1991

Right-To-Die

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RIGHT-TO-DIE

Judge Leon Lazer:

Now we are going to talk about *Cruzan.*[1] *Cruzan*, of course, is the famous right-to-die case that has local law and local government implications. We concluded that one of our professors, Professor Bruce Morton, who deals in the area of biomedical ethics and who is an expert in this area, would be appropriate to speak to you. As a music lover, I am proud to say that Professor Morton's Bachelors of Science degree is from the Juilliard School of Music. He is a graduate of Michigan Law School and was an Assistant Professor of Philosophy at both the University of Minnesota and Wayne State University. As an attorney, Professor Morton practiced with the law firm of Windels, Marx & Davies. So, on the question of the right-to-die, Professor Morton.

Professor Bruce Morton:

Thank you very much. I am pleased to be here; pleased to have been asked to talk to you. As I re-read the Supreme Court opinion in the *Cruzan*[2] case, I was struck by the date of the original accident. I think most of you are familiar with the case; it has been publicized in the media[3] and so forth. A healthy, vital young woman of twenty-five was involved in a one-car accident; she landed face down in a ditch and this is what really created her profound medical problems. Nancy Cruzan's brain was deprived of oxygen for twelve to fourteen minutes,[4] resulting in the loss of her higher cerebral functions,[5] leaving only limited functions, including the autonomous func-

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1. Cruzan v. Harmon, 760 S.W.2d 408 (Mo. 1988) (en banc), *aff'd sub nom.* Cruzan v. Director, Missouri Dep't of Health, 110 S. Ct. 2841 (1990).

2. Cruzan v. Director, Missouri Dep't of Health, 110 S. Ct. 2841 (1990).

3. *See, e.g.*, Gibbs, *Love and Let Die*, TIME, Mar. 19, 1990, at 62; Coyle, *Fast, Furious Questioning Marks Session On Coma Case*, Nat'l L.J., Dec. 18, 1989, at 8, col. 1; Gest, *Is There a Right to Die? Now the Supreme Court May Decide If Care Can Be Halted*, U.S. NEWS & WORLD REP., Dec. 11, 1989, at 35.

4. *Cruzan*, 110 S. Ct. at 2845.

5. The cerebral functions are controlled by the two cerebral hemispheres of the

tions,[6] such as respiration, digestion, circulation and so forth.[7] One reads a lot about the glacial pace of the courts, and I will not play the audience game of who thinks it was '84, '85, '86 and so forth. The date of her accident was January 11, 1983.[8] We are going on eight years in which she has languished in this same persistent vegetative state. At any rate, when it became clear that she was not going to recover, indeed that her condition was not going to improve, her parents sought an order terminating her treatment.[9] I deliberately use the word "treatment." In fact, what did her treatment consist of? It consisted of nutrition and hydration through a feeding tube.[10] One might dispute the issue of whether this ought to be regarded as treatment or not. But certainly, one outcome of the *Cruzan* opinion is that it denied the distinction between nutrition and hydration and any other form of medical treatment for purposes of the right to reject treatment.[11] In other words, this opinion stands rather squarely for the proposition that one may no longer argue that even though there may be a common law and a constitutional right to reject medical treatment, nutrition and hydration are *not* medical treatment and hence not included within that right. I think those who despair over the *Cruzan* decision, that is, those who regret the fact that the

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brain. This portion of the brain blends sensory experiences. "Specific sensory impulses . . . become associated with many other[] [impulses] and expand the experience and consciousness." VAN NOSTRAND'S SCIENTIFIC ENCYCLOPEDIA 351 (5th ed. 1976). Located within the cerebral hemispheres are the portions of the brain that control visual impressions, hearing, smell, speech, balance, taste sensations, judgment, reasoning and emotions. *Id.*

6. Autonomic functions are controlled by the autonomous nervous system. This system is not voluntarily controlled, but rather works at a level below consciousness. *Id.* at 239. Body functions controlled by this system include heart rate, body temperature, sweating and digestion. THE AMERICAN MEDICAL ASSOCIATION ENCYCLOPEDIA OF MEDICINE 199 (1989).

7. *See* Cruzan v. Director, Missouri Dep't of Health, 110 S. Ct. 2841, 2845 n.1 (1990).

8. *Id.* at 2845.

9. *Id.* at 2845-46.

10. *Id.* at 2845.

11. *See id.* at 2852.

Court did not permit her treatment to be terminated,[12] may take comfort in the fact that this distinction was rejected.

At any rate, the lower court in Missouri ruled that the treatment could be terminated.[13] The court did so on the basis of explicit findings of fact which I think deserve to be stressed. The lower court, the court that heard the evidence, concluded that Nancy Cruzan first had " 'expressed thoughts at age twenty-five in somewhat serious conversation with a housemate friend that if sick or injured she would not wish to continue her life unless she could live at least halfway normally . . . .' "[14] That was a finding of fact by the trial court, which further found that on another occasion she stated that she would not want to live as a "vegetable."[15] The lower court made the further finding of fact that it was reasonable to infer on the basis of these statements "that 'she would not wish to continue [on] with [her] nutrition and hydration.' "[16]

On appeal, the Supreme Court of the State of Missouri reversed,[17] and they did something rather interesting from a technical, procedural point of view. What was the basis upon which they reversed? Well, it seems that Missouri requires that a patient's wish to discontinue medical treatment if the person is incompetent, unable to express that wish at the present time, must be proven by clear and convincing evidence.[18] For whatever reason, the lower Missouri court failed to apply the clear and convincing evidence standard; they failed to make any reference to it. Notice, they did not misapply it; the claim was not that in applying the clear and convincing evidence standard the lower court abused its discretion in finding that clear and convincing evidence existed. Rather, the claim was that they committed an error of law in refusing to apply the applicable standard.[19]

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12. *Id.* at 2845.
13. Cruzan v. Harmon, 760 S.W.2d 408, 411-12 (Mo. 1988).
14. Cruzan v. Director, Missouri Dep't of Health, 110 S. Ct. 2841, 2846 (1990) (quoting App. to Pet. for Cert. A97-A98); *see also Cruzan*, 760 S.W.2d at 411.
15. *Cruzan*, 110 S. Ct. at 2855.
16. Cruzan v. Harmon, 760 S.W.2d 408, 411 (Mo. 1988).
17. *Id.* at 427.
18. *Id.* at 425.
19. *See id.* at 410.

On procedural grounds one could argue that it would have been more appropriate for the Missouri Supreme Court to declare the appropriate standard, point out that the lower court failed to apply the correct standard, and remand to the lower court for a determination based upon the application of the correct standard. However, the Missouri Supreme Court did not do that. It went ahead and decided the issue of whether it had been shown by clear and convincing evidence that Nancy Cruzan would have wished to reject nutrition and hydration, and, of course, the Missouri Supreme Court concluded that such a showing had not been made.[20] The United States Supreme Court was confronted with the federal constitutional question alone.[21] I culled a few statements of the issue as the United States Supreme Court stated it, and it goes something like this: Whether the United States Constitution prohibits the State of Missouri from requiring that a patient's wish to discontinue life sustaining treatment be proved by clear and convincing evidence?[22] The issue was limited strictly to the federal constitutional issue having to do with the constitutionality of the requirement of clear and convincing evidence.[23] As we know, the Supreme Court concluded that there was no such prohibition.[24]

Now another important thing that the Supreme Court did, which I think people who disagree with the ultimate result may take comfort from, is that the Supreme Court squarely acknowledged that there was both a common law[25] and a federal constitutional right to refuse treatment.[26] As I am sure most of you know, the common law right evolved essentially by analogy to battery cases,[27] that is, by analogy to the principle that

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20. *See id.* at 426; *see also* Cruzan v. Director, Missouri Dep't of Health, 110 S. Ct. 2841, 2845 (1990).

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

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.* at 2847; *see id.* at 2846-51 (Court's discussion of the common law right to refuse medical treatment, including an overview of the pertinent state court decisions).

26. *See id.* at 2851-52.

27. *Id.* at 2846-47.

every adult of sound and competent mind has the right to determine what should be done to his or her own body and when it needs to be touched or invaded and so forth.[28] So out of those lines of cases, *Schloendorff*[29] and *Natanson v. Kline*[30] and so forth, evolved the common law right to refuse medical treatment.[31] The Supreme Court also squarely acknowledged a federal constitutional right to reject medical treatment.[32]

Now, I think it is interesting — I may be reading too much into this — that the Supreme Court took pains in a footnote to say it was not holding that there was a privacy right,[33] that there was a constitutional right based upon a right to privacy as found in the line of cases from *Griswold*[34] to *Eisenstadt*[35] and *Roe*.[36] Rather, the Supreme Court said this was simply a liberty interest, a direct liberty interest under the fourteenth amendment.[37] I think I am right in concluding that the reason

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28. *Id.* at 2847.

29. Schloendorff v. Society of New York Hosp., 211 N.Y. 125, 129, 105 N.E. 92, 93 (1914) ("Every human being of adult years and sound mind has a right to determine what shall be done with his own body . . . .").

30. 186 Kan. 393, 350 P.2d 1093 (1960) (informed consent as consideration in determining medical treatment decisions).

31. *See e.g.*, Union Pac. Ry. Co. v. Botsford, 141 U.S. 250 (1891); Fosmire v. Nicoleau, 75 N.Y.2d 218, 551 N.E.2d 77, 551 N.Y.S.2d 876 (1990); *In re* Westchester County Medical Center *ex rel* O'Connor, 72 N.Y.2d 57, 531 N.E.2d 607, 534 N.Y.S.2d 886 (1988); *In re* Storar, 52 N.Y.2d 363, 420 N.E.2d 64, 438 N.Y.S.2d 266, *cert. denied*, 454 U.S. 858 (1981); Schloendorff v. Society of New York Hosp., 211 N.Y. 125, 105 N.E. 92 (1914); *In re* Melideo, 88 Misc. 2d 974, 390 N.Y.S.2d 523 (Sup. Ct. Suffolk County 1976); Long Island Jewish-Hillside Medical Center v. Levitt, 73 Misc. 2d 395, 342 N.Y.S.2d 356 (Sup. Ct. Nassau County 1973); Erickson v. Dilgard, 44 Misc. 2d 27, 252 N.Y.S.2d 705 (Sup. Ct. Nassau County 1962).

32. Cruzan v. Director, Missouri Dep't of Health, 110 S. Ct. 2841, 2852 (1990).

33. *Id.* at 2851 n.7.

34. Griswold v. Connecticut, 381 U.S. 479 (1965) (Connecticut statute forbidding use of contraceptives found unconstitutional as violative of the right of marital privacy).

35. Eisenstadt v. Baird, 405 U.S. 438 (1972) (Massachusetts statute prohibiting the distribution of contraceptives to unmarried persons found unconstitutional as violative of the equal protection clause of the fourteenth amendment).

36. Roe v. Wade, 410 U.S. 113, 154 (1973) ("[T]he right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation.").

37. Cruzan v. Director, Missouri Dep't of Health, 110 S. Ct. 2841, 2851 n.7 (1990).

why the Supreme Court made that distinction between a privacy right and a liberty interest was to avoid the *Griswold* analysis in terms of fundamental rights. That is, they did not want to be stuck with having to argue that perhaps the right to reject medical treatment is not just a garden variety liberty interest, but a fundamental right under *Griswold* for which a higher level of state interest would have to be shown.[38]

Remember especially Justice Goldberg's concurrence in *Griswold* where he talked about fundamental rights and said that in order to override a person's fundamental right, more than just a rational state basis, a rational state interest, had to be shown.[39] Well, in this case, the Supreme Court really said nothing whatsoever about what kind of state interest standard would have to be shown; they did not say this is a compelling state interest case or a rational basis case, they simply did not address that question.

We have a situation where Nancy Cruzan is not competent to express her wishes regarding termination of treatment to the Supreme Court, thus, her parents made essentially two arguments to the Court. Her parents said first, that Nancy had sufficiently expressed her wishes to terminate treatment and it would be an unconstitutional interpretation of the Missouri statute to hold otherwise.[40] Secondly, the parents argued that if the Court did not accept that argument, then they, the parents, had a personal, separate and independent constitutional right to make the decision for her.[41] Actually, we must make a three-part distinction among evidence of Nancy's wishes on the one hand; and secondly, a surrogate deciding what Nancy would have wished if she had been competent; and thirdly, a surrogate having an independent constitutional right to make the decision for the incompetent person without reference to what the incompetent person would have wished.

With respect to the issue of the constitutionality of the statute as interpreted, obviously the Court went through a rather straightforward analysis that involved a balancing of the state

38. *Griswold*, 381 U.S. at 497 (Goldberg, J., concurring).
39. *Id.*
40. *See Cruzan*, 110 S. Ct. at 2852.
41. *Id.* at 2855.

interest against the protected liberty interest.[42] The Court made a move which may seem to many people as very straightforward; to me it seems — well, it is a move which I reject — the Court asserted an unqualified general interest in the preservation of life.[43] I think it is false that a state has a general interest, underlining the word general, in the preservation of life, at least to the extent that it applies to someone in a persistent vegetative state like Nancy Cruzan. What were the Court's arguments for this proposition that a state has an unqualified general interest in the preservation of life?

Well, the first argument, if you can call it that, was an appeal to self-evidence. That is, the Court said at one point, that "[w]e think it is self-evident that the interests at stake in the instant proceedings are more substantial, both on an individual and societal level, than those involved in a run-of-the-mill civil dispute."[44] I will talk about that in a minute.

Secondly, the Court offered an argument based upon the fact that everyone treats homicide as a serious crime.[45] In other words, it is an argument from the general case that homicide, the taking of life, is a crime, to the conclusion that there is a general interest in the preservation of life. It strikes me that this simply begs the question at issue, which is whether there is something special and distinctive about the situation in which Nancy Cruzan finds herself, such that the general prohibition against homicide ought not to apply to her.

I can see that I am going to be exceeding my time, so let me jump forward a little bit. First, let me try to give you what the Court said.

The Court asked the question that in light of this general interest in life, may the State of Missouri constitutionally assert this heightened evidentiary standard?[46] The Court ended by saying, yes, the State of Missouri may do that.[47] The Court acknowledged that if the party who wished to terminate treat-

42. *Id.* at 2851-54.
43. *Id.* at 2853.
44. *Id.* at 2854.
45. *Id.* at 2852.
46. *Id.*
47. *Id.* at 2852-53.

ment had a higher evidentiary burden than the party who opposed the termination of treatment, the burden of error would be on the party seeking to terminate the treatment.[48] In other words, it is more likely that there would be a mistake in favor of continuing treatment, rather than in favor of discontinuing treatment. Here, the Court said something that I find so distressing that I find it difficult to comment on. The Court compared the consequence of an erroneous decision to terminate treatment with the consequence of an erroneous decision to continue the treatment.[49] The Court said, I guess rightly, that to erroneously terminate the treatment would be irrevocable and final.[50] But what would the consequence be of an erroneous decision to continue the treatment? Well, the Court said it would just be a maintenance of the status quo,[51] as if the status quo was just fine, and maintaining it did not make much of a difference to anyone.

Let me read to you a passage in which the Court suggested that if the status quo is maintained, then there are some eventualities that may mitigate or correct the effects of the erroneous decision.[52] In a truly incredible passage, to my mind, the Court discussed the effects of an erroneous decision to continue the treatment. The Court stated:

> [T]he 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 a potential that a wrong decision will eventually be corrected or its impact mitigated.[53]

Specifically, I object to the idea that it somehow mitigates or corrects the effect of maintaining the status quo to cause Nancy Cruzan to remain in this pitiful, helpless state with her parents in this ongoing state of limbo for another few months or years. Oh well, if her heartbeat finally gives out spontaneously, that mitigates the effects of having to continue to main-

48. *Id.* at 2854.
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.*

tain her in the same state for a few years, so it makes little difference one way or the other.

The Court even made a rather hypocritical statement to the effect that this was a personal choice and the Court's heightened evidentiary standard safeguards the personal element of that choice.[54] To my mind, what the Court's evidentiary standard really does is make it more likely that it will be some bureaucrat from the State of Missouri who makes the termination of treatment decision, rather than a person who has some personal interest in the outcome. Indeed, the Court made another astonishing statement where, in disparaging the fitness of the parents to make the decision, the Court protested that the parents may have "a strong feeling — a feeling not at all ignoble . . . but not entirely disinterested, either — that they do not wish to witness the continuation of life of a loved one which they regard as hopeless, meaningless . . . ."[55] I think it parodies only slightly the sense of this passage to say that the Court was saying that there is no guarantee that family members will ignore feelings and human values in making this decision and therefore they must be disqualified. It must be the logical, disinterested state bureaucrat who stands in a stronger position to make the decision.

Before I was asked to speak on this topic, I had already written out some thoughts about this case; I think it will simplify matters if I read them. The points in this opinion to which I object most strongly are the ideas that there is a general interest in the preservation of life, and second, this idea that I have already talked about with respect to correcting the wrong decision. Let me just quickly read to you, since I have given this sort of teaser, as to why I think there is no general interest in the preservation of life.

Contrary to the Court's view, there is no general state or societal interest in life sufficiently broad and encompassing to include Nancy Cruzan's tragic situation. The term "life" refers to a wide range of dissimilar states of existence, ranging from the healthy, intelligent, vital ten-year-old girl which Nancy

54. *Id.* at 2852-53.
55. *Id.* at 2855-56.

Cruzan once was, to the persistent vegetative state in which she now exists. The process of technology, which enables medical science to maintain a human body in a state in which no "reasonable person would want to inhabit it,"[56] should force us to recognize that distinctions must be made as to the legal and moral consequences that flow from the various states of existence which are comprehended under the heading "life."

It is these crucial distinctions which the Court refused or failed to make. Rather, the Court contented itself with the astonishingly callous offhand remark that a state may properly decline to make judgments about the quality of life that a particular individual may enjoy and simply assert an unqualified interest in the preservation of human life.[57] One might have imagined that the Court was comparing a life with and without a persistent toothache. It does not follow from the fact that the state possesses, let us assume, a legitimate and strong interest in many of the states of existence we term "life," that it has a similar interest in all such states of existence, and to the extent that the Court's reasoning is based on this fallacy, the Court errs.

This is nothing more than the obvious logical point that because a certain characterization or description applies to some of the entities to which a general term refers, it does not follow that the same characterization applies to all the entities. Suppose, for example, that a state has long expressed an interest in prohibiting or regulating the private ownership of animals which are vicious or dangerous to human beings. The basis for that interest is obviously to protect human beings. Let us suppose that all of the presently known members of a particular species of animals are dangerous and vicious, hence it has become a convenient shorthand method of speaking to say that the state has a general interest in regulating that species of animal. But suppose that another sub-species of animals is discovered, which under the applicable biological taxonomy, falls within that species, but that these animals are generally docile and affectionate. There is no basis for a conclusion that the

56. *Id.* at 2859 (Scalia, J., concurring).
57. *Id.* at 2853.

state has an interest in prohibiting or regulating these newly discovered animals merely because they have the misfortune of belonging to a group all of whose previous members fall within a legitimate state interest. A new way of speaking will have to be developed to reflect accurately the actual legitimate state interest.

That is just a little analogy suggesting my rejection of the idea that there is anything like a general state societal interest in the preservation of life, divorced from and separated from the actual human values and characteristics of life, which the state legitimately may value.

I do not have time. I was going to talk about a couple of New York cases.[58] I was going to compare *O'Connor*[59] and the *Fosmire v. Nicoleau*[60] case. Maybe we can discuss these issues privately afterwards.

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58. For a treatment of New York decisions pertaining to an incompetent individual's right to refuse medical treatment, see *In re* Storar, 52 N.Y.2d 363, 420 N.E.2d 64, 438 N.Y.S.2d 266 (court recognized right to refuse medical treatment extended to incompetent individuals when supported by clear and convincing evidence), *cert. denied*, 454 U.S. 858 (1981); Elbaum v. Grace Plaza of Great Neck, 148 A.D.2d 244, 544 N.Y.S.2d 840 (2d Dep't 1989) (incompetent patient's prior statements regarding medical treatment satisfied clear and convincing evidence standard); Delio v. Westchester County Medical Center, 129 A.D.2d 1, 516 N.Y.S.2d 677 (2d Dep't 1987) (court refused to distinguish between nutrition and hydration devices and other forms of medical treatment).

59. *In re* Westchester County Medical Center *ex rel* O'Connor, 72 N.Y.2d 517, 531 N.E.2d 607, 534 N.Y.S.2d 886 (1988). In *O'Connor*, the patient was not in a vegetative state but did require medical assistance — insertion of a nasogastric tube — to obtain nourishment. *Id.* at 533, 531 N.E.2d at 615, 534 N.Y.S.2d at 894. The patient's two daughters sought to prevent the insertion of the nasogastric tube based upon the patient's expressed wishes "that 'no artificial life support be started or maintained in order to continue to sustain her life . . . .'" *Id.* at 523, 531 N.E.2d at 609, 534 N.Y.S.2d at 888. The court concluded that "there [was] not clear and convincing evidence that the patient had made a firm and settled commitment, while competent, to decline this type of medical assistance under circumstances such as these." *Id.* at 522, 531 N.E.2d at 608, 534 N.Y.S.2d at 887. The witnesses acknowledged that the patient never discussed declining food or water as part of her medical treatment; neither had it been discussed whether she would refuse medical treatment, even if it meant a painful death. *Id.* at 527, 531 N.E.2d at 611, 534 N.Y.S.2d at 890.

60. 75 N.Y.2d 218, 551 N.E.2d 77, 551 N.Y.S.2d 876 (1990). In *Fosmire*, the patient was a competent adult, *id.* at 221-22, 551 N.E.2d at 78, 551 N.Y.S.2d at 877, therefore, the court was not faced with a factual situation analogous to *Cruzan*, where the patient was an incompetent adult. Nevertheless, the court recognized

ADDENDUM

On November 1, 1990, Judge Charles E. Teel, the judge who presided over the initial *Cruzan* trial, conducted a one-day hearing to determine whether or not to remove Nancy Cruzan's feeding tube.[61] New testimony was presented from more than three additional friends of Nancy Cruzan confirming that she would not want to live in a vegetative state.[62] Judge Teel concluded that there was "clear and convincing" evidence showing that Nancy Cruzan would want to terminate the hydration and nutrition treatment that was sustaining her condition.[63] The feeding tube was removed December 14, 1990, and Nancy Cruzan died twelve days later.[64] According to a statement issued by her parents, " 'she remained peaceful throughout and showed no sign of discomfort or distress in any way'. . . ."[65]

Professor Gary Shaw:

I do take comfort from the fact that the Court recognized a liberty interest in refusing treatment[66] and that they are no longer drawing the distinction between nutrition and hydration, and treatment.[67] I think that what Professor Morton has given you today is a small sample of a debate that is raging between

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New York's application of the clear and convincing evidence standard to termination decisions involving incompetent individuals. *Id.* at 225, 551 N.E.2d at 80, 551 N.Y.S.2d at 879. The court found that the patient, in *Fosmire*, had a personal common law and statutory right to decline the administration of blood transfusions, and that "the hospital ha[d] not identified any State interest which would override the patient's rights . . . ." *Id.*

61. Malcolm, *Right-To-Die Case Nearing a Finale*, N.Y. Times, Dec. 7, 1990, at A24, col. 1.

62. Malcolm, *Judge Allows Feeding-Tube Removal*, N.Y. Times, Dec. 15, 1990, § 1, at 10, col. 1.

63. *Id.*; *see also* Lewin, *Nancy Cruzan Dies, Outlived by a Debate Over the Right to Die*, N.Y. Times, Dec. 27, 1990, at A1, col. 1 [hereinafter *Lewin*].

64. *Lewin, supra* note 63, at A15, col. 2; *see also* Malcolm, *Nancy Cruzan: End to Long Goodbye*, N.Y. Times, Dec. 29, 1990, § 1, at 8, col. 4.

65. *Lewin, supra* note 63, at A15, col. 1.

66. Cruzan v. Director, Missouri Dep't of Health, 110 S. Ct. 2841, 2851 (1990) ("The principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions.").

67. *Id.* at 2852.

constitutional law experts. Professor Morton is convinced that there is no general unqualified interest in preserving life. He rejects that argument. If there is not, then who should set the limits? Should it be the judiciary or should it be the legislature? I think Professor Morton's position would be that there is an absolute irreversible minimum protected by the Constitution which should be recognized by the judiciary. Actually, I agree with him, but nonetheless, I do not find it at all surprising that this Court rejects that position. The Court is saying that it cannot determine what a meaningful life is because it is just too complex as far as justiciability standards are concerned. This Court would say that there are no judicially discoverable and manageable standards to decide that issue.[68] Given that, the Court opts for allowing the legislature to make the decision.

Professor Bruce Morton:

Professor Shaw, you are running together two questions. You are running together first the question of who should make the decision as to where the line is drawn between what I call the state of existence — or the types of life in which the state has a legitimate interest — and those in which it does not and second, on the basis of what criteria or standard should that distinction be drawn. Taking the latter question first, you would have to make some analysis of the concept of having an experience, and in particular, having pleasant versus unpleasant experiences. It strikes me that, at a minimum, you need a being who is capable of having those experiences of pleasure and pain or displeasure in order to have a state interest in the preservation of that life.

As to the question of who should make the decision, it strikes me that, at least at the extreme end of the spectrum, such as here where Nancy Cruzan finds herself in a persistent vegetative state, clearly, there is no legitimate state interest

68. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-13, at 96-98 (2d ed. 1988) (explaining that the Court, under the political question doctrine, may decline to decide an issue before it, when the issue lacks "judicially discoverable and managable standards for resolving it").

overriding her acknowledged constitutional and common law right to determine her own treatment.

Who should make that decision? If the legislature leaves—what did David Souter say, a "vacuum"[69]—I suppose that if the vacuum is there long enough and if the vacuum becomes abhorrent enough to the nature which is the judiciary, then I suppose it is the realm of the judiciary to enter into and to fill that vacuum.

69. During his Senate confirmation hearing, Justice Souter stated that there was an unfortunate "vacuum of [legislative] response to problems that have to be solved, and . . . of necessity, those problems ultimately end up before the judiciary." N.Y. Times, Sept. 15, at 10, col. 1.