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Legitimate Exercise of *Parens Patriae* Doctrine:
State Power to Determine an Incompetent
Individual's "Right to Die" After *Cruzan ex rel.*
Cruzan v. Director, Missouri Department
*of Health*¹

I. INTRODUCTION

One of the most perplexing issues ever to reach the attention of judges, legislators, and the American public is that of determining a person's so-called "right to die."² In *Cruzan ex rel. Cruzan v. Director, Missouri Department of Health*, the Supreme Court held that a state may maintain an "unqualified interest"³ in the preservation of life and may exercise substantial power in determining an incompetent individual's right to die.⁴ This note will demonstrate that the Court's decision in *Cruzan* correctly promotes a legitimate state interest in protecting life while, at the same time, safeguarding the rights of an incompetent person's wishes, stated while competent, not to have her life prolonged by life-sustaining treatment.

Because the decision turned on an inherently philosophical principle⁵—when life ends and who may determine when it

1. 110 S. Ct. 2841 (1990).

2. The first in this line of cases was *In re Quinlan*, 355 A.2d 647 (N.J. 1976), *cert. denied*, 429 U.S. 992 (1976). For a discussion of *Quinlan*, see *infra* notes 35-38 and accompanying text.

3. *Cruzan*, 110 S. Ct. at 2853.

4. Including the *Cruzan* case, 22 states have addressed the issue and "no national consensus has yet emerged on the best solution for this difficult and sensitive problem." *Cruzan*, 110 S. Ct. at 2859 (O'Connor J., concurring). For a listing of state courts addressing the issue, see *Cruzan ex rel. Cruzan v. Harmon*, 760 S.W.2d 408, 412 n.12 (Mo. 1988) (en banc), *aff'd sub nom. Cruzan ex rel. Cruzan v. Director, Missouri Dept. of Health*, 110 S. Ct. 2841 (1990). See also *In re Guardianship of Browning*, 568 So. 2d 4 (Fla. 1990); *McKay v. Bergstedt*, 801 P.2d 617 (Nev. 1990); *In re Estate of Longeway*, 549 N.E.2d 292 (Ill. 1989).

5. As Justice Stevens suggested, an interest in preserving life may be made on "the basis of theological or philosophical conjecture." *Cruzan*, 110 S. Ct. at 2888 (Stevens, J., dissenting). Justice Stevens also commented that the "constitutional significance of death is difficult to describe" and that "not much may be said with confidence about death unless it is said from faith." *Id.* at 2885. Concerning the individual's right to choose when he will die, Justice Stevens stated: "Many philosophies and religions have, for example, long venerated the idea that there is a 'life

may be properly terminated—the Court's five-to-four decision in *Cruzan* reflects the diverse viewpoints which may be argued in favor of or against an incompetent person's so-called "right to die." *Cruzan* sheds new light on this difficult issue and is significant because the Court relies on an unprecedented fourteenth amendment analysis in deciding the issues. Based on this fourteenth amendment analysis, *Cruzan* gives individual states broad leeway to develop both substantive and procedural rules of law concerning an incompetent individual's right to die.⁶

This note seeks to demonstrate that *Cruzan* is a correct decision by discussing the Court's apparent rejection of previous "right to die" decisions based on common law doctrines and on a federal constitutional right to privacy. Most importantly, the Court has implicitly promoted the doctrine of *parens patriae*,⁷ thereby giving states more power to determine the confines of an incompetent individual's right to die. A state may exercise this *parens patriae* power by affording incompetent individuals a right to die based on a state constitutional right to privacy or state judicial proceedings consistent with notions of substantive and procedural due process of law.⁸

after death,' and that the human soul endures even after the human body has perished. Surely Missouri would not wish to define its interest in life in a way antithetical to this tradition." *Id.* n.15; see also Nancy K. Rhoden, *Litigating Life and Death*, 102 HARV. L. REV. 375 (1988).

6. Justice O'Connor made this evident when she stated: "Today we decide only that one State's practice does not violate the Constitution; the more challenging task of crafting appropriate procedures for safeguarding incompetents' liberty interests is entrusted to the 'laboratory' of the States . . ." *Cruzan*, 110 S. Ct. at 2859 (O'Connor, J., concurring) (citing *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

7. The term *parens patriae* referred to the common law power of the King to act as guardian for infants and others who were unable to make competent decisions. BLACK'S LAW DICTIONARY 1003 (5th ed. 1979). "The words '*parens patriae*,' meaning 'father of the country,' refer to a state's sovereign power of guardianship over minors and other persons under disability." *Wentzel v. Montgomery General Hosp.*, 447 A.2d 1244, 1253 (Md. 1982).

8. After summarizing the present state of the law concerning an incompetent person's right to refuse life-sustaining treatment, the Court stated:

As these cases demonstrate, the common-law doctrine of informed consent is viewed as generally encompassing the right of a competent individual to refuse medical treatment. Beyond that, these decisions demonstrate both similarity and diversity in their approach to decision of what all agree is a perplexing question with unusually strong moral and ethical overtones. State courts have available to them for decision a number of sources—state constitutions, statutes, and common law—which are not

II. THE *Cruzan* CASE

Nancy Cruzan was rendered incompetent due to serious injuries sustained in an automobile accident in 1983. Nearly nine years after the accident,⁹ Nancy remained in a Missouri State hospital in a "persistent vegetative state."¹⁰ After concluding that Nancy's chances for recovery were virtually non-existent, her parents asked hospital personnel to terminate artificial nutrition and hydration mechanisms which served to keep Nancy alive. Termination of the support systems would "cause" Nancy to die.¹¹

After the request was denied, the Cruzans sought and received a court order authorizing termination of their daughter's life support system. The basis of the state trial court's decision turned on Nancy's expressed intent that her life not be sustained by artificial means. The trial court stated:

Nancy's 'expressed thoughts at age twenty-five in somewhat serious conversation with a house-mate friend that if sick or injured she would not wish to continue her life unless she could live at least halfway normally suggests [sic] that given her present condition she would not wish to continue on with her nutrition and hydration.'¹²

available to us.

Cruzan, 110 S. Ct. at 2851.

9. Recently, Nancy's parents were allowed to have Nancy's treatment removed. Nancy died 12 days after nutrition and hydration mechanisms were disconnected from her body. See *Father Wins Ruling on Right to Die*, N.Y. Times, Jan. 18, 1991, § A, at 16, col. 4.

10. *Cruzan*, 110 S. Ct. at 2845. The Court described this medical term as "a condition in which a person exhibits motor reflexes but evinces no indications of significant cognitive function." *Id.* Dr. Fred Plum, the originator of the term, described it in this manner:

"Vegetative state describes a body which is functioning entirely in terms of its internal controls. It maintains temperature. It maintains heart beat and pulmonary ventilation. It maintains digestive activity. It maintains reflex activity of muscles and nerves for low level conditioned responses. But there is no behavioral evidence of either self-awareness or of awareness of the surroundings in a learned manner."

Id. n.1 (quoting *In re Jobes*, 529 A.2d 434, 438 (N.J. 1987)).

11. *Cruzan*, 110 S. Ct. at 2846. In times past, the natural process of dying prevented such difficult issues from arising. However, with the advent of new technology, a balance between the right of the government (acting on behalf of the people) in asserting an interest in the preservation of life and the rights of incompetent individuals must be met.

12. *Id.* (quoting App. Pet. for Cert. A97-A98).

The Missouri Supreme Court reversed the lower court's decision—which would have allowed Nancy Cruzan's parents to remove the life-sustaining treatment—by rejecting the common law theory of substitute judgment as applied to an incompetent individual's decision to refuse life-sustaining treatment.¹³

The Missouri Supreme Court also rejected the notion that Nancy could refuse life-sustaining treatment by exercising the common law doctrine of informed consent¹⁴ on her own behalf. Thus, the court held that an incompetent person's right to removal of life sustaining treatment could only be exercised by meeting the proper formalities of the Missouri living will statute or by demonstrating the incompetent's previously stated desire by a showing of "clear, and convincing, inherently reliable evidence."¹⁵ The United States Supreme Court granted certiorari to hear the case.¹⁶

One issue before the Supreme Court in *Cruzan* was whether Nancy Cruzan had a federal constitutional right requiring the hospital to remove the life-sustaining treatment.¹⁷ The Court held that Nancy Cruzan had no federal constitutional right to privacy in having the nutrition and hydration treatment removed.¹⁸ An equally important issue was whether the United States Constitution forbids Missouri's requirement that an incompetent's desire to have life-sustaining equipment removed be proven by clear and convincing evidence.¹⁹ In answering this question, the Court stated that "Missouri may legitimately seek to safeguard the personal element of the choice between life and death through the imposition of height-

13. *Cruzan v. Harmon*, 760 S.W.2d at 424-26. For a discussion of the substitute judgment theory, see *infra* text accompanying note 26.

14. *Id.* at 416-17. For a discussion of the doctrine of informed consent, see *infra* text accompanying note 25.

15. *Id.* at 425. Although the court presented these two tests, it avoided giving any explanation as to what may constitute "inherently reliable evidence." *Id.* Plausible suggestions on how the latter test may be met are discussed *infra* section V.D.2 of this note. Although the Court stated that the Missouri living will statute was not at issue in the case, it relied upon the statute's clear policy in favor of preserving life. *Id.* at 420. For discussion of Missouri's living will statute, see *infra* notes 72-85 and accompanying text.

16. *Cruzan ex rel. Cruzan v. Director, Missouri Dept. of Health*, 109 S. Ct. 3240 (1989).

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

18. *Id.* at 2851 n.7.

19. *Id.* at 2852.

ened evidentiary requirements."²⁰ However, the question still remains: *how* may a state exercise this power as *parens patriae* for the incompetent individual in "right to die" cases?

III. AN INCOMPETENT INDIVIDUAL'S "RIGHT TO DIE" PRIOR TO *Cruzan*

Prior to *Cruzan*, an incompetent person's right to die was founded in common law,²¹ in state and federal constitutions,²² and in state statutes.²³ Arguably, only a state constitutional right to privacy has supported the state's interest in the preservation of life while at the same time protecting the incompetent person's interests in "right to die" cases.²⁴ The common law and the statutory "right to die," in many instances, did not adequately recognize the state's interest in the preservation of life nor the incompetent individual's choice to remove or retain life-sustaining treatment in "right to die" cases.

A. *The Common Law Right*

Most courts basing an incompetent person's right to die in the common law have done so with reference to the doctrines of informed consent²⁵ and substitute judgment.²⁶ An incompe-

20. *Cruzan*, 110 S. Ct. at 2852-53. The Court supported Missouri's imposition of a clear and convincing standard of evidence, which also arguably promotes a balancing of state and individual interests, by stating that this standard of proof was appropriate because:

The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to "instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication."

Id. at 2853 (quoting *Addington v. Texas*, 441 U.S. 418 (1979)).

21. See, e.g., *In re Storar*, 420 N.E.2d 64 (N.Y. App. Div.), *cert. denied*, 454 U.S. 858 (1981); *In re Lydia E. Hall Hosp.*, 455 N.Y.S.2d 706 (N.Y. App. Div. 1982); *In re Welfare of Colyer*, 660 P.2d 738 (Wash. 1983).

22. For a list of representative cases, see *Cruzan v. Harmon*, 760 S.W.2d 408, 417 n.12 (Mo. 1988) (en banc).

23. See, e.g., *Conservatorship of Drabick*, 245 Cal. Rptr. 840 (Cal. Ct. App. 1988), *cert. denied*, 488 U.S. 1024 (1989); *In re Estate of Longeway*, 549 N.E.2d 292 (Ill. 1989); *In re Conservatorship of Torres*, 357 N.W.2d 332 (Minn. 1984).

24. For discussion of an incompetent individual's right to die under a state constitutional right to privacy, see *infra* section V.C of this note.

25. See, e.g., *In re Estate of Longeway*, 549 N.E.2d 292 (Ill. 1989). In order for a person to give informed consent to medical treatment, it is generally recognized that:

"[T]he patient must have the capacity to reason and make judgments, the

tent person's right to refuse medical treatment based on the common law doctrine of informed consent was first recognized by the Supreme Judicial Court of Massachusetts in *Superintendent of Belchertown State School v. Saikewicz*.²⁷ There, a severely mentally-retarded resident of a state school was in need of chemotherapy but incapable of giving informed consent to receive treatment.²⁸ The court reasoned that since a competent individual could refuse life-sustaining treatment based on the doctrine of informed consent, an incompetent person could also exercise that same right.²⁹ Although the right to informed consent was maintained in the incompetent person, the court recognized that the state interest in the preservation of life was substantial.³⁰ However, the court failed to offer a complete analysis in balancing the state's interest in the preservation of life with the incompetent's right to have previously stated wishes carried forth.

In *Cruzan v. Harmon*, the court expressly disavowed the notion that Nancy Cruzan could make an informed decision to refuse to have her life-sustaining treatment removed, stating that "it is definitionally impossible for a person to make an informed decision—either to consent or to refuse [medical treatment]—under hypothetical circumstances."³¹ Moreover,

decision must be made voluntarily and without coercion, and the patient must have a clear understanding of the risks and benefits of the proposed treatment alternatives or non treatment, along with a full understanding of the nature of the disease and the prognosis."

Cruzan v. Harmon, 760 S.W.2d at 417 (quoting Wanzer, Adelstein, Cranford, Federman, Hook, Moertel, Safar, Stone, Taussig & Van Eys, *The Physicians's Responsibility Toward Hopelessly Ill Patients*, 310 NEW ENG. J. MED., 955, 957 (1984)).

26. See, e.g., *Brophy v. New England Sinai Hosp.*, 497 N.E.2d 626 (Mass. 1986). Under the substitute judgment theory, another person, such as a close family member is allowed to make a decision to retain or remove an incompetent's life-sustaining treatment. The substitute judgment theory, however, creates problems when another individual is allowed to exercise his *unilateral* judgment on the incompetent's behalf, neglecting virtually *any* interest a state may have in the matter.

27. 370 N.E.2d 417 (Mass. 1977). Although the doctrine of informed consent as applied to an incompetent person's right to refuse treatment was a novel application in *Saikewicz*, the doctrine is well established in cases where a person is competent to exercise the right. See, e.g., Marjorie M. Shultz, *Informed Choice to Patient Choice: A New Protected Interest*, 95 YALE L.J. 219 (1985).

28. *Saikewicz*, 370 N.E.2d at 427.

29. *Id.*

30. *Id.* at 426.

31. *Cruzan v. Harmon*, 760 S.W.2d at 417. It can be inferred from this

the court rejected the substitute judgment theory as applied to an incompetent's choice by stating that the theory allows "the decisionmaker to assume that he is an incompetent who becomes competent but continues to weigh the decision as though incompetent."³²

Recognizing that both state and individual interests may not be properly balanced when the common law doctrines of informed consent and substitute judgment are applied, the *Cruzan* Court limited the application of these doctrines by stating:

The difficulty with petitioner's claim is that in a sense it begs the question: an incompetent person is not able to make an *informed* and *voluntary* choice to exercise a hypothetical right to refuse treatment or *any other* right. Such "right" must be exercised, *if at all*, by some sort of surrogate.³³

Thus, by *limiting* the informed consent and substitute judgment doctrines relied on in *Saikewicz* and by other courts, the Court announced that the State of Missouri could require a surrogate decision-maker to demonstrate by clear and convincing evidence that the incompetent person would have refused the use of life-support systems.³⁴

statement that the court referred to Nancy's *Cruzan's actual* ability to make an informed decision about the treatment she was receiving *after* she became incompetent. The court probably reached this decision because prior statements made by Nancy could not provide enough evidence to show that the necessary elements of an informed decision were fulfilled. For a discussion of the informed consent criteria, see *supra* text accompanying note 25.

32. *Cruzan v. Harmon*, 760 S.W.2d at 425 n.20. For a definition of the substitute judgment theory, see *supra* text accompanying note 26.

33. *Cruzan*, 110 S. Ct. at 2852 (emphasis added). The Court also seems to reject the substitute judgment standard by stating:

If the State were required by the United States Constitution to repose a right of substituted judgment with anyone, the Cruzans would surely qualify. But we do not think the Due Process Clause requires the State to repose judgment on these matters with anyone but the patient herself. Close family members may have a strong feeling—a feeling not at all ignoble or unworthy, but not entirely disinterested, either—that they do not wish to witness the continuation of the life of a loved one which they regard as hopeless, meaningless, and even degrading. But there is no automatic assurance that the view of close family members will necessarily be the same as the patient's would have been had she been confronted with the prospect of her situation while competent.

Id. at 2855-56.

34. *Id.* Requiring a standard of clear and convincing evidence allows for the avoidance of inherently problematic issues arising from reliance on purely common

B. *The Constitutional Right*

The landmark decision in *In re Quinlan*³⁵ was the first time a court was faced with the issue of whether an incompetent person in a vegetative state is entitled to the removal of a life support system. The New Jersey Supreme Court held that Karen Quinlan had a federal constitutional right to privacy to have the respirator, which kept her alive, removed.³⁶ Most courts following this decision have deviated little from its holding.³⁷ However, the court in *Quinlan* also recognized that the right to privacy in refusing life-sustaining treatment was not an absolute right and must properly yield to state interests in some circumstances.³⁸ As is the case in common law "right to die" analysis, state interests are often neglected by analyzing an incompetent's right to die under a federal constitutional right to privacy. As the court in *Cruzan v. Harmon* stated:

In casting the balance between the patient's common law right to refuse treatment/constitutional right to privacy and the state's interest in life, we acknowledge that the great majority of courts allow the termination of life-sustaining treatment. In doing so, these courts *invariably* find that a patient's right to refuse treatment outweighs the state's interest in preserving life.³⁹

law theories. Dependence on outdated common law theories when dealing with difficult social policy issues, such as the one presented in *Cruzan*, can only serve to abate the rights of the incompetent individual and of the state. In these types of cases, a preponderance of the evidence will simply not suffice. See, e.g., Tracy L. Merritt, Note, *Equality for the Elderly Incompetent: A Proposal for Dignified Death*, 39 STAN. L. REV. 689, 714 (1987) (arguing that the substitute judgment theory cannot be used to promote an incompetent's autonomy without reliable evidence of the incompetent's intent).

35. 355 A.2d 647 (N.J. 1976), cert. denied, 429 U.S. 922 (1976).

36. 355 A.2d at 662-64.

37. See, e.g., *Superintendent of Belchertown State School v. Saikewicz*, 370 N.E.2d 417 (Mass. 1977), stating:

The constitutional right to privacy, as we conceive it, is an expression of the sanctity of individual free choice and self determination as *fundamental* constituents of life. The value of life as so perceived is lessened not by a decision to refuse treatment, but by the failure to allow a competent being the right of choice.

Id. at 426 (emphasis added); see also *Bouvia v. Superior Court*, 225 Cal. Rptr. 297, 304 (Cal. Ct. App. 1986).

38. *In re Quinlan*, 355 A.2d at 664.

39. *Cruzan v. Harmon*, 760 S.W.2d at 420 (emphasis added). The Missouri Supreme Court also stated that the root of this apparent problem is the *Quinlan*

Recognizing a need to foster development of state laws concerning an incompetent's right to die—and the subsequent opportunity for a state to protect its interests while at the same time protecting the incompetent's interests—the *Cruzan* Court refused to base its analysis on a federal constitutional right to privacy.⁴⁰ Although there is no federal constitutional right to privacy in “right to die” cases, a state remains free to extend such a right based on its own constitution.⁴¹

C. The Statutory Right

Due to the complex issues involved in deciding whether an incompetent person has the right to refuse life-sustaining treatment, a number of states have enacted “living will” legislation with the intent to allow persons to expressly state whether they would refuse life-sustaining treatment in the event they become incompetent at some future time.⁴² Additionally, some

decision. *Id.* at 421.

40. The Court stated that “[a]lthough many state courts have held that a right to refuse treatment is encompassed by a generalized constitutional right of privacy, we have never so held. We believe this issue is more properly analyzed in terms of a Fourteenth Amendment liberty interest.” *Cruzan*, 110 S. Ct. at 2851 n.7. For a discussion of the liberty interest, see *infra* notes 97-104 and accompanying text. Perhaps the Court's rejection of the federal constitutional right to privacy as applied to an incompetent person's right to die stems from the legal controversies resulting from its expanded reading of the federal constitutional right to privacy in *Roe v. Wade*, 410 U.S. 113 (1973). Indeed, Justice Scalia stated:

I am concerned, from the tenor of today's opinions, that we are poised to confuse that enterprise as successfully as we have confused the enterprise of legislation concerning abortion—requiring it to be conducted against a background of federal constitutional imperatives that are unknown because they are being newly crafted from Term to Term. That would be a great misfortune.

Cruzan, 110 S. Ct. at 2859 (Scalia, J., concurring). The Court “has cautioned against an expansive interpretation of privacy rights.” *Gray v. Romeo*, 697 F. Supp. 580, 584 (D.R.I. 1988). The Court has also stated that “[c]ourts are most venerable and [come] nearest to illegitimacy when . . . [working] with judge-made constitutional law having little or no cognizable language or design of the Constitution.” *Gray*, 697 F. Supp. at 584 (quoting *Bowers v. Hardwick*, 478 U.S. 186, 194 (1986)).

41. For a discussion of this theory, see *infra* section V.C.

42. Thirty-eight states and the District of Columbia have enacted “living will” statutes. See ALA. CODE §§ 22-8A-1 to -8A-10 (1990); ALASKA STAT. §§ 18.12.010 to .100 (1986); ARIZ. REV. STAT. ANN. §§ 36-3201 to -3210 (1986); ARK. STAT. ANN. §§ 20-17-101 to -203 (Supp. 1989); CAL. HEALTH & SAFETY CODE §§ 1785-1795 (West Supp. 1991); COLO. REV. STAT. §§ 15-18-101 to -113 (Supp. 1990); CONN. GEN. STAT. ANN. §§ 19a-570 to -575 (West Supp. 1990); DEL. CODE ANN. tit. 16, §§ 2501-2508 (1983); D.C. CODE ANN. §§ 6-2401 to -2430 (1989); FLA. STAT. ANN. §§

states have durable power of attorney statutes⁴³ which expressly authorize the appointment of health care proxies to make medical decisions for incompetent persons.⁴⁴ Still, other living will statutes specifically authorize an individual to designate health care proxies who may assure that the intent of the living will is effectuated.⁴⁵ When properly followed, living will statutes allow an individual to forego life-sustaining treatment in the event the individual becomes incompetent to make such

765.01 to .15 (West Supp. 1991); GA. CODE ANN. §§ 31-32-1 to -32-12 (Supp. 1990); HAW. REV. STAT. §§ 327D-1 to -27 (Supp. 1989); IDAHO CODE §§ 39-4501 to -4509 (Supp. 1990); ILL. ANN. STAT. ch. 110 1/2, para. 701-710; (Smith-Hurd Supp. 1990); IND. CODE ANN. §§ 16-8-11-1 to -11-22 (Burns 1990); IOWA CODE ANN. §§ 144A.1 to .11 (West 1989); KAN. STAT. ANN. §§ 65-28,101 to -28,109 (1985); LA. REV. STAT. ANN. §§ 40;1299.58.1 to 58.10 (West Supp. 1991); MD. HEALTH-GEN. CODE ANN. §§ 5-601 to -614 (Supp. 1990); MINN. STAT. ANN. §§ 145B.01 to .17 (1990); MISS. CODE ANN. §§ 41-41-101 to -121 (1987); MO. ANN. STAT. §§ 459.010 to .055 (Vernon 1991); MONT. CODE ANN. §§ 50-9-501 to -511 (1989); NEV. REV. STAT. §§ 459.540 to .690 (1986); N.H. REV. STAT. ANN. §§ 137-H:1 to -H:16 (1990); N.M. STAT. ANN. §§ 24-7-1 to -7-10 (1986); N.C. GEN. STAT. §§ 90-320 to -322 (West Supp. 1991); N.D. CENT. CODE §§ 23-06.4-01 to .4-14 (1989) OKLA. STAT. ANN. tit. 63, §§ 3101-3111 (West Supp. 1991); OR. REV. STAT. §§ 127.605 to .650 (1989); S.C. CODE ANN. §§ 44-77-10 to -160 (Supp. 1990); TENN. CODE ANN. §§ 32-11-101 to -110 (Supp. 1990); UTAH CODE ANN. §§ 75-2-1101 to -1118 (1987); VT. STAT. ANN. Tit. 18, §§ 5251-5262 (1987); VA. CODE ANN. §§ 54.1-2981 to -2992 (Supp. 1990) WASH. REV. CODE ANN. §§ 70.122.010 to .122.905 (West Supp. 1991); W. VA. CODE §§ 16-30-1 to -10 (1985); WIS. STAT. ANN. §§ 154.01 to .15 (West 1989); WYO. STAT. §§ 35-22-101 to -109 (1987).

43. Every state, as well as the District of Columbia, has a general power of attorney statute. *Cruzan*, 110 S. Ct. at 2858 n. 3 (O'Connor, J., concurring) (citing statutes). A general power of attorney statute allows a person (principal) to confer authority upon another to act on behalf of the principal "notwithstanding later disability or incapacity of the principal at law . . ." UTAH CODE ANN. § 75-5-501 (1987). The power must be conferred in writing. *Id.* The power may be revoked either orally or in writing. *Id.* Theoretically, the general power of attorney statute may be used to delegate medical decisions prior to the advent of future incapacity. This method, however, has essentially the same pitfalls which exist with living will statutes. For a discussion of these problems, see *infra* notes 52-69 and accompanying text.

44. *Cruzan*, 110 S. Ct. at 2857 n.2 (O'Conner, J., concurring) (citing statutes). Durable power of attorney statutes, in this author's opinion, do not substantially forward the interests of the state in solving the "right to die" issue. This is because most statutes require that durable power of attorney documents comport *substantially* with the provisions and examples set forth in the statute. See, e.g., MISS. STAT. ANN. § 41-41-63 (Supp. 1990). Thus, it seems that most people would have to consult an attorney to draft the document, a requirement which is not practical for thousands of this country's citizens. Moreover, since few people know that such statutes exist, see *Cruzan*, 110 S. Ct. at 2857 (O'Connor, J., concurring), it is unlikely that they will rely on drafting such documents required in durable power of attorney statutes.

45. *Cruzan*, 110 S. Ct. at 2858 n.4 (O'Connor, J., concurring) (citing statutes).

a decision.

The living will is much more rigidly confined than the ordinary will, and correctly so, because in "right to die" cases the "individual interests at stake in a state proceeding are both 'particularly important' and 'more substantial than mere loss of money.'"⁴⁶ Generally speaking, traditional wills usually require that the testator be at least eighteen years of age and be of "sound mind,"⁴⁷ and that the will be in writing and signed by the testator or in the testator's name by another in the testator's presence.⁴⁸ Additionally, two other witnesses generally must sign the will. In comparison, all living will statutes require witnesses, but not all statutes require the witnesses to sign in the presence of each other.⁴⁹ Also, all living will statutes require that the declarant be a competent adult.⁵⁰ In addition, a number of limitations are usually placed on those who are allowed to serve as witnesses in the creation of the living will.⁵¹ These limitations are often nullified by other conflicting sections within the same statute. Such conflict compels the argument that judicial involvement is warranted in "right to die" cases, even where a living will is involved.

1. *Problems with current legislation*

Although an in-depth discussion of problems relating to living will statutes and other legislation is beyond the scope of this note,⁵² discussion of a few examples will help in showing that current statutes may be as problematic as common law theories because, in many instances, they allow for unilateral decision-making by family members and doctors—a decision process implicitly rejected in *Cruzan*.⁵³

A common problem with all living will statutes is that they seem to extend to a person desiring to execute the will an absolute right to have its mandates set in motion. The living will is

46. *Id.* at 2853 (quoting *Santosky v. Kramer*, 455 U.S. 745, 756 (1982)).

47. *See, e.g.*, UTAH CODE ANN. § 75-2-501 (1978).

48. *Id.* at § 75-2-502.

49. *Id.*

50. *See* Gregory Gelfand, *Living Will Statutes: The First Decade*, 1987 WIS. L. REV. 737, 757.

51. *See infra* notes 55-64 and accompanying text.

52. For an in depth discussion of problems encountered in living will statutes, see Gelfand, *supra* note 50, at 737.

53. *Cruzan*, 110 S. Ct. at 2855-56.

deceiving in this manner since "[l]iving wills were not intended to solve every problem associated with the dying process. Accordingly, living will statutes often contain limitations on the scope and significance of the authority to execute such a document."⁵⁴ The limitations are often inadequate, and, as the following examples will show, sole reliance on legislation in deciding an incompetent person's right to die is inappropriate.

Concerning the execution of the living will, many states provide that a witness to the will cannot be related to the declarant.⁵⁵ Neither may a witness be an attending physician,⁵⁶ a person financially responsible for a declarant's medical care,⁵⁷ an employee of the attending physician or an employee of the institution where the declarant is receiving treatment,⁵⁸ or someone who expects to inherit from the declarant.⁵⁹ These limitations apparently are placed in living will statutes to avoid conflicts of interest. However, many times these limitations are nullified by the fact that most statutes ultimately allow a close family member to make the decision to remove life-sustaining treatment from an incompetent,⁶⁰ and this decision is usually based heavily on the diagnosis of the attending physician.⁶¹

54. Gelfand, *supra* note 50, at 783.

55. See, e.g., ALA. CODE § 22-8A-4 (1990) (providing that a witness cannot be "related to the declarant by blood or marriage").

56. See, e.g., COLO. REV. STAT. § 15-18-105 (Supp. 1990) (providing that no witness may be "the attending physician or any other physician").

57. See, e.g., D.C. CODE ANN. § 6-2422 (a)(4)(A) (1989) (stating witness may not be a person "directly financially responsible for declarant's medical care").

58. See, e.g., WASH. REV. CODE ANN. § 70.122.030 (Supp. 1990).

59. See, e.g., ARIZ. REV. STAT. ANN. § 36-3202(A)(2), (3) (1985).

60. Allowing an incompetent person's purported wishes to be fulfilled by a close family member is even more dangerous, from a conflict of interest perspective, than allowing a relative to take part in the signing of a living will. Logically speaking, it makes little sense to grant family members unilateral rights to make a decision for an incompetent person where a family member should be allowed little or no participation in the creation of a living will. Accordingly, the state as *parens patriae* should play a significant role in assuring that the incompetent person's wishes are rightfully carried forth. See *infra* section V of this note.

61. See, e.g., CONN. GEN. STAT. ANN. § 19a-571 (West Supp. 1990) providing:

- (1) The decision to remove such life support system is based on the best medical judgment of the attending physician;
- (2) the attending physician deems the patient to be in a terminal condition;
- (3) the attending physician has obtained the informed consent of the next of kin, if known, or legal guardian, if any, of the patient prior to removal; and
- (4) the attending physician has considered the patient's wishes as expressed by the patient directly through the next of kin, or legal guardian.

The validity of such provisions is highly questionable after *Cruzan's* apparent

Some states which authorize the use of living wills do not prohibit those who might inherit and those who have other claims against the estate from becoming witnesses.⁶² This is very disturbing since there may be an even higher possibility that such a witness will not act in the incompetent's best interest. As the court in *John F. Kennedy Memorial Hospital, Inc. v. Bludworth*⁶³ commented: "One need not go so far back in history as Cain and Abel to recognize that the interests of various family members are not always synonymous or even harmonious. The newspaper is a daily reminder that murderers are often related to their victims."⁶⁴ Thus, the need for a balanced approach in deciding such difficult issues as those presented in *Cruzan* becomes apparent because evidence of an incompetent's purported desire to have life-sustaining treatment removed may only exist in those who may know the declarant most intimately: most likely this will be the incompetent's close family members.⁶⁵

However, the most disturbing point regarding the living will and other similar legislation is that the vast majority of the public does not or cannot employ the use of a living will.⁶⁶ Some people fail to plan for the need of the documents and others do not know that such documents exist.⁶⁷ Additionally, some persons are born incompetent and obviously cannot execute a living will.⁶⁸ Assuming that a person will execute his own living will neglects the fact that relatively few people understand the confines of the will, its purposes, and its necessity. At least two states have recognized the difficulties posed in relying on living will statutes to solve *all* "right to die" issues. Both Maine and Texas repealed their respective living will

rejection of the substitute judgment theory and its reliance on due process analysis allowing for a balancing of state and individual interests. In light of *Cruzan*, it would seem that such reliance on physician and family decisions must be subject to judicial review before life-sustaining treatment may be allowed.

62. See Gelfand, *supra* note 50, at 758 n.77.

63. 432 So. 2d. 611 (Fla. Dist. Ct. App. 1983), *rev'd*, 452 So. 2d. 921 (Fla. 1984).

64. *Id.* at 618.

65. See Gelfand, *supra* note 50, at 758.

66. Justice O'Connor cites one survey in which only 15% of those surveyed utilized a living will statute declaring their wishes concerning the use of life-sustaining treatment in the event they become incompetent to make such decisions. *Cruzan*, 110 S. Ct. at 2857 n.1. (O'Connor, J., concurring).

67. Gelfand, *supra* note 50, at 787.

68. *Id.*

statutes in 1989.⁶⁹

Despite the problems found in various living will statutes, what really must be balanced is the right of the declarant to avoid life-sustaining treatment, the state's interest in the preservation of life, and the state's interest as *parens patriae* in protecting the incompetent from others who may make a decision contrary to her true desire.⁷⁰ Such a balance may exist in allowing guardians to represent the state as *parens patriae* for the incompetent individual and allowing the courts, also as *parens patriae* for the incompetent, to determine whether execution of the will is in the best interest of the incompetent. Because *Cruzan* has implicitly allowed for a limitation on the substitute judgment theory, some living will statutes may need modification to create procedural processes which will more equally balance state and individual interests in determining an incompetent's right to die. Such modification would create an avenue by which the role of the courts, as *parens patriae* for the incompetent, may be significantly expanded.⁷¹

2. Missouri's living will statute in the *Cruzan* case

The Missouri Life Support Declarations Act⁷² is similar to an ordinary will in respect to making a declaration.⁷³ The act permits a declarant to decide whether a "death-prolonging procedure" is to be maintained.⁷⁴ The declaration provides that if a person "should have a terminal condition," her intent to have life-prolonging treatment withheld may be honored. The "terminal condition" definition of the statute, however, is extremely narrow. The definition provides that a terminal condition is "an incurable or irreversible condition, which in the opinion of the attending physician, is such that death will occur *within a short time regardless of the application of medical*

69. ME. REV. STAT. ANN. tit. 22, §§ 2921-2931, *repealed* by Laws 1989, § 0.830 (Supp. 1990); TEX. REV. CIV. STAT. ANN. art. 4590h, *repealed* by Acts 1989, 71st leg., ch. 678, § 13(1) (eff. Sept. 1, 1989) (Supp. 1991).

70. The Court in *Cruzan* stated that "whether respondent's constitutional rights have been violated must be determined by *balancing his liberty interests against the relevant state interests.*" *Cruzan*, 110 S. Ct. at 2851-52 (emphasis added) (quoting *Youngberg v. Romeo*, 457 U.S. 307, 321 (1988)).

71. See *infra* section V of this note.

72. MO. ANN. STAT. §§ 459.010 to .055 (Vernon Supp. 1991).

73. See *supra* notes 46-48 and accompanying text.

74. MO. STAT. ANN. § 459.015 (Vernon Supp. 1991).

procedures."⁷⁵

The Missouri Supreme Court held that Nancy Cruzan's circumstances did not fall within the statutory definition of "terminally ill" because "[m]edical experts testified that she could live another thirty years."⁷⁶ Therefore, it is apparent that the Missouri living will procedure is inapplicable in *Cruzan* because Nancy was neither dead⁷⁷ nor terminally ill.⁷⁸

Missouri's living will statute provides that a competent person may explicitly refuse in writing the "administration of death-prolonging procedures"⁷⁹ should he at some time become incompetent. The incompetent's wish is narrowly confined, however, because the statute's definition of "death-prolonging procedure"⁸⁰ does not include "the *administration of medication or the performance of medical procedure[s]* deemed necessary to provide comfort care or alleviate pain *nor the performance of any procedure to provide nutrition or hydration . . .*"⁸¹ Nancy Cruzan's parents' request to have Nancy's life-sustaining nutrition and hydration removed⁸² clearly contravened this express provision in Missouri's living will statute and was, therefore, denied.⁸³ Moreover, Missouri's living will

75. MO. STAT. ANN. § 459.010(5) (Vernon Supp. 1991) (emphasis added).

76. *Cruzan v. Harmon*, 760 S.W.2d at 411.

77. *Id.* The court quoted language from Missouri's statutory definition of death as follows:

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

(1) When respiration and circulation are not artificially maintained, there is no irreversible cessation of spontaneous respiration and circulation; or

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

Id. n.3 (quoting MO. STAT. ANN. § 194.005 (1986)).

78. *Id.* at 411.

79. MO. ANN. STAT. § 459.015(3) (Vernon Supp. 1991).

80. *Id.*

81. *Id.* (emphasis added). Interestingly, the statute's definition of the "death-prolonging" procedure would seem to entirely eviscerate the statute. See *Cruzan v. Harmon*, 760 S.W.2d at 442 (Welliver, J., dissenting). The statute, however, can be read as supporting the state of Missouri's "interest in prolongation of the life of the individual patient and an interest in the sanctity of life itself." *Id.* at 419.

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

83. *Cruzan v. Harmon*, 760 S.W.2d at 419-20.

statute was enacted after Nancy's accident and Nancy had not executed a living will.⁸⁴ Accordingly, Nancy Cruzan could only have her life-sustaining treatment removed by a showing of clear and convincing evidence that she so desired while still competent.

Missouri's living will statute supports the state's strong interest in the preservation of life. However, adherence to such a narrowly confined statute may work to deprive an incompetent individual from having her previously stated desires carried forth. One may argue that Missouri's living will statute is eviscerated by its definition of "death-prolonging procedure,"⁸⁵ thereby denying an incompetent person *any* right under the statute to agree to refuse life-sustaining treatment. This is troubling since living will statutes must balance both state and individual interests.

Because Nancy Cruzan was neither technically dead nor terminally ill under Missouri law, the Missouri Supreme Court held in *Cruzan v. Harmon* that the state's interest under the Missouri living will statute was not in the "quality" of life which Nancy might maintain but an "unqualified" interest in the preservation of life.⁸⁶ The Supreme Court in *Cruzan* agreed with the Missouri Supreme Court, stating that "we think a State may properly decline to make judgments about the 'quality' of life 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."⁸⁷

With this recognition of a state's "unqualified interest in the preservation of life," a state is more able to properly balance its interest in the preservation of life and the incompetent

84. *Id.* at 421. Some living will statutes specifically provide that persons who have not executed a living will may rely on living will provisions in the event they become incompetent. See Gelfand, *supra* note 50, at 787. A relative is then allowed to give consent for the refusal of or receiving of life sustaining-treatment. *Id.* A problem develops in such situations because in essence the statutes allow for authorization of oral living wills. *Id.* This approach was implicitly rejected by the Supreme Court in *Cruzan*. The Court stated: "It is also worth noting that most, if not all, States simply forbid oral testimony entirely in determining the wishes of parties in transactions which, while important, simply do not have the consequences that a decision to terminate a person's life does." *Cruzan*, 110 S. Ct. at 2854.

85. See *supra* notes 79-81 and accompanying text.

86. *Cruzan v. Harmon*, 760 S.W.2d at 420.

87. *Cruzan*, 110 S. Ct. at 2853.

individual's right to refuse or retain life-sustaining treatment by imposing substantive and procedural processes in "right to die" cases.⁸⁸ These processes are properly founded upon notions of due process.⁸⁹ Accordingly, even where living wills and similar legislation are involved, subsequent decisions involving an incompetent individual's right to die should be subject to judicial scrutiny, and therefore, fit squarely within the *parens patriae* power of state courts.⁹⁰

IV. *Cruzan's* APPLICATION OF

FOURTEENTH AMENDMENT ANALYSIS IN RIGHT TO DIE CASES

The *Cruzan* decision provides the first instance in which a court applied a fourteenth amendment⁹¹ analysis in a "right to die" case. This approach is significantly different than the federal constitutional right to privacy analysis⁹² previously utilized by state courts because it allows a state to assert an interest in the preservation of life without running afoul of the federal right to privacy. Moreover, the state's interest in the preservation of life and in protecting the incompetent individual's rights is more properly *balanced* against the unilateral decision process of the substitute judgment theory⁹³—a balancing approach the Supreme Court used by applying its decision in *Youngberg v. Romeo*⁹⁴ to the facts in *Cruzan*.⁹⁵

The Court in *Cruzan* explicitly stated that an incompetent person's right to die "is more properly analyzed in terms of a Fourteenth Amendment liberty interest."⁹⁶ This "liberty interest" was recently addressed by the Court in *Washington v.*

88. *Id.*

89. *Id.*

90. See *infra* section V.D of this note.

91. The fourteenth amendment provides, in pertinent part, that "[n]o State shall . . . deprive any person of life, liberty, or property without due process of law." U.S. CONST. amend. XIV, § 1.

92. See *supra* notes 36-42 and accompanying text. Although the United States Constitution does not expressly provide a right to privacy, the Supreme Court has recognized that the right is implicitly provided within the penumbras of the guarantees of the first, third, fourth, fifth, and ninth amendments to the Constitution. See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973) (women's right to an abortion).

93. The court in *Cruzan v. Harmon*, speaking on the substitute judgment theory stated that "[i]n cases like this one, the doctrine authorizes a guardian to cause the death of a ward unilaterally." *Cruzan v. Harmon* 760 S.W.2d at 426.

94. 457 U.S. 307 (1982).

95. See *infra* section IV.B of this note.

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

Harper.⁹⁷

A. *The Harper Liberty Interest*

In *Harper*, the issue before the Court was whether requiring a prison inmate to take anti-psychotic drugs against his will violated the due process clause of the fourteenth amendment.⁹⁸ The Court held that the inmate had a substantial liberty interest in refusing treatment,⁹⁹ but the state interests involved in this case were adequate to overcome the due process argument.¹⁰⁰ Therefore, the state's procedural scheme was found to be an adequate and proper balance of state and individual interests.¹⁰¹

Although the Court recognized that the "logic" in *Harper* was applicable to the *Cruzan* case, it noted that "the dramatic consequences involved in refusal of such treatment would inform the inquiry as to whether the deprivation of that interest is constitutionally permissible."¹⁰² The Court therefore recognized that the overwhelming finality of a decision to withhold life-sustaining treatment from an incompetent is much more serious than sedating a prison inmate. The Court also recognized that a person in Nancy Cruzan's position may not have a

97. 110 S. Ct. 1028 (1990).

98. *Id.* at 1032.

99. The Court stated that "[w]e have no doubt that, in addition to the liberty interest created by the State's Policy, respondent possesses a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs under the Due Process Clause of the Fourteenth Amendment." *Id.* at 1036 (citing *Youngberg v. Romeo*, 457 U.S. 307, 316 (1982); *Vitek v. Jones*, 445 U.S. 480, 491-94 (1980); *Parham v. J.R.*, 442 U.S. 584, 600-01 (1979)).

100. The state interests involved in *Harper* included a policy of forced administration of drugs where the inmate "(1) suffers from 'mental disorder' and (2) is 'gravely disabled' or poses a 'likelihood of serious harm' to himself, others, or their property." *Harper*, 110 S. Ct. at 1033. Interestingly, the Court rejected respondent's argument that to protect his "liberty interest" "the state must find him incompetent" and seek "court approval of the treatment using a 'substitute judgment' theory." *Id.* at 1039.

101. *Harper*, 110 S. Ct. at 1040. The procedure allowed for a medical professional to decide when to medicate rather than a judge. *Id.* at 1042. The Court held that "[a] State's attempt to set a high standard for determining when involuntary medication with antipsychotic drugs is permitted cannot withstand challenge if there are no procedural safeguards to ensure that the prisoner's interests are taken into account. Adequate procedures exist here." *Id.* at 1043. Arguably, no procedural safeguards exist in most living will statutes or common law theories in "right to die" cases which will protect state interests.

102. *Cruzan*, 110 S. Ct. at 2852.

"substantial liberty interest" in refusing life-sustaining treatment because an incompetent person cannot make an informed decision to assert the "liberty interest."¹⁰³

Clearly, the Court's discussion of *Harper* was intended to show that even if Nancy Cruzan had a "liberty interest" in refusing life-sustaining treatment, that interest was subject to a proper balancing of her interest with the State of Missouri's interest in the preservation of life. The Court stated that "determining that a person has a 'liberty interest' under the Due Process Clause does not end the inquiry; "whether respondent's constitutional rights have been violated must be determined by balancing his liberty interests against the relevant state interests."¹⁰⁴

B. *Youngberg's State and Individual Interest Balancing Test*

In *Youngberg v. Romeo*,¹⁰⁵ the Court held that a severely retarded person, involuntarily committed to a state institution, had substantive rights to: "(1) safe conditions of confinement; (2) freedom from bodily restraints; and (3) training or 'habilitation.'"¹⁰⁶ Using a balancing test, the Court stated that in "determining whether a substantive right protected under the Due Process clause has been violated, it is necessary to balance 'the liberty interest of the individual' and 'the demands of an organized society.'"¹⁰⁷

In determining what process sufficiently protects the liberty interests of an involuntarily committed person, the Court held that "[t]he Constitution only requires that the court make certain that professional judgment in fact was exercised. It is not appropriate for the courts to specify which of the several professionally acceptable choices should have been made."¹⁰⁸ The Court also held that the interests of an involuntarily committed person are entitled to protection under the due process clause, stating that "there certainly is no reason to think judg-

103. *Id.*

104. *Id.* (quoting *Youngberg v. Romeo*, 457 U.S. 307, 321 (1982)) (footnote omitted).

105. 457 U.S. 307 (1982).

106. *Id.* at 309.

107. *Id.* at 320 (quoting *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting)).

108. *Youngberg v. Romeo* at 321 (quoting *Youngberg v. Romeo*, 644 F.2d 147, 178 (3rd Cir. 1980), *aff'd*, 457 U.S. 307 (1982)).

es or juries are better qualified than appropriate professionals in making such decisions."¹⁰⁹

Taken at face value, the above reasoning seems to have application in *Cruzan*. The Court, however, rejected *Youngberg's* application to *Cruzan* because the facts in *Youngberg* applied to a retarded adult's freedom from bodily restraint and did not pertain to decisions to administer or withhold medical treatment.¹¹⁰ It is difficult to understand why the Court would take this position because a surrogate decision-maker's choice to terminate life-sustaining treatment of an incompetent person is based heavily on the "professional" opinion of competent medical doctors.¹¹¹ Perhaps directing states to follow its reasoning in *Youngberg* would require states to follow the substitute judgment theory, a theory which the Court rejects throughout the *Cruzan* opinion.¹¹² It is likely, however, that the court only wished to buttress its due process analysis by showing that "right to die" decisions may properly be subjected to procedural and substantive processes which allow for a proper balancing of state and individual interests. Despite the Court's rejection of *Youngberg's* application in *Cruzan*, the analytical procedures set forth in *Youngberg* are a valuable tool which may be exercised by state courts as *parens patriae* for incompetent individuals in "right to die" cases.

V. *Parens Patriae*: EFFECT OF *Cruzan* ON STATE POWER TO LEGISLATE AND OVERSEE AN INCOMPETENT INDIVIDUAL'S "RIGHT TO DIE"

After *Cruzan*, states extending a right to die to their citizens based on a federal constitutional right to privacy¹¹³ must reexamine the current status of this "right" and rely more heavily on state constitutions, statutes, or judicial proceedings implicitly and explicitly supported by the *Cruzan* Court.

109. *Youngberg v. Romeo*, 457 U.S. at 322-23. The Court further reasoned that this standard of proof would not place undue burden on the states to justify use of restraints or conditions of less than absolute safety. *Id.* at 322.

110. *Cruzan*, 110 S. Ct. at 2857.

111. See generally Linda F. Gould, *Right to Die Legislation: The Effect on Physicians' Liability*, 39 MERCER L. REV. 517 (1988); Allen E. Buchanan, *The Limits of Proxy Decisionmaking for Incompetents*, 29 UCLA L. REV. 386 (1981).

112. See *Cruzan*, 110 S. Ct. 2855-56.

113. See *supra* text accompanying note 7.

A. *The Doctrine of Parens Patriae.*

The doctrine of *parens patriae* was established in the courts of England and adopted into the United States's legal system¹¹⁴ as courts found it necessary to exercise their inherent powers of equity.¹¹⁵ The *parens patriae* power has also been found to exist by reference to state constitutions.¹¹⁶ Some courts have, however, refused to invoke the *parens patriae* doctrine in the absence of an explicit statutory mandate to do so.¹¹⁷ Whether founded in inherent equitable powers, state constitutions, or statutes, the doctrine of *parens patriae* forms a solid basis upon which courts may help in mediating the polar spectrum which now exists between a state's interest in preservation of life and an incompetent individual's rights in "right to die" cases.

B. *Cruzan's Approval of the Parens Patriae Doctrine*

The majority in *Cruzan* did not explicitly rely on the doctrine of *parens patriae* in reaching its decision, yet, the dissent argued heavily that the Court's majority opinion allowed an over-expansive acceptance of the doctrine.¹¹⁸ Although the Court examined the various methods a state may rely upon in considering cases such as *Cruzan*, the Court recognized that it could not rely on any of those means¹¹⁹ and instead rested its decision on a fourteenth amendment "liberty interest" analysis.¹²⁰ *Cruzan's* fourteenth amendment analysis provides a solid analytical framework upon which states may develop procedural and substantive safeguards in "right to die" cases.

In rejecting some of the methods used by state courts to decide this difficult issue, the Supreme Court has apparently

114. See *supra* note 7 and accompanying text.

115. See, e.g., *Wentzel v. Montgomery General Hosp.*, 447 A.2d 1244, 1248 (Md. 1982).

116. See *id.* at 1249 (citing *Matter of Guardianship of Hayes*, 608 P.2d 635 (Wash. 1980) (en banc)). See also N.Y. CONST. art. XVII, § 1 ("The aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions and in such manner and by such means, as the legislature may from time to time determine.").

117. See, e.g., *Sparkman v. McFarlin*, 552 F.2d 172 (7th Cir. 1977), *rev'd sub nom.* *Stump v. Sparkman*, 435 U.S. 349 (1978).

118. *Cruzan*, 110 S. Ct. at 2871 (Brennan, J., dissenting).

119. *Id.* at 2851.

120. See *supra* notes 96-104 and accompanying text.

strengthened the ability of states to assert an interest in the preservation of life while at the same time protecting an incompetent patient's desire to have life-sustaining treatment removed based on the doctrine of *parens patriae*. *Cruzan* appears to lessen the restrictions on state action in "right to die" cases by eliminating prior notions that the incompetent's right to die is *grounded* in a constitutional right to privacy or in the common law rights of informed consent or substitute judgment. Precedent was partially the reason that prior courts adhered to doctrines established in common and federal constitutional law.¹²¹ Without the "penumbral" cloak¹²² of the federal constitutional right to privacy hindering their analysis, the courts may exercise greater liberty in protecting the rights and interests of persons such as Nancy Cruzan¹²³ while at the same time protecting appropriate state interests.

In the *Cruzan* case, the Court stated that Nancy Cruzan was not afforded the same constitutional protection a competent person is afforded.¹²⁴ In such instances, a State's interest seems to go beyond the traditional state interests usually asserted in "right to die" cases¹²⁵—interests which have created a paradigm which courts have consistently relied upon in com-

121. Most courts have relied on the *Quinlan/Saikewicz* dichotomy in deciding "right to die" cases. Courts which have "wrestled" with such a difficult issue should be granted due recognition. *Cruzan v. Harmon*, 760 S.W.2d 408, 428 (Blackmar, J., dissenting).

122. See *supra* notes 35-41 and accompanying text.

123. "[T]he more challenging task of crafting appropriate procedures for safeguarding incompetents' liberty interests is entrusted to the 'laboratory' of the States . . ." *Cruzan*, 110 S. Ct. at 2859 (O'Connor, J., concurring) (citing *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

124. The Court stated:

Petitioners insist that under the general holdings of our cases, the forced administration of life-sustaining medical treatment, and even of artificially-delivered food and water essential to life, would implicate a competent person's liberty interest. 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. But for purposes of this case, we assume that the United States Constitution would grant a *competent person* a constitutionally protected right to refuse lifesaving hydration and nutrition.

Id. at 2852 (emphasis added).

125. These interests are: "(1) the preservation of life; (2) the protection of the interests of innocent third parties; (3) the prevention of suicide; and (4) maintaining the ethical integrity of the medical profession." Superintendent of Belchertown State School v. Saikewicz, 370 N.E.2d 417, 425 (Mass. 1977).

mon law and federal constitutional "right to die" decisions. Since the State of Missouri may not be required to defer to the surrogate decision of Nancy's parents¹²⁶ and may also require clear and convincing evidence¹²⁷ of her intent to have her life prolonged, the state may invoke the doctrine of *parens patriae* to protect both Nancy's and its own interests. Indeed, the state, "acting in its role as *parens patriae*, has the right and the duty to protect its weaker members" of society.¹²⁸

C. State Constitutional Right to Privacy in "Right to Die" Cases

A state is not precluded from determining that its own constitution provides an incompetent person with a right to privacy in refusing life-sustaining treatment. This proposition follows from the generally accepted notion that the United States Constitution is only a minimum standard of protection for citizen rights.¹²⁹ Accordingly, a state is free to offer its citizens protection above that provided by the United States Constitution.¹³⁰ For example, the California Constitution explicit-

126. The Court stated that "[a]ll of the reasons previously discussed for allowing Missouri to require clear and convincing evidence of the patient's wishes lead us to conclude that the state may choose to defer only to those wishes, rather than confide the decision to close family members." *Cruzan*, 110 S. Ct. at 2856.

127. The Court's discussion of the clear and convincing standard of evidence centered on the idea that the standard reflected the "importance of a particular adjudication" and served as "a societal judgment about how the risk of error should be distributed between the litigants." *Cruzan*, 110 S. Ct. at 2854 (quoting *Addington v. Texas*, 441 U.S. 418, 423 (1979)). Most importantly though, the Court focused on the idea that:

An erroneous decision not to terminate [life] 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.

Id.

128. *In re Terwilliger*, 450 A.2d 1376, 1380 (Pa. Super. Ct. 1982); see also *In re C.D.M.*, 627 P.2d 607 (Alaska 1981).

129. *Mills v. Rogers* 457 U.S. 291 (1982). There, the Court stated that "[f]or purposes of determining actual rights and obligations, however, questions of state law cannot be avoided. Within our federal system the substantive rights provided by the Federal Constitution define only a minimum. State law may recognize liberty interests more extensive than those independently protected by the Federal Constitution." *Id.* at 300 (citations omitted).

130. See generally William J. Brennan, Jr., *State Constitutions and the Protection*

ly provides for the right to privacy, stating that "[a]ll people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy."¹³¹ States are free, therefore, to extend a state constitutional right to privacy to their citizens. Florida has recently extended such a right by constitutional amendment.¹³² Further, the Florida Supreme Court recently held that the Florida Constitution allows an incompetent individual the right to refuse life-sustaining treatment based on a state constitutional right to privacy.¹³³

Seemingly, extending the state constitutional right of privacy is the preferred solution to protecting the rights of both the incompetent individual and the state.¹³⁴ If such a right is not created,¹³⁵ however, it becomes the right of the state as *parens patriae* to protect the rights of incompetent individuals such as Nancy Cruzan. This conclusion stems from *Cruzan's* apparent rejection of the notion that the common law doctrine of informed consent may be applied in cases involving an incompetent person's right to refuse life-sustaining treat-

of *Individual Rights*, 90 HARV. L. REV. 489 (1977); Brennan, *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535 (1986).

131. CAL. CONST. art. I, § 1; see also HAW. CONST. art. 1, § 6 ("The right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest. The legislature shall take affirmative steps to implement this right.").

132. See FLA. CONST. art. 1, § 23 (1991) ("Every natural person has the right to be let alone and free from governmental intrusion into his private life . . .").

133. *In re Guardianship of Browning*, 568 So. 2d 4 (Fla. 1990). Some courts, however, have rejected the notion that an incompetent person has a state constitutional right to privacy in declining life-sustaining treatment. See, e.g., *McKay v. Bergstedt*, 801 P.2d 617 (Nev. 1990).

134. Justice Scalia stated that the right to make such a public policy decision "is up to the citizens of . . . [the state] to decide through their elected representatives." *Cruzan*, 110 S. Ct. at 2859 (Scalia, J., concurring). A state constitution may be amended by state legislatures who, through the political process, are chosen by citizens of the state. Cf. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

135. It may be argued that even in the existence of a state constitutional right to privacy, a court must still exercise its *parens patriae* power to resolve disputes which may arise concerning an incompetent person's previously purported desire to refuse life-sustaining treatment. Such a contest should be guided by procedures which reflect the seriousness of the ultimate outcome, in this instance usually a showing of clear and convincing evidence.

ment.¹³⁶

The wisdom of applying common law doctrines to cases involving an incompetent person's right to die subsides in light of *Cruzan*.¹³⁷ Additionally, present living will statutes do not provide an adequate means of protecting the sometimes unascertainable wishes of an incompetent person's desire to receive or refuse life-sustaining treatment.¹³⁸ In light of these circumstances,¹³⁹ it is questionable whether a state would be required to defer to a surrogate's decision to terminate an incompetent's life-sustaining treatment when competent and probative evidence establishes the incompetent's intent.¹⁴⁰ Therefore, the doctrine of *parens patriae*, as exercised by the judicial branch, may be a better means of effectuating an incompetent's right to die.

D. Courts and Guardians: Keepers of the State's Parens Patriae Power

Decisions to forego life-prolonging procedures may be held in the hands of guardians¹⁴¹ or the courts¹⁴² as *parens pa-*

136. *Cruzan*, 110 S. Ct. at 2852.

137. See *supra* note 33 and accompanying text.

138. See *supra* notes 52-69 and accompanying text.

139. In view of the apparent problems with common law doctrines and living will statutes, an initial strong presumption in favor of a state's interest in promoting life may be properly asserted. Concerning such a presumption, the Court in *Cruzan* stated:

In the context presented here, a State has more particular interests at stake. The choice between life and death is a deeply personal decision of obvious and overwhelming finality. We believe Missouri may legitimately seek to safeguard the personal element of this choice through the imposition of heightened evidentiary requirements.

Cruzan, 110 S. Ct. at 2852; see also *infra* notes 154 & 160 and accompanying text.

140. The *Cruzan* Court explicitly reserved the question by stating:

We are not faced in this case with the question of whether a State might be required to defer to the decision of a surrogate if competent and probative evidence established that the patient herself had expressed a desire that the decision to terminate life-sustaining treatment be made for her by that individual.

Cruzan, 110 S. Ct. at 2856 n.12. It will prove difficult to prove an incompetent person's desire without the aid of formal procedures such as the "living will" since most persons do not contemplate ever being in a position of incompetency. See *id.* (citing 2 PRESIDENT'S COMMISSION FOR THE STUDY OF ETHICAL PROBLEMS IN MEDICINE AND BIOMEDICAL AND BEHAVIORAL RESEARCH, MAKING HEALTH CARE DECISIONS 241-42 (1982)). Adequate procedural and substantive safeguards may better, although not perfectly, aid in such situations.

141. See, e.g., *In re Terwilliger*, 450 A.2d 1376, 1380 (Pa. Super. Ct. 1982)

triae acting on behalf of the state. Indeed, the seminal case of *In re Quinlan*,¹⁴³ upon which most subsequent cases have relied, held that the judicial authority to order discontinuation of life-sustaining treatment could be found in the *parens patriae* power of the state.¹⁴⁴ The Court in *Cruzan* explicitly provided that states may create procedural methods to deal with an incompetent's right to die.¹⁴⁵ Accordingly, the state court may act as *parens patriae* on behalf of the incompetent, reviewing the facts of each individual case to assure that the rights of the incompetent are protected. By analogy to petitions to sterilize incompetent individuals,¹⁴⁶ a proper procedural framework may be created by state legislatures or by state courts.

The Missouri Supreme Court in *Cruzan v. Harmon* stated that "[a] guardian's power to exercise third party choice arises from the state's authority, not the constitutional rights of the ward. The guardian is the delegatee of the state's *parens patriae* power."¹⁴⁷ Accordingly, guardians represent both the state and the incompetent individual as *parens patriae* for the incompetent individual and as delegatee of the state's *parens patriae* power.

("court-appointed 'guardian', . . . being an officer of the court, is always under the court's control and is subject to its directions as to the person of the ward").

142. See, e.g., *In re Moe*, 432 N.E.2d 712, 716-17 (Mass. 1982) ("prior judicial approval is required before a guardian may consent to administering or withholding . . . extraordinary . . . treatment").

143. 70 N.J. 10, 355 A.2d 647, cert. denied, 429 U.S. 922 (1976).

144. See, e.g., *Severns v. Wilmington Medical Center*, 421 A.2d 1334 (Del. 1980).

145. The *Cruzan* Court stated that "a State is entitled to consider that a judicial proceeding to make a determination regarding an incompetent's wishes may very well not be an adversarial one, with the added guarantee of accurate factfinding that the adversary process brings with it." *Cruzan*, 110 S. Ct. at 2841. In this sense, a judicial proceeding is much like an administrative proceeding. The doctrine of *parens patriae* has been criticized on the basis that it affords little judicial scrutiny of administrative decisions. See Peter M. Horstman, *Protective Services for the Elderly: The Limits of Parens Patriae*, 40 MO. L. REV. 215 (1975). Theoretically, when a court is allowed to apply a clear and convincing standard of evidence in a proceeding like that in *Cruzan*, the court is acting as *parens patriae* for the individual. This is because the court is also seeking to act in the best interest of the incompetent person, not the best interest of the state. Additionally, there are adequate safeguards for administrative proceedings found in all state constitutions. See, e.g., *Stofer v. Motor Vehicle Casualty Co.*, 68 Ill. 2d 361, 369 N.E.2d. 875 (1977) (unconstitutional delegation of power).

146. See *infra* section V.D.1.

147. *Cruzan v. Harmon*, 760 S.W.2d at 425 (citing *In re Link*, 713 S.W.2d 487, 493 (Mo. 1986) (en banc)).

1. Procedural guidelines

The doctrine of *parens patriae* has traditionally been limited to protecting minors and incompetents¹⁴⁸ where they are not normally afforded constitutional protection.¹⁴⁹ For purposes of analysis, this subsection will focus on decisions which have allowed the use of the *parens patriae* doctrine in deciding whether an incompetent individual may be sterilized based on the requests of guardians. This note argues that the same principles relied upon in those cases may be properly applied in cases such as *Cruzan*.

The doctrine of *parens patriae* has often been applied to cases where a guardian has petitioned for the sterilization of an incompetent ward¹⁵⁰ and where a state has had an interest in promoting and preserving the welfare of the incompetent person.¹⁵¹ Likewise, it may be argued that a state has an interest, as *parens patriae*, in promoting the rights of incompetent individuals in "right to die" cases. In *In re C.D.M.*,¹⁵² a sterilization request case, the Alaska Supreme Court established procedural guidelines which could, by analogy, provide the context upon which a state may further its own interests and those of the incompetent individual in "right to die" cases.

In re C.D.M. involved a case where the parents of a nineteen-year-old mildly retarded child suffering from Down's Syndrome requested that their child be sterilized. The Alaska Supreme Court held that under its *parens patriae* authority,

148. The *parens patriae* doctrine has, however, recently been extended to allow "any attorney general of a state" to seek redress for antitrust violations "on behalf of natural citizens residing" in the state. *Kansas v. UtiliCorp United, Inc.*, 110 S. Ct. 2807, 1818 (1990). Accordingly, a state, as *parens patriae*, has a right to sue to prevent harm to its "quasi-sovereign" interests. See, e.g., *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 258 (1972).

149. See, e.g., *Prince v. Massachusetts*, 321 U.S. 158 (1944); John A. Siliciano, Note, *The Minor's Right of Privacy: Limitations on State Action After Danforth and Carey*, 77 COLUM. L. REV. 1216, 1218 (1977).

150. See, e.g., *In re Romero*, 790 P.2d 819, 820-21 (Colo. 1990) ("No Colorado statute authorizes district courts to act on petitions for sterilizations . . . , however, . . . district courts have jurisdiction to act on petitions for sterilization of incompetent persons under the courts' *parens patriae* authority."); *In re Moe*, 432 N.E.2d 712 (Mass. 1982); *In re Grady*, 426 A.2d 467 (N.J. 1981); *In re Guardianship of Hayes*, 608 P.2d 635 (Wash. 1980).

151. See, e.g., *Lassiter v. Department of Social Servs.*, 452 U.S. 18, 27 (1981); *Stanley v. Illinois*, 405 U.S. 645, 652 (1972).

152. 627 P.2d 607 (Alaska 1981).

courts had jurisdiction to deal with such petitions.¹⁵³ Additionally, the court set forth the following minimum standards which state courts must follow in granting petitions for sterilization:

- (1) Those advocating sterilization bear the heavy burden of proving by clear and convincing evidence that sterilization is in the best interests of the incompetent;
- (2) The incompetent must be afforded a full judicial hearing at which medical testimony is presented and the incompetent through a guardian *ad litem*, is allowed to present proof and cross examine witnesses;
- (3) The trial judge must be assured that a comprehensive medical, psychological, and social evaluation is made of the incompetent;
- (4) The trial court must determine that the individual is legally incompetent to make a decision whether to be sterilized and that this incapacity is in all likelihood permanent;
-
- (8) The court must examine the motivation behind the petition.¹⁵⁴

This list of procedural safeguards can, by analogy, be applied to cases such as *Cruzan*, a case involving something which is arguably much more serious than the right of procreation.

In several cases concerning the sterilization of incompetent individuals, the courts have been extremely cautious in allowing guardians to exercise their power to have incompetent individuals sterilized.¹⁵⁵ If such a protection may be legitimately exercised by the courts as *parens patriae* for an incompetent person, it makes no sense not to extend that court protection to cases where a guardian seeks to terminate the *life* of an incompetent individual.

153. *Id.* at 612.

154. *Id.* at 612-13.

155. See, e.g., *In re Romero*, 790 P.2d 819, 822 (Colo. 1990) ("Because the seriousness of the rights and interests at stake and the irreversibility of sterilization, courts must exercise great care and caution in evaluating petitions for non-consensual sterilization."); *In re Terwilliger*, 450 A.2d 1376, 1382 (Pa. Super. Ct. 1982) ("We caution that because sterilization necessarily results in the permanent termination of the intensely personal right of procreation, the trial judge must take the greatest care to ensure that the incompetent's rights are jealously guarded.") (emphasis in original).

2. Substantive guidelines

Although the Court in *Cruzan* provided that a state may assert an "unqualified interest" in life,¹⁵⁶ this statement only allows a state to avoid the "abrogation of the state's *parens patriae* power"¹⁵⁷ in favor of the substitute judgment theory, which "authorizes a guardian to cause the death of a ward *unilaterally*, without interference by the state, and contrary to the state's vital interests in preserving life and in assuring the safekeeping of those who cannot care for themselves."¹⁵⁸ When faced with the *actual* decision of whether to allow a guardian to permit removal of life-sustaining treatment, a court must use substantive guidelines to reach such a decision.

An example of these guidelines was set forth in *In re Beth Israel Medical Center*.¹⁵⁹ In *Beth Israel*, the court began its analysis, stating:

Since an incompetent patient cannot choose for himself, the presumption should initially be that he would choose life and favor any procedure which sustains, prolongs or enhances life, and this presumption should prevail unless it be established by clear and convincing evidence that the burdens of continued life for this patient markedly outweigh the benefits that furthering life would bring. "Clear and convincing" proof is a more appropriate standard than "preponderance of evidence" to determine the patient's "best interests", when the decision will so directly affect the length of time the patient will continue to live. Secondly, no procedure should be withheld if to do so would conflict with any prior contrary wishes of the patient, or would be inconsistent with his character or beliefs. Further, no life-shortening course of action should be contemplated unless the patient is, at the very least, suffering from severe and permanent mental and physical debilitation and with a very limited natural life expectancy.¹⁶⁰

The court then set forth its substantive criteria to determine when burdens outweigh the benefits of continuing life-sustaining treatment. The factors include:

156. *Cruzan*, 110 S. Ct. at 2853.

157. *Cruzan v. Harmon*, 760 S.W.2d at 426.

158. *Id.* (emphasis added).

159. 519 N.Y.S.2d 511 (N.Y. Sup. Ct. 1987).

160. *Id.* at 516.

1. the age of the patient
2. the life expectancy with or without the procedure contemplated
3. the degree of present and future pain or suffering with or without the procedure
4. the extent of the patient's physical and mental disability and degree of helplessness
5. statements, if any, made by the patient which directly or impliedly manifest his views on life prolonging measures
6. the quality of patient's life with or without the procedure, i.e., the extent, if any, of pleasure, emotional enjoyment or intellectual satisfaction that the patient will obtain from prolonged life
7. the risks to life from the procedure contemplated as well as its adverse side affects and degree of invasiveness
8. religious or ethical beliefs of the patient
9. views of those close to him
10. views of the physician
11. the type of care which will be required if life is prolonged as contrasted with what will be actually available to him
12. whether there are any overriding State *parens patriae* interests in sustaining life (e.g. preventing suicide, integrity of the medical profession or protection of innocent third parties, such as children)¹⁶¹

Although these guidelines are not intended to be all inclusive, they do form a good substantive basis upon which the court, as *parens patriae*, may protect the right of an incompetent individual's right to die.

VI. CONCLUSION

The Supreme Court in *Cruzan* has correctly sought to strike a balance between a state's interest in preserving life and protecting an incompetent individual's right to die by allowing states to act as *parens patriae* for an incompetent individual. In reaching this balance, the Court has apparently rejected the common law doctrines of informed consent and substitute judgment as applied to an incompetent's right to die. The Court was correct in allowing the states to invoke its *parens patriae* power in asserting an interest in an incompetent's right to die because it prevents unilateral decision-making by

161. *Id.* at 516-17.

individuals who may not be acting in the best interest of the individual.

Additionally, many living will statutes do not comport with *Cruzan* because they allow for unilateral substitute decision-making without affording a state's interest proper weight. The *Cruzan* decision also rejects the notion that a federal right of privacy is available in "right to die" cases. As such, the states are now free to legislate on the issue without fear of overstepping the constitutional bounds of the federal right of privacy. Moreover, states may turn to their own constitutions in finding a state constitutional right to privacy.

Most importantly, the Court made an unprecedented move in applying a fourteenth amendment "liberty interest" analysis to an incompetent's right to die. This analysis allows states to develop procedural processes which can serve to properly balance both the state's and the incompetent individual's interests in "right to die" cases. Recognizing both interests, the Court has implicitly extended the doctrine of *parens patriae* to these cases.

The doctrine of *parens patriae* forms a solid base upon which states may invoke procedural processes which are explicitly supported in *Cruzan*, procedures which will properly balance state and individual interests. Additionally, guardians act as delegates of the state's *parens patriae* power and should therefore be subjected to the court's guidance in reaching a decision of such magnitude as found in *Cruzan*.

Finally, the *Cruzan* decision does not give the state an unfettered right to intrude into the personal decision of an incompetent's right to die. It only provides that a state may initially assert an "unqualified interest" in the preservation of life counterbalancing the previously unchallenged right of a guardian to substitute his judgment on behalf of the individual. Once the state has asserted its interest, it must then seek to protect the interest of the incompetent individual. This may be done through the courts and guardians as *parens patriae* for the incompetent individual. Therefore, the court must use substantive guidelines to reach appropriate decisions which will ultimately further the interest of the incompetent individual's purported desire to receive or withhold life-sustaining treatment.