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***Cruzan* and the “Right to Die”**

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FOREWORD: CRUZAN AND THE “RIGHT TO DIE”

Thomas Wm. Mayo¹

AS a second-year law student in 1976 (the year the New Jersey Supreme Court decided the *Quinlan*² case), it seemed to me that the phrase “right to die”³ had an ironic, even a bit baffling, ring to it. In what sense, exactly, does one have a *right* to do something that is *absolutely unavoidable*? And yet, the phrase is of nearly ancient lineage, having appeared in the title of a medical journal article as early as 1900,⁴ in the titles of at least 352 law review articles dating back to at least 1964,⁵ and much more recently in the title of the indispensable treatise on the subject by three contributors to this symposium.⁶

From their first appearance, the words “right to die” have meant something far more subtle and challenging: the “right to be allowed to die,”⁷ the “right to die with dignity,”⁸ or more expansively, the right to decide the terms (time, place, and manner) of one’s death, including the right to refuse unwanted life-sustaining medical treatment and, more controver-

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

3. The phrase appears multiple times in the *Quinlan* opinion, *id. passim*, and featured prominently in contemporaneous news accounts of the case.

4. See *The Right to Die*, HOSPITAL, Apr. 28, 1900, at 62. This essay is a largely approving response to the Honorable Simeon E. Baldwin’s presidential address at the September 4, 1899 annual meeting of the American Social Science Association, in which Baldwin championed “a natural right to a natural death” once a patient has become overmastered by disease. The full text of Baldwin’s address, “A Natural Right to a Natural Death,” was published in the *St. Paul Medical Journal* along with a critical editorial rejecting Baldwin’s main point. See Simeon E. Baldwin, *The Natural Right to a Natural Death*, 1 ST. PAUL MED. J. 875, 875–89 (1899) (full text of Baldwin’s address); *id.* at 915 (editorial criticism of the address). An unsigned essay in the journal *Public Opinion* stated that “reports of Judge Baldwin’s speech have evoked wide comment, mostly of a condemnatory character.” *The Right to Die*, 27 PUBLIC OPINION 364, 364 (1899) (citing an interview in the *New York Tribune* and an editorial comment in the *New York Times*). Even earlier, the phrase “right to die” appeared in the text (though not the title) of an English legal newspaper in 1873. See 54 LAW TIMES 317, 318 (1873) (“A somewhat dangerous controversy is now going on concerning what may be termed property in life. Has any man a right to die?”).

5. See John D. O’Connell, Note, *The Right to Die: A Comment on the Application of the President and Directors of Georgetown College*, 9 UTAH L. REV. 161 (1964). The phrase also appeared in an 1873 English legal periodical. See LAW TIMES, *supra* note 3, at 318.

6. See ALAN MEISEL, KATHY L. CERMINARA & THADDEUS M. POPE, *THE RIGHT TO DIE: THE LAW OF END-OF-LIFE DECISIONMAKING* (3d ed. 2020).

7. Albert R. Jonsen, *Dying Right in California: The Natural Death Act*, 13 CLINICAL TOXICOLOGY 513, 516 (1978).

8. *Id.* at 513.

sially, the right to receive medical aid in dying.⁹ To say that the subject has touched a collective nerve would be an understatement. As a culture, we may be all about the denial of death,¹⁰ but it is around us everywhere and all the time. Death has gone from being the twentieth century's "principal forbidden subject"¹¹ to being the subject of a National Book Award winner for nonfiction¹² and a Pulitzer Prize-winning play.¹³ Considering the factors that often inform decisions about the time, place, and manner of death—technology, religious authority, personal values and beliefs, psychological and emotional burdens, family histories, the not-so-tender mercies of our health care "system," and evolving professional norms, to list just a few—it is little wonder that the means of death would eventually become the stuff of litigation and legislative agendas.

In 1976, the Supreme Court of New Jersey broke new ground with its *Quinlan* decision, making it the first state supreme court to recognize that a permanently unconscious patient's constitutionally protected right of privacy includes the right to avoid unwanted medical interventions, and that a legal guardian has the authority to assert the patient's right on her behalf.¹⁴ The court grounded its privacy holding in both the New Jersey and United States constitutions.¹⁵ Scores of states followed suit (under the federal Constitution, the state's constitution, the common law, or some combination thereof), eventually holding that this particular privacy right extends to patients who had never been competent¹⁶ (including infants and other minors) and to competent patients making medical treatment decisions for themselves.¹⁷

Also, in 1976, California enacted the Natural Death Act, the first "living will" statute in the United States.¹⁸ The law aimed to provide terminally ill competent patients a mechanism for avoiding unwanted life-sustaining treatment if they later lack decision-making capacity and death is imminent. In retrospect, it was a startlingly narrow law that has been considerably broadened since 1976.¹⁹ Advance-directive legislation—typically authorizing living wills and medical powers of attorney, and some-

9. See *Washington v. Glucksberg*, 521 U.S. 702 (1997).

10. See ERNEST BECKER, *THE DENIAL OF DEATH* (1973).

11. See PHILIPPE ARIÈS, *WESTERN ATTITUDES TOWARD DEATH* 92 (1974).

12. SHERWIN B. NULAND, *HOW WE DIE: REFLECTIONS ON LIFE'S FINAL CHAPTER* (1994).

13. MARGARET EDSON, *WIT* (1999) (depicting the last months of life of a scholar of John Donne after receiving a diagnosis of stage IV ovarian cancer); see also BRIAN CLARK, *WHOSE LIFE IS IT ANYWAY?* (1978).

14. *In re Quinlan*, 355 A.2d 647, 662–63 (N.J. 1976).

15. *Id.* at 663.

16. See, e.g., *Superintendent of Belchertown State Sch. v. Saikewicz*, 370 N.E.2d 417 (Mass. 1977).

17. See *Bartling v. Superior Ct.*, 209 Cal. Rptr. 220 (Cal. Ct. App. 1984).

18. See CAL. PROB. CODE §§ 4600–4805 (West, Westlaw through urgency legislation through Ch. 3 of 2020 Reg. Sess.) (Health Care Decisions Law, formerly the Natural Death Act); ROBERT M. VEATCH, *DEATH, DYING, AND THE BIOLOGICAL REVOLUTION: OUR LAST QUEST FOR RESPONSIBILITY* 156–65 (1989) (history of advance-directive legislation in the United States).

19. See VEATCH, *supra* note 18, at 158–61.

times including non-hospital do-not-resuscitate orders—have now been enacted in all fifty states, the District of Columbia, Guam, and Puerto Rico.²⁰

Most of this state-law litigation and legislative activity was carried on without any word from the Supreme Court of the United States on the federal constitutional status of the right to die. That changed in 1990 with the Court’s decision in *Cruzan v. Director, Missouri Department of Health*.²¹ The 5–4 decision rejected a due-process/privacy-based challenge to the Missouri Supreme Court’s holding that the parents of Nancy Beth Cruzan—an adult patient in a permanent vegetative state—could have their daughter’s feeding tube discontinued only if they could show through clear and convincing evidence that she would have rejected artificial nutrition and hydration under her present medical circumstances.²²

Two logically prior issues received less definitive treatment from the two supreme courts. Before the Missouri Supreme Court ruled against Nancy Cruzan’s parents, it “[a]ssum[ed], *arguendo*, that the right of privacy may be exercised by a third party in the absence of strict formalities assigning that right.”²³ The court went on to modify that assumption in the context of end-of-life decision-making by requiring the formalities of either the state’s living will statute or the standard of “clear and convincing, inherently reliable evidence” described in its opinion.²⁴

The United States Supreme Court also needed to address some preliminary issues before it could get to the merits of the Cruzans’ challenge to the Missouri decision. First, does the Fourteenth Amendment protect the liberty interest of a competent person to refuse unwanted medical treatment? The Court’s somewhat timid answer was that such a principle “may be inferred from [its] prior decisions.”²⁵ Second, does that “inferred principle” extend to refusals of life-sustaining treatment such as artificial nutrition and hydration? Here, the Court’s response was less obscure. “For purposes of this case,” the Court “assume[d] that the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition.”²⁶

Did the *Cruzan* Court actually hold that the Due Process Clause extends to decisions to withhold or withdraw life-sustaining treatment? Justice Scalia, who joined every word of the majority opinion, certainly thought not and said so in his concurring opinion.²⁷ On the other hand,

20. See MEISEL, CERMINARA & POPE, *supra* note 6, at 7-188 to -190 (table).

21. 497 U.S. 261 (1990).

22. See *Cruzan v. Harmon*, 760 S.W.2d 408, 425 (Mo. 1988), *aff’d*, 497 U.S. 261, 265 (1990) (describing the evidentiary burden required of guardians seeking withdrawal of life-sustaining treatment on behalf of a permanently incapacitated patient).

23. *Cruzan*, 760 S.W.2d at 425.

24. *Id.*

25. *Cruzan*, 497 U.S. at 278.

26. *Id.* at 279.

27. See *id.* at 293 (Scalia, J., concurring) (“[T]he Constitution says nothing about the matter . . .”).

Justice Stevens later wrote that that is exactly what the Court held.²⁸ Although the majority's position on this assumed right might be "mere dicta" or a simple "acknowledgement," the fact remains that five Justices—the four dissenters and Justice O'Connor—agreed that the Fourteenth Amendment extends to decisions to withhold or withdraw life-sustaining treatment.

Thirty years later, the significance of the *Cruzan* decision is now clear. As the first, and so far only, decision squarely on the "right to die," it represented a watershed event for the Court, and for the rest of the country as well. The impact of *Cruzan* is impressively illustrated by the nine articles that comprise this symposium. Whether or not the Court's decision settled the question of federal constitutional protection for the right to die, it provided the framework for constitutional analysis in later cases in state and federal courts. It also expanded the range of questions that remain to be settled as medical providers, patients (if competent), surrogate decision makers (if the patient is not competent), and on occasion, courts and legislatures work out the details of this right. Five of these articles focus principally upon issues around surrogate decision making; for example, the moral agency of surrogates for the never-capacitated patient, video advance-directives and surrogate decision making, state regulation of surrogates, surrogate decision making and disorders of consciousness, and dementia and the best-interests standard for decision making. Other articles consider the past and future of "medical aid in dying," the evolving conceptions of autonomy post-*Cruzan*, and the career of "futility" and related notions in resolving end-of-life disputes. Finally, one of our symposium pieces casts a critical eye on the so-called "system" of health care in this country through the lenses of the *Cruzan* case and the Apollo 11 moon landing. We are fortunate, indeed, to have attracted articles from the leading voices in the field to address some of the most vexing issues at the intersection of law and medicine.

28. See *Washington v. Glucksberg*, 521 U.S. 702, 745 (1997) (Stevens, J., concurring) ("*Cruzan* makes it clear that some individuals who no longer have the option of deciding whether to live or to die because they are already on the threshold of death have a constitutionally protected interest that may outweigh the State's interest in preserving life at all costs.").