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GRAY V. ROMEO*: RIGHT OF PRIVACY OVER-EXTENDED TO ALLOW WITHDRAWAL OF NUTRITION FROM PATIENT IN PERSISTENT VEGETATIVE STATE

The United States Supreme Court has interpreted the Constitution as providing a right to privacy which encompasses a right to self-determination in controlling the administration of medical treatment. In Gray v. Romeo, the United States District Court for Rhode Island determined whether the right to privacy allows a person in a persistent vegetative state, who is incapable of intelligent

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1. The Constitution does not explicitly mention any right of privacy. In Griswold v. Connecticut, 381 U.S. 479 (1965), the Supreme Court, in protecting a married couple's use of contraceptives, announced for the first time that the right to privacy was guaranteed by the Constitution. In finding that the privacy right protected a married couple's decision to use contraceptives, the Court held that the right of privacy is found in the penumbra formed by emanations of specific constitutional guarantees. Id. at 484. In other words, the first, third, fourth, and fifth amendments are based on protecting interests that may generally be viewed under the heading of privacy. This constitutional concern, combined with the ninth amendment's provision that the rights enumerated in the Constitution shall not disparage other rights not so enumerated, form a general zone of privacy that exists outside of the specified Constitutional guarantees. Id. at 484-85.

Courts have also found the roots of the privacy right in various amendments. See, e.g., Stanley v. Georgia, 394 U.S. 557, 564 (1969) (first amendment necessarily protects right to receive information and ideas, and to be free from unwanted governmental intrusions into one's privacy); Katz v. United States, 389 U.S. 347, 350 (1967) (fourth amendment protects, and fifth amendment reflects a concern for, protection of individual privacy against certain kinds of governmental intrusion); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (first section of fourteenth amendment guarantees the concept of liberty).

2. Roe v. Wade, 410 U.S. 113, 163-64 (1973). In analyzing previous decisions concerning the right of privacy, the Court found that the only rights included in the guarantee of personal privacy are those that are fundamental or "implicit in the concept of ordered liberty." Id. at 152, citing, Palko v. Connecticut, 302 U.S. 319, 325 (1937).

The Roe Court found that the right of personal privacy includes the decision of a woman to have an abortion. Roe, 410 U.S. at 154. However, this right is not absolute and must be balanced against state interests. Id. The Court found that the state interests become sufficiently compelling to override a woman's right of privacy at the end of the first trimester of pregnancy. Id. at 163. Therefore, under Roe, until the end of the third month of pregnancy, a woman has the right to terminate the pregnancy. Id. at 164. However, after the third month, the state can regulate the abortion procedure. Id.

3. In re Quinlan, 70 N.J. 10, 355 A.2d 647, cert. denied, 429 U.S. 922 (1976). The right to privacy is presumably broad enough to allow a patient to decline medical treatment under certain circumstances. Id. at 40, 355 A.2d at 663.

4. Gray, 697 F. Supp. at 582. A persistent vegetative state (PVS) is:
[A] type of comatose state in which the cerebral functioning has ceased but in
sensation,\textsuperscript{6} to refuse life-sustaining nourishment which will result in
death. This was the first time that a federal district court con-
fronted this issue.\textsuperscript{6} The court allowed cessation of artificial feeding,\textsuperscript{7} and
required the hospital to accede to the wishes of the patient's
guardian.\textsuperscript{6} By this ruling, the court held that the right of self-deter-
mination, as protected by the fourteenth amendment, outweighs any
state interests in preserving life.\textsuperscript{6} However, to arrive at this decision,
the court extended the privacy right beyond the limitations which
the Supreme Court has enunciated.

On Saturday, January 4, 1986, the Rhode Island Hospital ad-
mitted Marcia Gray\textsuperscript{10} after she suffered a major cerebral hemor-
rhage.\textsuperscript{11} Mrs. Gray's husband, Glenn, and her two children, Brian

which the brain stem functioning is fully or partially intact. The brain stem
controls primitive reflexes, including heart activity, breathing, the sleep/wake
cycle, reflexive activity in upper and lower extremities, some swallowing
motions and eye movements. Marcia shows signs of each of these activities. The
cerebrum, on the other hand, controls sensation and voluntary conscious activi-
ties. [Because] Marcia's cerebrum has been damaged severely . . . she displays
no voluntary or conscious movements, nor does she display any awareness or
sensation. This combination of reflexive activity in the absence of sensation or
conscious activity is characteristic of PVS. PVS is generally a permanent
condition.

\textit{Id.}

5. Marcia Gray was only capable of reflexive activity because that part of her
brain which controlled intelligent sensation was severely damaged. \textit{Id.}

6. Several state courts have previously addressed issues similar to the one in
of nursing home patient in chronic vegetative state to have nasogastric tube removed
and not resuscitate order placed on medical chart); Bouvia v. Superior Court, 179 Cal.
App. 3d 1127, 225 Cal. Rptr. 297 (1986) (nonterminal, competent patient has right to
compel hospital to remove nasogastric tube); Barber v. Superior Court, 147 Cal. App.
3d 1006, 195 Cal. Rptr. 484 (1983) (doctors who removed all life-support systems and
ceased providing hydration and nourishment from vegetative state acquitted of mur-
der charges); Foody v. Manchester Memorial Hosp., 40 Conn. Supp. 127, 482 A.2d 713
(1984) (right of family to call for removal of respirator from semicomatose patient);
Severns v. Wilmington Medical Center, 425 A.2d 156 (Del. Ch. 1980) (court ordering
discontinuance of respirator and feeding tube); Brophy v. New England Sinai Hosp.,
Mass. 629, 405 N.E.2d 115 (1980) (termination of life-prolonging hemodialysis treat-
ment); Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 370
N.E.2d 417 (1977) (substituted judgment standard used to refuse chemotherapy
to require surgery to insert feeding tube); \textit{In re Conroy}, 98 N.J. 321, 486 A.2d 1209
(1985) (feeding tube could not be removed from elderly, incompetent patient because
guardian ad litem objected); \textit{In re Quinlan}, 70 N.J. 10, 355 A.2d 647 (1976) (removal
of respirator), \textit{cert. denied}, Garger v. New Jersey, 429 U.S. 932 (1976); Westchester
to surgically insert feeding tube).

8. \textit{Id.} at 591.
10. \textit{Id.} at 582.
11. A cerebral hemorrhage is a profuse flow of blood into the substance of the
cerebrum, which is the principle portion of the brain including practically all parts
within the skull. \textit{STEDMAN'S MEDICAL DICTIONARY} 637 (24th ed. 1982).
and Karen, consented to a brain operation in an effort to save her life. Marcia Gray underwent a right frontal craniotomy which established that she had suffered a massive hemorrhage and severe brain damage to the right cerebral hemisphere. She never regained consciousness.

To facilitate feeding Mrs. Gray, Glenn Gray consented to the surgical insertion of a G-tube on January 16, 1986. Between January 16, 1986 and June 10, 1986, Mrs. Gray underwent further surgery and four separate medical procedures, and doctors performed subsequent procedures to counter infection. On June 24, 1986, Marcia Gray was transferred to the Rhode Island Medical Center. Her doctors diagnosed Mrs. Gray as being in a "persistent vegetative state" (PVS). As such, she was maintained on "comfort only status."

On May 20, 1987, Mrs. Gray’s husband, her two children, her mother and her sister-in-law requested that the attending physician stop feeding Mrs. Gray. The hospital denied this request because it equated the removal of nutrition and hydration with euthanasia, which it considered inconsistent with a health care provider’s role. Moreover, the hospital feared civil or criminal liability, and it

12. Gray, 697 F. Supp. at 582. Mrs. Gray was originally brought to the South County Hospital because she was experiencing a severe headache with serious pain. Id. After a CAT scan showed initial evidence of a blood vessel rupture, she was transferred to the Rhode Island Hospital where a neurologist, Paul Welch, confirmed a major cerebral hemorrhage. Id.

13. Id. The right frontal craniotomy involved the removal of a section of Mrs. Gray’s skull bone to extract a blood clot which was present in the brain. Id.

14. Id. The massive hemorrhage occurred within the cerebrum and the meninges, which is the membrane that covers the brain. Id.

15. Id.

16. Id. To provide nutrition and hydration directly to the stomach, a gastrostomy was performed. Id. This procedure involves the creation of a hole in the abdominal wall and into the stomach. Id. Nutrition and hydration are provided to the patient through a tube, known as a G-tube, which is directly inserted into the stomach. Id. To aid in the removal of mucus in Mrs. Gray's throat, an endotracheal tube was inserted in her trachea. Id.

17. Id. Surgery was performed on February 6, 1986 because Mrs. Gray had developed hydrocephalus, a build up of cerebrospinal fluid in the brain. Id. The procedure involved the insertion of a shunt to drain the excess fluid. Id. Due to malfunctions of the shunt, four additional procedures were required. Id.

18. Id. The removal of the cranial bone plate and the deterioration of brain matter on the right side of the brain left a sunken crater on the right side of her head. Id.

19. Id.

20. Id.

21. Id. at 582-83. Mrs. Gray received no medical attention except for nutrition and hydration. Id. Her care included feedings of a liquid formula every four hours through the G-tube, and water provided through the tube in-between the feedings. Id. The opinion states that she was in need of constant attention, but does not describe the nature of the care required. Id.

22. Id. at 583.

23. Id.
wanted to protect its reputation as an institution for long-term care. The professional health care personnel who were taking care of Mrs. Gray also unanimously opposed removing nutrition and hydration.

Even though the health care provider preferred to maintain Mrs. Gray's current status, the neurosurgeon, the consulting physician and the treating physician all agreed that it was unlikely that she would return to a conscious state. The neurosurgeon and consulting physician believed that Mrs. Gray's conscious faculties had ceased to function; therefore, she would not experience pain, thirst or hunger if the hospital stopped feeding Mrs. Gray.

The state probate court appointed Mrs. Gray's husband, Glenn, as guardian of her person and estate. The federal district court appointed a guardian ad litem to determine what Mrs. Gray's wishes would have been if she was competent. This guardian ad litem also was to determine whether the family had any ulterior motives in requesting the termination of feeding and what course of action was in her best interest.

The guardian ad litem reported that Mrs. Gray had several conversations with her husband and her sister-in-law concerning the

24. Id.
25. Id. The difficulty of determining the extent of brain damage is highlighted in a published statement written for the Pope John XXIII Center, and endorsed by over 100 physicians, ethicists and scholars. May, Barry, Griese, Grisez, Johnstone, Marzen, McHugh, Meilander, Siegler and Smith, Feeding and Hydrating the Permanently Unconscious and Other Vulnerable Persons, 3 ISSUES IN L. & MED. 203 (1987). Because each medical condition is unique, there are always more and less severe cases which may produce the same symptoms. Id. at 207.
26. Gray, 697 F. Supp. at 583. The family consulted with an outside physician who was board certified in neurology and internal medicine to evaluate Mrs. Gray's condition. Id. Both the consulting physician and the neurologist who performed the craniotomy agreed that there was no chance of recovery, and that it was unlikely that Marcia Gray would return to a conscious state. Id. The treating physician at the General Hospital also stated that her chances of recovery were "close to zero." Id.
27. Id. The neurosurgeon indicated that Marcia Gray did not exhibit any "conscious, cognitive, sentient responses which would indicate functioning cerebral hemisphere activity." Id. Although she had responded to noxious stimuli, he felt that these responses were of "questionable significance given the primitive nature of the startle reflex." Id. See also supra note 4 and accompanying text (explanation of which of Mrs. Gray's faculties had ceased to function).
29. A guardian ad litem is a guardian appointed by the court to represent the interests of an infant or incompetent in the pending litigation. BLACK'S LAW DICTIONARY 635 (5th ed. 1979).
30. Telephone interview with Linda S. MacDonald, attorney for the plaintiff, East Greenwich, Rhode Island (March 16, 1989). Ms. MacDonald pointed out that there were no ulterior motives found in this case. Id. Furthermore, Mr. Gray had authorized the G-tube and other procedures in the hope that Mrs. Gray still had some chance of recovery. Id. He was not informed until December, 1987 that it was highly unlikely that she would return to a conscious state. Id. It was at this time that the family began to evaluate what Marcia Gray's wishes would have been. Id.
plight of Karen Ann Quinlan. Karen Ann Quinlan was a 22 year-old woman diagnosed as being in a persistent vegetative state whose life was supported by an artificial respirator and a feeding tube. During these conversations, Mrs. Gray expressed her feelings that if she were in the same circumstances, she would not want a respirator or feeding tube. Glenn Gray also stated that at one point he had promised his wife that if she ever were in a situation similar to Karen Ann Quinlan, he would not keep her alive by artificial means. Based on this evidence, the guardian ad litem agreed that, if competent, Mrs. Gray would refuse the life-sustaining medical treatment.

Glenn Gray, as guardian of Marcia’s person and estate, brought this action on her behalf to obtain a declaration that the actions of the hospital violated Marcia Gray’s constitutional rights, and to obtain authorization for the guardian to require the hospital to withdraw the life support apparatus. The court held in favor of Glenn Gray and ordered the removal of the nutrition and hydration. Pursuant to the court’s decision, the doctors withdrew nutrition and hydration on November 15, 1988, and Marcia Gray died 15 days later. During those 15 days, Mrs. Gray lost approximately 50 pounds and received the drug Valium to reduce seizures.

31. See Gray, 697 F. Supp. at 583. At the age of 22, Karen Quinlan was diagnosed as being in a chronic persistent vegetative state. In re Quinlan, 70 N.J. 10, 24, 355 A.2d 647, 654, cert. denied, 429 U.S. 922 (1976). Karen’s breathing was assisted by a respirator, and she was fed through a nasal-gastro tube. Id. at 25, 355 A.2d at 655. Karen’s father sought appointment as her guardian for the purposes of withdrawing only extraordinary means of treatment, i.e. the respirator. Id. at 22, 355 A.2d at 658. Mr. Quinlan did not request removal of the feeding tube. Id. at 54, 355 A.2d at 671-72. The court appointed Mr. Quinlan as guardian with instructions to the family and the attending physicians to evaluate Karen’s condition. Id. The respirator could be discontinued only if the guardian, family, attending physicians and the hospital Ethics Committee concurred that there was no reasonable possibility of Karen’s ever emerging from the comatose condition. Id. The respirator was removed and Karen Quinlan lived for nine years. Cruzan v. Harmon, 760 S.W.2d 408, 413 n.6 (Mo. 1988) (en banc), cert. granted, 109 S. Ct. 3240 (1989).

34. Id.
35. Id. at 587.
36. Id. at 583. Glenn Gray, on behalf of Marcia Gray, brought this action into federal court under 42 U.S.C. § 1983 which provides federal jurisdiction whenever a person, acting under color of any statute or regulation of any state, deprives another of rights secured by the Constitution. 42 U.S.C. § 1983 (1982). Therefore, the United States District Court had jurisdiction over this case because a state hospital was depriving Mrs. Gray of the right of privacy by refusing to terminate the life support procedures.

39. Id. The final cause of death was kidney and respiratory failure. Id. According to that article, Rhode Island’s Governor got involved in the legal dispute by ordering state officials not to appeal the district court’s ruling. Id.
The United States District Court for Rhode Island found that the central issue was whether the state can insist that a person in a persistent vegetative state submit to medical care if the treatment would be contrary to the patient's preferences.\(^{40}\) To resolve this question, the court considered whether Mrs. Gray had a federal constitutional right to refuse life-sustaining treatment.\(^{41}\) This required the court to resolve two sub-issues. The first sub-issue was whether this type of decision is protected by the right of privacy. The second sub-issue was that, even if the decision does fall within the right to privacy, does the state's interest in preventing the starvation of a person override the individual's right to choose.

The court construed the right to privacy as one that encompasses the right to control medical decisions because this right of self-determination is "deeply rooted in our country's history and tradition."\(^{42}\) Furthermore, Marcia Gray's right to refuse medical treatment included the right to have the G-tube removed.\(^{43}\) Next, the court determined that, although Marcia Gray was incompetent, the evidence clearly supported removal of the G-tube.\(^{44}\) Furthermore, the court ruled that there were no governmental interests that outweighed Marcia Gray's interest in self-determination.\(^{45}\) There-

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\(^{40}\) Gray, 697 F. Supp. at 584. By phrasing the issues this way, the court was able to view the problem not as relating to death, but rather to life and its circumstances. \(\text{Id.}\)

\(^{41}\) The court also considered four related issues: Whether nutrition and hydration are the type of medical treatment that a person may refuse, whether there are any overriding state interests; what is the role of a health care provider in a situation like this; and what are the rights of an incompetent patient in such a situation. \(\text{Id.}\) at 584-90.

Competent persons have a right to refuse medical treatment, even if that decision results in the patient's death. See State Dep't of Human Servs. v. Northern, 563 S.W.2d 197, 209 (Tenn. Ct. App. 1978), appeal dismissed as moot, 436 U.S. 923 (1978). Legal competency, for the purposes of making this type of decision, has been defined as the "mental ability to make a rational decision, which includes the ability to perceive, appreciate all relevant facts and to reach a rational judgment upon such facts." \(\text{Id.}\)


\(^{42}\) Gray, 697 F. Supp. at 584.

\(^{43}\) \(\text{Id.}\) at 587.

\(^{44}\) \(\text{Id.}\)

\(^{45}\) \(\text{Id.}\) at 588. Courts often find that the state's interests do not outweigh the individual's interest in the freedom to refuse medical treatment. See Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 742, 370 N.E.2d 417, 425 (1977). In upholding the right of a sixty-seven year old terminally ill patient to refuse chemotherapy treatments, the Saikewicz court concluded that the constitutional right to privacy is one of the fundamental constituents of life and is not outweighed by any state interests in the preservation of life. \(\text{Id.}\) 373 Mass. at 742, 370 N.E.2d at 426. Furthermore, medical ethics are not offended because the medical community recognizes that terminally ill patients are often more in need of comfort than treat-
fore, the court held that the Rhode Island Medical Center must ac-
cede to Marcia Gray’s right to terminate nutrition and hydration.46

In finding that the right to privacy is based on the principle of
self-determination,47 the court began its analysis by examining cases
that recognize a federal right to control medical decisions.48 The
court interpreted the decision in Roe v. Wade49 to stand for the
principle that the right of a woman to control fundamental decisions
involving her own body is grounded in the fourteenth amendment’s
due process clause.50 Although the right of privacy is not absolute
and must be balanced against important state interests, the court
found that the basis of this right is in the principle of personal au-
tonomy.51 Similarly, the court interpreted decisions involving the
use of contraceptives,52 mandatory sterilization of habitual
criminals,53 abortion legislation,54 and state legislation enacted to

47. Id. at 585.
48. Id.
49. 410 U.S. 113 (1973). In invalidating state abortion prohibitions, the Court
found that the right of privacy is founded in the fourteenth amendment’s concept
of personal liberty. Id. at 153. Furthermore, although the exercising of this right is sub-
ject to important state interests, it is broad enough to encompass a woman’s freedom
to decide whether to terminate her pregnancy. Id.
51. Id.
52. See Griswold v. Connecticut, 381 U.S. 479 (1965) (invalidating statutes
prohibiting the use of contraceptives).
court found that this case implicated the right to privacy by protecting the right to
control medical decisions affecting one’s body. Gray, 697 F. Supp. at 585. However, in
holding that the Oklahoma sterilization statute violates the equal protection clause of
the fourteenth amendment, the Skinner Court emphasized that the Oklahoma Act
involves one of the basic and fundamental rights of man — marriage and procreation.
Skinner, 316 U.S. at 541. This concept later became the basis for finding the right to
privacy which the Court used to invalidate Connecticut’s statute prohibiting the use

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erally outweigh any state interests, and a patient does not lose this right upon becom-
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Skinner, 316 U.S. at 541. This concept later became the basis for finding the right to
privacy which the Court used to invalidate Connecticut’s statute prohibiting the use

discourage abortions\textsuperscript{56} as reaffirming the general principles set forth in \textit{Roe}.

The \textit{Gray} court next distinguished the recent case of \textit{Bowers v. Hardwick},\textsuperscript{57} in which the United States Supreme Court upheld a Georgia statute criminalizing consensual sodomy.\textsuperscript{58} The court in \textit{Gray} found that the Supreme Court limited the interpretation of privacy rights to include only those personal decisions that are "deeply rooted in this Nation's history and tradition."\textsuperscript{59} The \textit{Gray} court reasoned that since the right to control medical decisions is fundamental,\textsuperscript{60} the right of privacy must include Mrs. Gray's right to refuse food and water.\textsuperscript{61} The court further found that the right to control medical decisions was more analogous to decisions concerning abortions and contraceptives\textsuperscript{62} than to the claimed constitutional
right to engage in consensual homosexual acts. Therefore, the court found that the right to privacy protected Mrs. Gray's right to refuse life-sustaining medical treatment.

The Gray court next found that other courts have found no analytical difference between artificial feeding and other life-support measures. In support of this position, the court cited cases which allowed the removal of nutrition and hydration. Therefore, the court found that Marcia Gray's right to refuse treatment included the right to have the G-tube removed.

The Gray court further held that the right to refuse medical treatment extended equally to both competent and incompetent patients. In addition to citing precedent supporting an incompetent's right to refuse medical treatment, the court examined the use of the substituted judgment analysis that would allow the patient to exercise this right. The court went on to hold that the evidence in this case clearly supported a finding that Marcia Gray, if competent, would refuse life sustaining medical treatment.

The court next examined the competing governmental and state interests. In Roe, the United States Supreme Court held that, because no privacy right is absolute, courts must balance the right of the individual against the competing state interests. The governmental interests at stake included: "the preservation of life, the pre-
vention of suicide, the protection of innocent third parties, and the integrity of medical ethics.\textsuperscript{73} The \textit{Gray} court conceded that the preservation of life is the greatest governmental interest.\textsuperscript{74} However, the court reasoned that governmental interests do not override an individual’s interest when the individual is in a situation which he would feel degrades his humanity.\textsuperscript{75} Therefore, because artificial feeding is the type of intrusive treatment that can demean or de-grade an individual’s humanity, the individual’s interest is paramount to any governmental interest.\textsuperscript{76}

In addition, the \textit{Gray} court found there were no interests which overrode Mrs. Gray’s right to privacy. The court found that the interest of the state in preventing suicide was not implicated in this case.\textsuperscript{77} It also determined that innocent third parties, consisting of the patient’s dependents,\textsuperscript{78} were sufficiently protected because all of Marcia Gray’s dependents have sought and endorsed Marcia’s right to terminate treatment.\textsuperscript{79} The court further decided that maintaining the integrity of medical ethics was not such a substantial interest so as to justify overriding Mrs. Gray’s wishes.\textsuperscript{80} Furthermore, because both case law\textsuperscript{81} and Rhode Island law\textsuperscript{82} recognize that a

\textsuperscript{73} \textit{Gray}, 697 F. Supp. at 588.
\textsuperscript{74} \textit{Id.}
\textsuperscript{75} \textit{Id.}, citing \textit{Brophy v. New England Sinai Hosp., Inc.}, 398 Mass. 417, 497 N.E.2d 626 (1986). Paul Brophy existed in a persistent vegetative state after suffering a rupture of an aneurysm. \textit{Brophy}, 398 Mass. at 421, 497 N.E.2d at 628. Brophy was dependent upon a G-tube for nourishment. \textit{Id.} at 425, 497 N.E.2d at 630. The court noted that nothing medical regulates the process of digesting food. \textit{Id.} at 426, 497 N.E.2d at 631. The G-tube merely allows the food to get to the stomach without requiring the patient to swallow. \textit{Id.} In allowing the G-tube to be removed, the court espoused the self-determination theory of privacy. \textit{Id.} at 430, 497 N.E.2d at 633. Furthermore, the state’s interest in preserving life did not override Brophy’s right to refuse treatment because his affliction was not curable and the treatment was intrusive. \textit{Id.} at 435-39, 497 N.E.2d at 636-38.
\textsuperscript{76} \textit{Gray}, 697 F. Supp. at 588-89, citing \textit{Brophy}, 398 Mass. at 434, 497 N.E.2d at 635 (as a matter of law, maintenance of patient on G-tube is intrusive treatment).
\textsuperscript{77} \textit{Gray}, 697 F. Supp. at 589. Another court examining a patient’s right to refuse life-sustaining medical treatment drew a distinction between deliberately ending a life by artificial means and allowing nature to take its course. See \textit{id.} (interpreting \textit{Tune v. Walter Reed Army Medical Hosp.}, 602 F. Supp. 1452 (D. D.C. 1985) (competent adult patient at federal medical facility had right to have life-support apparatus removed, and removal of patient’s life support system does not constitute suicide)).
\textsuperscript{79} \textit{Gray}, 697 F. Supp. at 589.
\textsuperscript{80} \textit{Id.}
\textsuperscript{82} Rhode Island’s law reads: “The patient shall have the right to refuse any treatment by the health care facility to the extent permitted by law.” R.I. GEN. LAWS § 23-17-19.1(4)(1986).
patient determines what medical treatment to accept and what treatment to refuse,\textsuperscript{83} there were no state interests that could over-ride Mrs. Gray's right to refuse medical treatment.\textsuperscript{84} Consequently, because the court found that Rhode Island legislation\textsuperscript{85} and case law\textsuperscript{86} guarantee a patient the right to refuse medical treatment,\textsuperscript{87} the Rhode Island Medical Center was obligated to either promptly transfer Mrs. Gray to another institution or comply with her wishes.\textsuperscript{88}

Every medical situation is unique; therefore, courts must tread carefully when making life and death decisions for incompetent patients.\textsuperscript{89} The cessation of feeding does not merely allow a patient to die from the underlying disease, but rather, directly causes the death of the patient.\textsuperscript{90} Due to the severity of Mrs. Gray's condition,

\begin{itemize}
  \item \textsuperscript{83} Gray, 697 F. Supp. at 589.
  \item \textsuperscript{84} Id. at 590.
  \item \textsuperscript{85} See R.I. GEN. LAWS § 23-17-19.1(4)(1985).
  \item \textsuperscript{86} Gray, 697 F. Supp. at 590, citing, In re Jobes, 108 N.J. 394, 529 A.2d 434 (1987). The Jobes court held that the nursing home could not refuse to withdraw artificial feeding because the family could not have known that the choice of nursing home was also a choice between medical alternatives. Jobes, 108 N.J. at 425, 529 A.2d at 450. The family was entitled to rely on the nursing home's willingness to defer to their choice of medical treatment. Id.
  \item \textsuperscript{87} Gray, 697 F. Supp. at 590.
  \item \textsuperscript{88} Id. at 591.
  \item \textsuperscript{89} In order to preserve a consensus regarding legal standards, court opinions dealing with these very difficult cases must take into account the authority of physicians to make medical judgments, and the duty of society to insure that patients' rights are protected by sound and ethical medical practice. Horan & Grant, The Legal Aspects of Withdrawing Nourishment, 5 J. L. & MED. 595, 599 (1984). After all, it seems that the rights of those who want to live should be as fiercely protected as the rights of those who want to die.
  \item Because the patient in Cruzan is not terminally ill, the debate is not between life and death, but rather between quality of life and death. See Cruzan v. Harmon, 760 N.W.2d 408, 413 n.6 (Mo. 1988)(en banc), cert. granted, 109 S. Ct. 3240 (1989).
  \item The administration of food and water is more than merely symbolic because the death process from starvation bears no relation to death from the underlying disease. The difficulties in addressing this issue were raised in the dissenting opinions in
and the dim prognosis for recovery, the decision in this case was arguably correct.\textsuperscript{91} However, the Gray court's analysis was flawed.

Brophy v. New England Sinai Hosp., Inc., 398 Mass. 417, 497 N.E.2d 626 (1986). Three dissenting justices argued that food and water were not medical care:

> The court has built its entire case on an outrageously erroneous premise, i.e., food and liquids are medical treatment. The issue is not whether the tube should be inserted but whether food should be given through the tube. The process of feeding is simply not medical treatment and is not invasive . . . . Food and water are basic human needs.

\textit{Id.} at 442, 497 N.E.2d at 640 (Nolan, J., dissenting). The issue is not whether courts should endorse the refusal of food and water, but rather how this decision is to be made. The result must include a realization of the actual consequences as it affects the medical profession, society and the patient.

11. Other courts have required a stricter review of the patient's wishes. See generally In re Jobes, 108 N.J. 394, 529 A.2d 434 (1987) (statements made while competent were deemed unreliable because they were remote, general, spontaneous and made in casual circumstances); Westchester County Med. Ctr. v. Hall, 72 N.Y.2d 517, 531 N.E.2d 607 (1988) (statements made by competent patient that she would refuse life-sustaining treatment found to be too remote to allow cessation of treatment). Informed consent assumes the patient is aware of the risks of treatment, risks of non-treatment and available alternatives. Hirsch & Cuneo, \textit{Who Shall Live, Who Shall Die. Who Decides?}, 5 MED. & L. 111, 113 (1986). A statement made by a competent, healthy person as to how they would feel if confronted by a life-threatening disease should not be considered to be an informed decision. See Beschle, \textit{infra} note 41, at 344-45. See also Smith, \textit{In re Quinlan. Defining the Basis for Terminating Life Support Under the Right of Privacy}, 12 TULSA L.J. 150, 161 (1976) (permitting a guardian to make personal medical decisions for an incompetent patient actually interferes with the patient's right of privacy).

The Gray court should have applied an objective, quantifiable test to determine what treatment was in the best interest of Mrs. Gray. For example, the Conroy court propounded three tests to guide courts in making these types of medical decisions. See \textit{In re Conroy}, 98 N.J. 321, 486 A.2d 1209 (1985). Specifically, Claire Conroy's guardian sought permission to remove her nasogastric feeding tube. \textit{Id.} at 335, 486 A.2d at 1213. The first test, known as the subjective test, allows a guardian to exercise a substituted judgment to refuse medical treatment where there is clear and convincing evidence that the incompetent patient would refuse treatment under the circumstances. \textit{Id.} at 360, 486 A.2d at 1231. In the absence of clear and convincing evidence, the limited objective test should be applied. \textit{Id.} at 365, 486 A.2d at 1231. This test allows life-sustaining treatment to be withdrawn where there is trustworthy evidence that the patient would have refused the treatment, and the burdens of maintaining life outweigh the benefits to the patient. \textit{Id.} In the absence of any evidence of the patient's desires, the pure objective test allows life-sustaining treatment to be withdrawn when the effect of administering such treatment is inhumane due to severe, recurring and unavoidable pain. \textit{Id.} at 366, 486 A.2d at 1232. Although Ms. Conroy died during the pendency of the litigation, the court found that the evidence at trial was inadequate to satisfy any of the three tests, and would have refused to allow cessation of the feeding. \textit{Id.} at 386, 486 A.2d at 1232.

The Conroy court further set forth a list of objective factors to be considered: patient's present level of cognitive functioning; degree of physical pain resulting from the medical condition, treatment, and termination of treatment; degree of dependence and loss of dignity as a result of the condition and treatment; prognosis with and without treatment; various treatment options; and risks and benefits of each of those options. \textit{Id.} at 1285 (Handler, J., concurring in part and dissenting in part). See also Rasmussen v. Fleming, 154 Ariz. 207, 741 P.2d 674 (1987) (best interests standard requires consideration of objective criteria such as relief from suffering, preservation of function and extent of life); Classen, \textit{Substituted Judgment: The Courts Speak for the Speechless}, 5 Misp. & L. 199 (1986) (arguing that a uniform method of decisionmaking is critical to protect incompetent individuals); Comment, \textit{The Right
By misconstruing the Supreme Court's recent privacy decisions, and in light of the most recent Supreme Court privacy decision, the Gray court's ruling extended this right beyond the boundaries the Supreme Court had previously enunciated, and did so without providing guidance for future courts faced with analogous factual situations.

While courts have found the right to privacy to be grounded in the Constitution, this right is elusive and has escaped any firm definition. In an effort to explain the basis for this right, courts have advanced two divergent theories. One theory is that the right to privacy is rooted in the Constitution, while the other suggests that the right is grounded in the Bill of Rights. The Supreme Court has not expressly defined the contours of the right to privacy.

92. For cases recognizing a constitutional right to privacy, see supra note 1.


Although the use of phrases like "personal autonomy" and "dignity" have been used to define the limits of the right to privacy, there is not yet any operative definition of privacy. See L. Tribe, American Constitutional Law 1304 (2d ed. 1988).
privacy only encompasses activities that relate to marriage, family or procreation — the type of fundamental rights that are rooted in this country's traditions.\textsuperscript{44} The other theory is that the right to privacy is based on personal autonomy or the right of self-determination in controlling inherently personal decisions.\textsuperscript{46} The personal autonomy theory creates a more expansive view of the privacy right by allowing individuals greater freedom in making decisions that affect society as a whole.\textsuperscript{46} In its most recent privacy decisions, the Supreme Court has rejected the personal autonomy theory as the basis for the privacy right, relying instead on a determination that the state had a sufficient, legitimate interest in the disputed legislation.\textsuperscript{47} However, the requirement that a legitimate governmental purpose must underlie the legislation begs the question of what fac-

\textsuperscript{44} In reversing a lower court's finding that there is a fundamental right to engage in homosexual sodomy, the Court declined to expand the privacy right. Bowers v. Hardwick, 478 U.S. 186, 194 (1986). "The Court is most vulnerable . . . when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution." Id. One of the Court's considerations was that proscriptions against sodomy have ancient roots. Id. at 192.

In Roe, the Court stated that there is not an unlimited right to do with one's body as one pleases because that concept does not bear a close relationship to the right of privacy as previously articulated in the Court's decisions. Roe v. Wade, 410 U.S. 113, 154 (1973). See also Note, On Privacy, supra note 93, at 675-76.

\textsuperscript{45} In Bouvia v. Superior Court, the California appellate court found that a competent, nonterminal patient had a constitutional right to refuse food and water. 179 Cal. App. 3d 1127, 1137, 225 Cal. Rptr. 297, 301 (1986). Elizabeth Bouvia was a twenty-eight year old quadriplegic who had suffered from cerebral palsy since birth. Id. at 1135, Cal. Rptr. at 299. In determining that Ms. Bouvia had a right to refuse nourishment, the court reasoned that a patient's right to consider the quality of their life when making medical decisions was protected under the principle of self-determination. Id. at 1142, 225 Cal. Rptr. at 304.

"The constitutional right to privacy . . . is an expression of the sanctity of individual free choice and self-determination as fundamental constituents of life." Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 737, 370 N.E.2d 417, 426 (1977). Joseph Saikewicz was a profoundly retarded sixty-seven year old suffering from leukemia. Id. at 730, 370 N.E.2d at 420. Chemotherapy was the recommended treatment. Id. The court relied on the self-determination theory of the right to privacy and allowed the guardian to refuse chemotherapy on Joseph's behalf. Id. at 745, 370 N.E.2d at 434.

Some courts have advanced the theory that a constitutional analysis is unnecessary because the common law provides a right of self-determination that encompasses the 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 (1981) (substituted judgment analysis abandoned in favor of exercising common law right); In re Eichner, 102 Misc. 2d 184, 423 N.Y.S.2d 580 (N.Y. Sup. Ct. 1982)(common law right controlling decision to disconnect respirator).

\textsuperscript{46} See generally Collester, Death, Dying and the Law: A Prosecutorial View of the Quinlan Case, 30 Rutgers L. Rev. 304 (1977); Eichbaum, infra note 93, at 362.

\textsuperscript{47} Bowers v. Hardwick, 478 U.S. 186 (1986). In Bowers, the Court specifically based its decision on the fundamental right theory of privacy by finding that consensual homosexual activity could not be protected by the Constitution because this type of activity is not grounded in the fundamental principles of the Constitution, and that the Georgia legislature had the right to prohibit homosexual activity. Id. at 192-94. See also supra note 95 (Court's interpretation of the privacy right).
tors are needed to demonstrate a legitimate purpose. 98

In finding that the right to privacy is grounded in the principle of personal autonomy, the Gray court examined cases recognizing a federal right to control fundamental medical decisions. 99 Because the Gray court found that the central theme in those cases was to protect an individual's dignity, it was logical to extend this same reasoning to a patient in a persistent vegetative state. However, since the Supreme Court, in its recent decision in Bowers v. Hardwick 100 espoused a more restrictive view of the right to privacy, the Gray court had to distinguish the cases on their facts. The Gray court reasoned that because there was a common law right to control medical decisions, 101 the right to refuse life-sustaining treatment must be deeply rooted in the traditions of this country and, therefore, is the fundamental type of activity that the Constitution was designed to protect. 102

Moreover, in an effort to further support its expansive view of the right to privacy, the Gray court erroneously reasoned that because medical decisions were more similar to abortion, contraceptive and surgical decisions, the holding in Bowers would not apply to the right to terminate medical treatment. 103 However, after Bowers, it is unlikely that the determination of whether to starve an incompetent patient would fall under the right to privacy "umbrella of rights." Even though it is an intensely personal decision, that fact alone is not enough to bring it within the protections of privacy.

The Gray court's reasoning is further eroded by the Supreme Court's recent privacy decision in Webster v. Reproductive Health Services, et. al. 104 In that case, the Court determined that Missouri abortion regulations did not violate a woman's right to privacy. 105 By doing so, the Court endorsed legislation that protects a compelling state interest. 106 The Court found that the state interest in protecting the life of a viable fetus is sufficiently compelling to restrict

98. L. Tribe, supra note 93, at 1306-09.
100. For a discussion of the Bowers decision, see supra notes 94 and 97.
101. For cases holding that the right to privacy is grounded in the common law, see supra note 93.
103. Id. The contraception, abortion and surgical decisions upheld by the Court as protected under the privacy right are extremely personal and the consequences of such decisions may be life or death. Id. Therefore, the Court reasoned that because refusing medical treatment that will certainly result in one's death is also a personal decision with serious consequences, it is encompassed by the personal autonomy aspect of the right to privacy. Id.
105. Id. at 3056.
106. Id. at 3057.
the availability of public funds for abortions.\textsuperscript{107} The logical application of this conclusion to \textit{Gray} is that even if withdrawal of nutrition was analyzed under a privacy framework, the state interest in an adult person would be sufficiently compelling to require the patient to be fed. The \textit{Gray} court has, in essence, created the type of judge-made constitutional law specifically prohibited by the Court in \textit{Bowers}.\textsuperscript{108}

The recent Supreme Court decisions show a trend toward more narrow interpretations of the right to privacy.\textsuperscript{109} The issue is unresolved as to whether the right to refuse nutrition and hydration is encompassed in this more limited view of the privacy right.\textsuperscript{110} However, the potential protection of this right must be analyzed under the proper legal framework: whether the right to refuse nutrition and hydration has “cognizable roots in the language or design of the

\textsuperscript{107}. \textit{Id.}
\textsuperscript{108}. \textit{Bowers v. Hardwick}, 478 U.S. 186 (1986). Courts should resist expanding the substantive reach of the right of privacy, particularly if the result would redefine the category of rights deemed to be fundamental. \textit{Id.} at 195. \textit{See also} \textit{Roe v. Wade}, 410 U.S. 113, 154 (1973) (Court rejects most-expansive view of privacy that would create unlimited right to control one’s body).

The language limiting the privacy right in \textit{Roe} is not an aberration. \textit{See Cruzan v. Harmon}, 760 S.W.2d 408, 418, \textit{cert. granted}, 109 S. Ct. 3240 (1989). In fact, the most recent Supreme Court case resisted expanding the privacy right beyond the common theme of procreation and relationships within the marriage bonds. \textit{See Bowers v. Hardwick}, 478 U.S. 186 (1986). It seems, therefore, very doubtful that the privacy right encompasses decisions to terminate nourishment to a comatose patient.

\textsuperscript{109}. \textit{Webster}, 109 S. Ct. at 3057; \textit{Bowers}, 478 U.S. at 186. \textit{See also} \textit{Thornburgh v. American College of Obstetricians \\& Gynecologists}, 476 U.S. 747, 771-72 (1986) (statutes regulating abortions held invalid as violating right to privacy as it exists within the limits specified by \textit{Roe}); \textit{Moore v. City of East Cleveland}, 431 U.S. 494, 501-03 (1977) (Constitution protects sanctity of the family because the family is an institution deeply rooted in history and tradition); \textit{Roe v. Wade}, 410 U.S. 113, 154 (1973) (upholding privacy right in order to seek some abortions); \textit{Comment, Suicidal Competence}, supra note 90, at 723.

\textsuperscript{110}. A patient’s refusal, by his or her guardian, of nutrition certainly will result in death, but removal of a respirator may or may not result in death depending on the patient’s condition. In refusing to terminate blood transfusions, one court found that the transfusions were analogous to food in that they would not cure the underlying disease, but the transfusions did eliminate the risk of death from another treatable cause. \textit{See In re Storar}, 52 N.Y.S.2d 363, 420 N.E.2d 64, 73 (1981).

In a case very similar to \textit{Storar}, another court denied the guardian’s petition to remove nutrition and hydration. \textit{See Cruzan v. Harmon}, 760 S.W.2d 408, 413 n.6 (Mo. 1988)(en banc), \textit{cert. granted}, 109 S. Ct. 3240 (1989). The court specifically noted that the patient is not terminally ill and that her death is imminent only if she is denied food and water. \textit{Id.} at 419. Furthermore, the court said it must tread carefully to protect those incompetent persons whose wishes would be to continue treatment. \textit{Id.}

If a court accepts the idea that food and water are medical treatments that can be refused, the next step, of course, would be to end life in a less painful way. Horan \& Grant, supra note 89, at 631-32; \textit{Comment, Suicidal Competence}, supra note 90 at 735-43; \textit{Note, Voluntary Active Euthanasia for the Terminally Ill and the Constitutional Right to Privacy}, 69 \textit{CORNELL L. REV.} 363 (1984) (arguing that the right of privacy extends to individuals whose assistance is necessary to help competent terminal patients end their lives).
Constitution."

The trend in recent cases concerning the terminally ill or coma
tose patients is to protect their rights to refuse medical treatment
under the Constitutional privacy protections. However, this issue
will not truly be resolved until it is addressed by the Supreme
Court. The right to privacy is only defined by the Supreme
Court's interpretations of the Constitution, and the current trend of
the Court is to restrict the parameters of this right.

Consequently, lower courts, like the district court which decided
Gray, should not expand the right to privacy beyond the Supreme
Court's restrictive view. The decision in Gray does exactly that.
Gray goes beyond the restrictive view because it is doubtful that the
right to terminate food and water would even be protected under
the right to privacy. Furthermore, even if it were classified under
the privacy umbrella, the Supreme Court's recent trend, especially
in light of Webster, suggests that the government's interest would
outweigh the individual's right to privacy as it applies to starvation
of a comatose patient.

Because of advancements in medical technology, this issue will
confront state courts with increasing regularity. State courts can
only evaluate these issues within the Supreme Court's decisions.
Therefore, it is imperative that the Supreme Court's future privacy
decisions more clearly define the parameters of the right to privacy.
Absent this type of guidance, this Constitutionally-based right will
be defined by the varying views of lower courts.

Donna L. Marks

111. Bowers, 478 U.S. at 194.

112. Courts viewing nutrition and hydration as medical treatment have equated
artificial feeding with artificial respiration in that both procedures merely prolong the
moment of death. See generally Dello v. Westchester County Medical Center, 129
Superior Ct., 147 Cal. App. 3d 1006, 195 Cal. Rptr. 484 (1983). The patients involved
in those cases were in persistent vegetative states; there were no chances that they
would return to cognitive states. Therefore, food would not have cured them, but only
would have delayed their deaths.

113. The U.S. Supreme Court may soon address this issue because it granted
certiorari to review a similar case. See Cruzan v. Harmon, 760 N.W.2d 408, 413 n.6