Ms. Busalacchi's photo on the cover of their February 11, 1991 issue of the "National Right to Life News."

Both the state of Missouri and the U.S. Supreme Court's antifamily position virtually mirror the Reagan Administration's position in setting forth "Baby Doe" rules and squads: families and doctors are out to kill the handicapped, and only strong state intervention will prevent them from carrying out their agenda. As Attorney Marzen has put it:

> The purpose behind 'right to die' litigation and legislation is plain, certain, and obvious. It is to assure that those persons deemed to *lack* some requisite 'quality' of life (especially consciousness or 'cognitive sapience,' but even sometimes the capacity to move, to feel, to see, or to hear) or people who *possess* some 'quality' (pain, anguish, 'mental suffering,' or a diminished life span) should forthwith depart from the company of the living.[15]

This is a gross distortion of the "right to die" movement, just as it was a gross distortion of the Baby Doe problem. It *was* horrible for physicians not to treat Baby Doe (a child with Down syndrome), but the Reagan administration's reaction was counterproductive overkill. Instead of concentrating on real problems of prematurity, maternal and infant health care, and nutrition, the administration acted in a police-like fashion, describing physicians as child abusers, and parents as accessories before the fact. This politically expedient characterization was a lie: what was really going on in America was overtreatment, not undertreatment. Moreover, this lie permitted policy-makers to avoid real

problems of access to medical care and concentrate publicity around a fictitious problem that would cost no money to address. Thus after more than one hundred formal Baby Doe reports and investigations, the federal government was unable to document even one violation of its Baby Doe rules. The Supreme Court, the one Bopp and Marzen now think so highly of, ultimately voided the Baby Doe rules themselves. The Child Abuse Amendments of 1984 leave the law exactly where it was before the Baby Doe fiasco began: child abuse and neglect is an issue for the states, and the failure to provide children with "reasonable, appropriate, beneficial, or indicated" medical care can be child neglect.[16]

The Missouri scheme, which *Cruzan* holds is constitutional, goes even further than the Baby Doe regulations. It is an uncompromising Baby Doe-type rule that forbids the discontinuance of medical care which prolongs life from any child or never-competent individual in the state. Moreover, if the state has an interest in sustaining Nancy Cruzan's life regardless of its quality, antibiotics, CPR, kidney dialysis, and even organ transplantation *could* have been ordered over her parents' objections, had any of these interventions been needed to sustain her life. These bizarre results illustrate how radical a departure this anti-family opinion is from the traditional American practice that defers such decisions to the family, and indicates that the United States Supreme Court believes that no matter what the state of Missouri does to her, Nancy Cruzan herself has no right to respect or dignity and cannot be harmed by any medical intervention that could prolong her life.

As the identical five U.S. Supreme Court Justices decided in *Webster*[17] concerning abortion, so they have decided here: the interests of the state outweigh those of its individual citizens. The sweeping powers the Court cedes to states to control the private lives of their citizens can be illustrated by contrasting the state rationales put forward, and approved by the Court, for keeping Nancy Cruzan alive on the one hand, and for requiring pregnant teenagers to notify their parents about an abortion decision on the other. In both cases the Court ruled that the state could exercise power over individuals based on the state's view of the importance of the family. In *Cruzan*, the Court determined that Missouri could "legitimately and rationally" assume that all families of incompetent patients are a lethal danger to them. In *Ohio v. Akron*,[18] upholding the constitutionality of a statute that required notification of parents prior to a minor obtaining an abortion, *the same Court on the same day* decided that Ohio could "legitimately and rationally" assume that all families are loving and supportive in order to uphold the "dignity of the family." The only value the Court seems interested in fostering is raw state power designed to control the lives of individual citizens as each state sees fit.

Where do we go from here?

Although Bopp and Marzen relish the *Cruzan* opinion, it seems almost certain that a majority of Americans will be appalled by it when they understand it.[19] In many states, state supreme courts will continue to find a constitutional right to refuse medical treatment that is not automatically lost when an individual becomes incompetent. In other states, legislation will be introduced to broaden the rights of individuals. And although *Cruzan* did not change the law as it existed prior to the opinion in any state, its grant of authority to states to restrict the role of surrogate decision-makers will encourage some attempts to restrict such decision-making. The problems with living wills are well illustrated by the *Cruzan* case, even though Nancy Cruzan did not have one. Even had she signed a living will, however, it seems likely that neither the Supreme Court of Missouri nor the U.S. Supreme Court would have honored it unless it had specified that she did not want tube feeding in the event she was in a permanent coma. This type of predictive specificity is both unrealistic and unlikely.[20] The inherent difficulty of prediction led Justice O'Connor to discuss an issue the Court specifically declined to address: designating a surrogate decision-maker. Since she agreed that few people will provide explicit instructions, she suggested that everyone appoint a proxy decision-maker, noting that *Cruzan* "does not preclude a future determination that the Constitution requires the States to implement the decisions of a duly appointed surrogate." Every state now has durable power of attorney laws, and all of these can be used to name a proxy to make health care decisions.[21] If we take autonomy and self-determination seriously, we must take Justice O'Connor seriously as well: such delegations should be constitutionally-protected and the state should not be able to substitute its "official" decision-maker for the one chosen by the patient. Many states, will pass specific health care proxy laws in response to *Cruzan*, as New York and Massachusetts have already done.[22] Others, like Florida,[23] will act through their courts, guaranteeing the right of individuals to use the health care proxy method to help assure that they will not be victims of the state's technology-imposed vitalism. The growth of the durable power of attorney for health care, and the shrinking use of living wills, is an "inevitable" outgrowth of the *Cruzan* opinion.[24]

Another inevitable and constructive outgrowth is the passage of statutes designed to authorize specific family members to make decisions for their loved ones. Such decisions will not always be precisely those that the patient would have made, but the overwhelming majority of Americans will agree that it is more likely that family members will make decisions consistent with their wishes and best interests than that state officials will make

decisions in the interests of the state that are congruent with their personal interests. Not only should such statutes be passed (to prevent a "*Cruzan* disaster" from being legislatively imposed), but the standard for challenging family decisions under such statutes should be the reverse of the *Cruzan* "clear and convincing evidence" standard, i.e. the state must demonstrate by clear and convincing evidence that the decision of the authorized family member is not consistent with the wishes of the individual, or (if these are unknown) is not in the individual's best interests, in order to interfere with it.

The role of physicians

The U.S. Supreme Court did not consider the professional or personal role of Nancy Cruzan's physicians at all, simply referring to them as "hospital employees" who refused to honor her parents' request without a court order. Because the Court ignored physicians, it never discussed the doctor-patient relationship or whether it matters if the physician had a long-standing relationship with the patient and understood what treatment the patient wanted. Even though the Court ignored physicians, lawyers will not, and physicians across the country have been deluged with conflicting opinions regarding what they should do and what they must do in the wake of *Cruzan*. The reality is that *Cruzan* did not change the law in any state or in any way alter what physicians could or could not do before the opinion.

It remains good medical practice for physicians to discuss future care with patients and to document their wishes. It is also good practice to encourage patients to execute a durable power of attorney for health care, and encourage them to discuss their wishes with their designated agent and their doctor. These discussions and documents will help, but they will obviously not solve all the real treatment problems for all patients, and, of course, will have no application to children and the never competent. Medical care will continue to require the compassion, and often the courage, to act in a manner consistent with the patient's wishes, and if these are not known, consistent with the best interests of the patient and good medical practice. Outside Missouri and New York (thankfully) there is no legal obligation to provide incompetent patients with medical care that is either unwanted or not medically indicated.

Conclusion

Michel Foucault has argued that the real political struggles of the 20th century have not been over legal rights but over the control of the way individuals live their lives.[25] The modern state, in his view, uses its technological power to homogenize and normalize life, not just through law, but through education, military training, medicine, public health and housing, and other regulatory mechanisms. Constitutions, far from protecting against such normalization, "were forms that made an essentially normalizing power acceptable."[26] In Foucault's words, since the last century it has been

> ...life more than the law that became the issue of political struggles, even if the latter [was] formulated through affirmations concerning rights. The 'right' to life, to one's body, to health, to happiness, to the satisfaction of needs, and beyond all the oppressions or "alienations," the "right" to rediscover what one is and all that one can be, this "right"—which the classical juridical system was utterly incapable of comprehending—was the political response to all these new procedures of power which did not derive, either, from the traditional right of sovereignty.[27]

Foucault wrote of the disciplining of the body on the individual level, and the regulation of populations on the societal level (the "bio politics of the population") shortly before *Quinlan*. Although he did not have the Quinlan case in mind, he would likely have predicted its outcome. I think he would have been surprised, however, by *Cruzan*. Surprised to see the state so publicly and aggressively demand to make all decisions about the medical treatment of an incompetent person with a family. He would have been equally surprised to see the state openly seeking to control individual decisions about continuing a pregnancy (as the U.S. has in the Reagan and Bush presidencies). But he would agree with the *Webster* and *Cruzan* Court that the Constitution offers citizens no real protection from state control.

Our challenge is to effectively resist the state's inherent normalization program by striving to give meaningful content to our stated goals for forming our country: "life, liberty and the pursuit of happiness." We cannot, of course, have liberty or happiness without life. But life without liberty or happiness, in the sense of self-realization, translates into mere existence: into life reduced to the biology of cell division. The case of Nancy Cruzan provides us with a public warning as to how much control we have already ceded the state over our lives, and how far the state has already gone in redefining the "life" it seeks to "normalize" and control. It is past time to reclaim at least some of that control for ourselves and our families.[28]

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

5. In re Quinlan, 70 N.J. 10, 355 A.2d 647, cert. den. sub. nom. Garger v. New Jersey, 429 U.S. 922. (1976).

6. In re Jobes, 108 N.J. 394, 529 A.2d 434 (1987); In re Conroy, 98 N.J. 321, 486 A.2d. 1209 (1985).

7. In re Storar, 52 N.Y. 2d 363, 420 N.E. 2d 64, cert. den. 454 U.S. 858 (1981).

8. Chief Justice Robertson was very serious in his view that there is an agenda to destroy the nonproductive in society and that the court must stop it. As he put it later:

> Our nursing homes and hospitals are filled with persons whose lives are burdensome. They produce nothing. They consume resources without a visible benefit. They burden our patience by requiring a vigil which is destructive of our affection. (I did not say love, for that is different.) They remind us of our helplessness. They are inconvenient.
>
> Our society measures worth by production and readily disposes of those things that have outlived their usefulness. Fine china has turned to styrofoam, sterling to plastic. But people are not things, whether they are cognitive and sapient or helpless and dependent. And through the dark terror these choices present, the immense, clear fact of life shines brightly.

Robertson, "Is 'Substituted Judgment' a Valid Legal Concept?" 5 *Issues in Law & Med.* 197, 213 (1989). Judge Robertson goes on to state that the only solution to this problem is for "courts and the law [to] err on the side of the preservation of life when there is no clearly convincing evidence that the patient perceives termination of care as in his best interests." (*Id.* at 214) These emotional pleas, however, ring hollow in the face of Nancy Cruzan and her permanent coma, where it is almost obscene to say that "the clear fact of life shines brightly." As Robin West has observed in the context of *Cruzan*,

> To insist blindly on the unfathomability of the differing subjective preferences of each of us in the context of a vegetative state is to be willfully, irresponsibly blind to the terrible *sameness* of the subjectivity of that condition. The endless variability of subjective, individual life has its limit in natural death. It is the antithesis of the experience of individuality, idiosyncracy, and peculiarity that the liberal understands and celebrates as the essence that underlies individual existence...there is no 'self' to be determined or to do the determining.

West, "Taking Freedom Seriously," 104 *Harv. L. Rev.* 43, 100 (1989).

9. *Supra* note 1. Portions of this section are adapted from Annas, "Nancy Cruzan and the Right to Die," 323 *New Engl J Med* 670-673 (1990).

10. *Storar*, *supra* note 7.

11. In re Westchester Co. Medical Center on behalf of O'Connor, 581 N.E. 2d 607 (NY 1988).

12. For a more complete discussion of the fluids and nutrition issue *see* Cantor, "The Permanently Unconscious Patient, Non-Feeding and Euthanasia," 15 *Am. J. Law & Med.* 381-438 (1989).

13. Marzen, "'Insane Roots and Serpent's Teeth': Death and the Law in 1988," in *The Triumph of Hope: A Pro-Life Review of 1988 and a Look to the Future* (D Andrusko, Ed.), National Right to Life Committee, Washington, D.C., 1989, pp. 159-170.

14. A photo of Ms. Busalacchi from the videotape ran in the *New York Times*. "State Makes Public Videotape in Right-to-Die Case," *N.Y. Times*, Feb. 5, 1991 at B6. See, e.g., Berthiaume v. Pratt, 365 A.2d 762 (Me. 1976).

15. *Supra* note 13 at 166. (emphasis in original)

16. The history of the Baby Doe rules is chronicled in S. Elias and G.J. Annas, *Reproductive Genetics and the Law*, Yearbook Med. Pub., Chicago, Ill, 1987 at 168-194.

17. Webster v. Reproductive Health Services, 109 S. Ct. 3040 (1989), and see Annas, Glantz & Mariner, "The Right of Privacy Protects the Doctor-Patient Relationship," 263 *JAMA* 858 (1990).

18. Ohio v. Akron Center for Reproductive Health, 110 S.Ct. 2972 (1990).

19. E.g., In one survey prior to the U.S. Supreme Court's decision, 88 percent of the public thought the family should decide on treatment, 8 percent thought the doctors should decide, one percent the courts, and no one selected the state. Coyle, "How Americans View the High Court," *National L. J.*, Feb. 26, 1990, 1, 36.

20. See, e.g., Annas, "Precatory Prediction and Mindless Mimicry," 18 *Hastings Center Report*, Dec. 1988 at 31-33.

21. C. P. Sabatino, *Health Care Powers of Attorney*. American Bar Association, Chicago, Ill., 1990.

22. Mass. G. L. 201D [and NY cite].

23. In re Guardianship of Browning, ___ So.2d ___ (Fla. 1990).

24. Rosenthal, "Filling the Gap Where a Living Will Won't Do," *N.Y. Times*, Jan. 17, 1991 at B9.

25. Michel Foucault, *The History of Sexuality: An Introduction*, Vol. 1, Vintage Books, Random House, 1990 at 135-159 ("Right of Death and Power Over Life").

26. *Id.* at 144.

27. *Id.* at 145. The "traditional" right of sovereign power was to decide life and death, usually by requiring subjects to wage war, or executing them for disobedience to law.

28. An insistence on individual rights need not be inconsistent with a simultaneous commitment to work for the common good. *See*, e.g., V. Havel, *Living in Truth* (J. Vladislav ed. 1989) and discussion in Annas, "Mapping the Human Genome and the Meaning of Monster Mythology," 39 *Emory L. J.* 629, 658-664 (1990); and West, *supra* note 8.