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THE PHILOSOPHY OF PERSONAL IDENTITY AND
THE LIFE AND DEATH CASES

LINDA R. HIRSHMAN*

"Consume my heart away;
Sickened with desire and fastened to a dying animal."

W.B. Yeats: Sailing to Byzantium

On April 15, 1975, Karen Quinlan stopped breathing. At the time of the trial on her father's petition for guardianship, she was comatose and in a state medical experts call "vegetative." As the court acknowledged, "the quality of her feeling impulses is unknown." According to the best evidence available at the time, she could "never be restored to cognitive or sapient life." The situation arose, because medical technology had progressed to the point where "you can in fact start to replace anything outside of the brain to maintain something that is irreversibly damaged."

Fifteen years later, in *Cruzan v. Missouri* the Supreme Court of the United States issued its first decision on this compelling and controversial issue. By a sharply divided vote (three justices in the opinion of the court, with a majority formed by two concurring opinions, depending most importantly on the tentative and moderating opinion of Justice O'Connor), the Court ruled that the right to liberty in the Constitution did not invalidate a state law requirement that an incompetent patient's intent to be withdrawn from life support must be proved by clear and convincing evidence. The Court stopped short of interpreting the Constitution to be silent on the subject of the private right to die, and Justice O'Connor's pivotal concurring opinion made explicit her support for such a right, at least if embodied in a rigorously directive written docu-

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2. Id. at 655.
3. Id.
4. Id. (emphasis omitted).
5. Id. at 652 n.2.
7. Id.
8. Id. at 2851 n.7. This hesitation was the subject of Justice Scalia's separate opinion, which would rule out the constitutional claim altogether. Id. at 2859 (Scalia, J., concurring).
ment, such as a living will.\(^9\)

As the *Quinlan* opinion reflected, medical technology had come to a point where one might expect a steady stream of such cases, and the years between *Quinlan* in 1976 and *Cruzan* in 1990 were filled with them.\(^10\) Much has been written about these issues from the standpoint of positive law and constitutional theory.\(^11\) I wish to examine the problem and to use the compelling and revealing facts in some of the cases and opinions, but this time through the metaphysical lens of various philosophies of personal identity.

The main contemporary approaches to personal identity fall generally into three overlapping, but distinguishable, categories. The first group emphasizes psychological connectedness as personal identity.\(^12\) The discussions around this theory explore the ways in which the seeming impermeability of the individual human identity is illusory; instead, identity consists of the relationships among a brain, a body and a series of events. Parfit fills in this theory with examples such as the split brain patients\(^13\) and the fragility of identity over a human lifetime.\(^14\) I will categorize this position, for historical and structural reasons, as a variant of utilitarianism.\(^15\) The second category, which emphasizes the centrality of the separate individual will in personal identity, I will call Kantian.\(^16\) The third approach, which is most cogently set forth in the works of Charles Taylor and Alasdair MacIntyre, proposes that human identity

\(^9\) Id. at 2856 (O'Connor, J., concurring).
\(^12\) *DEREK PARFIT, REASONS AND PERSONS* (1984). Parfit is the leading modern expositor of the position that personal identity rests importantly in psychological connectedness and continuity.
\(^13\) Id. at 245. A set of twins is born, one brain dead. The remaining brain is divided between the two. Which is the person?
\(^14\) Id. at 205. While a person today may be strongly connected to his psychological experience yesterday, the same cannot be said usually for twenty years ago. Is Methuselah the same person he was 800 years ago?
can be best understood in a mixture of connectedness and autonomy, using metaphors of narrative and community frameworks for human identity.\textsuperscript{17}

The \textit{Quinlan} problem,\textsuperscript{18} which involves vegetative patients without pain or cognitive life, compellingly presents the question of the identity of persons, and it does so without invoking any of the science fiction objections to the more far-fetched of the philosophical thought experiments.\textsuperscript{19} Conversely, insights from the philosophical learning should help to illuminate the moral and legal questions posed by such patients. I will use the cases, which involve patients without apparent pain, but with ambiguous will regarding termination, as an experiment to exemplify the strengths and weaknesses of the main schools of thought about personal identity. I will try to probe the theories with two additional fact patterns: first, I will imagine a hypothetical patient who cannot reason but can experience pain, and who left an explicit previous directive not to stay on life support machinery. Second, I will examine the situation of a patient, with no reason and no sensations, but a compelling living will to stay on life support.

Next, I will examine the extent to which the legal doctrine, particularly as embedded in the two leading cases, \textit{Quinlan} and \textit{Cruzan}, is a product of inadequately understood intuitions about personal identity—intuitions which, lacking real analytic power, are clumsily producing wrong answers. (The wrongness of the answers are nonetheless interesting, for what they reveal about the assumptions and inadequacies of the theories they manifest.) Finally, I will propose that the \textit{Quinlan} cases can be best handled by a variation of the narrative theories of personal identity. This solution does, however, entail the perverse consequence that the legal system will have a much reduced role in deciding these matters.

\textsuperscript{17} Charles Taylor, \textit{Sources of the Self} (1989); Alasdair MacIntyre, \textit{After Virtue: A Study in Moral Theory} (1981).

\textsuperscript{18} I will not adopt the terminology of the “right to die,” which so powerfully incorporates Kantian notions of rights and natural rights and individual natural rights as to blind the reader to alternative paradigms. See, e.g., Taylor, \textit{supra} note 17, at 12:

To talk of universal, natural, or human rights is to connect respect for human life and integrity with the notions of autonomy. It is to conceive people as active cooperators in establishing and ensuring the respect which is due them. And this expresses a central feature of the modern Western moral outlook.

Similarly, I will call the subjects of consideration “patients,” rather than the weighted “persons” or “subjects.”

I. THE ANSWERS AVAILABLE

A. The do/allow distinction

At the time of Karen Quinlan's coma, the positive law of the state of New Jersey provided that "the unlawful killing of another human being is criminal homicide." In addition to the requested guardianship, Joseph Quinlan asked that the local prosecutor be enjoined from prosecuting him for this offense. Both his requests were opposed by the prosecutor, the neurologist in charge, the hospital, the state, and the court-appointed interim guardian of Karen Quinlan's person.

One possible way to resolve the issue was, of course, to invoke the well-established distinction in morality and in criminal law between doing and allowing. This distinction has long supported, for example, doctors' orders of DNR (do not resuscitate) in cases where painful and imminently fatal disease is apparent before the life support machinery is invoked. However, in Quinlan's case and many that have arisen since, the testimony was unequivocal: "[N]o physician would have failed to provide respirator support at the outset..." After that act, of course, resort to the do/allow distinction would be difficult. Nonetheless, medical and legal authorities lingered for a while around the possibility of categorizing life support as "extraordinary," such that even its withdrawal could be classified as merely allowing the ordinary to occur, with "doing" restricted to interfering with the ordinary course of nature. However, distinguishing between ordinary and extraordinary proved impractical, as various kinds of care form a continuum and depend on what the authorities are seeking to accomplish in the particular case, which, in turn, raises the ultimate question anyway. Moreover, a lot of cases simply involved feeding and liquids, which compellingly resemble the unsailably ordinary. In such cases, there could be no resort to the fiction that the patient died of the underlying cause. He or she would starve to death. Thus, there could be no refuge in an easy rule like "you can al-

21. Id. at 653.
24. Id.
26. Id. See also Quinlan, 355 A. 2d at 668. ("One would have to consider that the use of the same respirator or life support could be considered 'ordinary' in the context of the possibly curable patient but 'extraordinary' in the context of the forced sustaining by cardio-respiratory processes of an irreversibly doomed patient.")
ways disconnect a respirator."\(^{27}\)

Accordingly, the legal system has been compelled to confront—if not to address in any systematic way—the fundamental issue of personhood. Actually, there are at least two legal issues packed together as the cases come up. One is whether the patient is still a person, such that the protections embodied in the criminal law should, or do, by definition apply. The second is whether the patient’s personhood is such that the protections of life embodied in the criminal law should not apply, either on its own terms or because different and preemptive legal protections of personhood—for example, constitutional privacy doctrine—trump its application. Each of these questions involves fundamental issues of personhood, which the philosophy of personal identity should at least illuminate, if not answer.

B. *The person as the human body, or part of it*

One possible approach is to interpret the law broadly to protect all human bodies. The New Jersey law in *Quinlan*, for instance, speaks of “human beings,” not persons.\(^ {28}\) This approach can be divided at least once again. One is that living human bodies are sufficient for personhood; thus the problem does not arise. This “vitalism,” as it is called, requires the protection of life at all costs. As many commentators have noticed, if one adopts the vitalist position, one is committed to the preservation for decades of “anencephalic infants, permanently unconscious, with only cardiac, respiratory and excretory functions.”\(^ {29}\)

Although vitalists certainly exist in the public square, most of the serious discussion of the issues acknowledge that a living human body like that of an anencephalic infant is not sufficient to ring in the concerns the cases reflect.\(^ {30}\) In part, this goes back to ancient philosophy, which rested heavily on the distinctions between the functions of species. Like all living things, people come in living bodies; the living body is not distinctive. But even philosophies like Kantianism, self-consciously removed from the classical tradition, rest on some concept of human uniqueness—in Kant’s case the preeminence of the free will. Similarly, it is some such category of qualities that distinguish persons from bodies, even human bodies.

The second defense of a law extending to all human bodies is more

\(^{27}\) *Cruzan*, 110 S. Ct. at 2861 (Scalia, J., concurring).

\(^{28}\) *Quinlan*, 355 A.2d at 669.


\(^{30}\) See, e.g., Quinn, *supra* note 25, at 927 n.169; Rhoden, *supra* note 29.
prudential than definitional. Proponents would defend such an interpretation on the ground, for example, of concern about the slippery slope, so that mistakes about personhood do not wind up costing patients at the margins their lives or so that indifference to survival doesn't lead to neglect or assault on beings who are unassailably persons. Even setting aside the positivist question of legal construction, both utilitarian and Kantianism analyses may be invoked to support the overprotection of life; utilitarianism as a rule of thumb, because of the difficulty of judging in a particular case, and Kantianism because even suicide on grounds of future pain or loss is immoral as unimaginable under a law of nature.

Although it would obviate the need for an understanding of personhood in the context of these cases at the positivist level, prudential vitalism cannot legitimate such laws, because this argument still leaves unanswered an important part of the philosophical question of whether there is something about humans that makes them worth overprotecting. If there is some such thing, and if, in the Quinlan state, that "thing" is not perfectly congruent with the body, the argument for protecting the human body as a condition precedent for personhood is simply reduced to a risk assessment.

In modern philosophy, the thought experiments about organ transplants generate the strong intuition that not only is the body not sufficient, but all of the body is not even necessary for personhood. Insofar as any body part is necessary, the strongest intuition is for that part of the body which is the brain, because it is difficult to imagine surviving a whole human brain transplant with one's personhood intact.

But one can go further with the thought experiments and contemplate the possibility that even the whole brain isn't necessary to personhood, as in, for example, surgery that affects one's right-handedness

31. Quinn, supra note 25, at n.37 and 927-8 (citing sources).
33. Immanuel Kant, Groundwork For A Metaphysics Of Morals 422 (H.J. Paton trans., 1964). Upon closer examination, the Kantian argument turns out to be prudential as well. This is so because the impossibility of loss minimizing suicide is extremely questionable, unless one envisions such suicide as weakening some sort of separate life force. Otherwise, such suicide may keep the population down, but it doesn't wipe it out.
34. Here, the facts in the actual case are instructive: "She can never be restored to cognitive or sapient life." Quinlan, 355 A.2d at 655 (emphasis omitted). At that level of improbability, gambling on medical miracles would essentially collapse into the slippery slope argument.
35. If human bodies were necessary and sufficient for personhood, the whole field of personal identity would be reduced. One might interestingly address questions of burial for fingernail clippings, etc., but issues of identity over time, multiple personalities, consciousness, and self-creation would all be avoided.
or some such function, or even that which produces mild aphasia. Indeed, Quinlan and the others are only dead as to the sapient and cognitive functions. Their brains are still able to maintain vegetative functions. The answer here might be that a person is some minimum of the thinking aspects of the higher brain, allocating the vegetative functions to the body, as described above. Under this analysis, a person might be more than the thinking brain, but it certainly no less. If a person is minimally the thinking brain, patients like Quinlan would not be covered by the homicide statute, and these difficult-seeming cases would be easy.37

We can test this intuition by asking whether there is any circumstance or any theoretical construct which would cause us to hesitate to disconnect someone in Quinlan's position—a body, but not a thinking brain—from artificial life-support systems. Here, I think, the two thought experiments may do some work: one, if the patient were to experience profound physical pain upon dying, despite being unable to think or reason about it; second, if the patient, while facing no pain, had expressed when conscious a strong commitment to living as long as technology allowed, say, for example, in hope of new medical developments. Although these cases may not, in the end, be decided differently under theories other than the thinking brain theory, the hesitation at pulling the plug in either hypothetical case should at least cause us to doubt the strength of this, simplest, answer. What do the other theories say about these and the actual cases?

C. Utilitarianism and utilitarian theories of personal identity

Utilitarianism, with its teleological and hedonic underpinnings, protects physical well-being to the extent not outweighed by competing well-being. Thus, for example, many utilitarians have in recent years come to varying positions of vegetarianism, based on the capacity of other species to feel pain.38 One might infer, therefore, that utilitarians would support application of the criminal law to protect patients in the position of Karen Quinlan, on grounds of their possession of a body with a capacity to suffer at death and on their loss of future pleasures.

But the protections of utilitarianism, though broad, are not deep. Thus, Quinlan's speculative pain would be discounted by her lack of response to painful stimuli and the absence of hope of future pleasure; the possibility of her future suffering and the suffering of her family and

37. Quinlan, 355 A.2d at 656 (citing Ad Hoc Committee of the Harvard Medical School, 205 J. AM. MED. ASS'N 337, 339 (1968)).
others implicated in her status would weigh against her continued life in the utilitarian calculus.39

Of course the patient's naturally anesthetized state makes this a much easier case for utilitarianism; one would anticipate a much harder calculus in the case set forth above of a speechless, non-cognitive, but unassailably physically sensible human.40 One utilitarian approach would simply be to balance the pain to others against the pain to the subject. Wealth-maximizing variants of utilitarianism might justify disconnection here, if only one could be sure of the patient's own will was to be cut off, and that is the most accurate measurement of the relative pain and pleasure.41 This approach has the additional appeal of reassuring people that commitments to them will be kept, invoking the social peace of mind argument.42

The hard problem for the utilitarian approach is, of course, the vegetative patient who will not suffer but who had expressed a desire not to be disconnected. Here, again, one move available to utilitarian theories of personhood might be that people would not be disconnected against their previous wishes under utilitarianism, because people would suffer pain anticipating that their wishes at death would not be honored. Critics of utilitarianism might make the countermove of weighing more heavily the costs of maintaining the patient against the generalized anxiety of future hemlock.

These hedonic arguments pretty much come to deadlock on the measuring problem, but the more complex and subtler utilitarian approach to personal identity articulated by Derek Parfit does weigh in on the side of terminating the pro-life vegetative patient, in part by removing the arguments of the wealth-maximizers. This is so because, according to Parfit, if utilitarianism must weigh personhood beyond the body and if personhood is linked somehow to consciousness, people evolve over their lives, until the person at any given time is but remotely, if at all, related to the possessor of experiences that was the past self.43 This is most graphically illustrated by the example of people aging and losing the memories they had of their own past lives; who alive thinks of himself or

39. For a thorough review of the direct utilitarian analysis, see James Lindgren, Death by Default, 57 LAW & CONTEMP. PROB. (forthcoming 1993).

40. The possibility of compelling claims to disconnect even in this scenario is, of course, what supports the criticism of utilitarianism as producing "utility monsters," but this is well beyond the scope of this paper.

41. RICHARD A. POSNER, THE ECONOMICS OF JUSTICE 107 (1981); Lindgren, supra note 39 (manuscript at 15 n.76).

42. SMART & WILLIAMS, supra note 22, at 62.

43. PARFIT, supra note 12, at 281.
herself as the same “person” at age five or fifteen? Moreover, although
Quinlan and the hypothetical patients were persons in the past, by any
calculation, their present selves are but distantly related to the past
selves—indeed, they may be at the other side of an abrupt break in the
self at the time of their loss of consciousness—and any claims they might
have must be measured in terms of their present reduced selves, not as
the sum of their past lives and desires. Accordingly, the degree of pain
associated with the ignorance of a person’s wishes regarding this future
self should be quite small. Thus, utilitarian theories of personal identity
seem to favor disconnecting the patient.

This outcome graphically illustrates the connection between utilita-
rian metaphysics and ethics. By deconstructing the person into a series
of psychological relationships of continuity (and, as illustrated above,
change), Parfit’s utilitarian metaphysics lighten the weight of the
bounded human individual on the ethical scale at any given time. The
life and death cases show how the claims of other “persons” like family
members and co-citizens then gain relative to the claims of the
individual.

Utilitarianism, is one of the mainstays of the American systems of
tort and criminal law. It is no surprise, then, that “[n]early unani-
mously, . . . courts have found a way to allow persons wishing to die, or
those who seek the death of a ward, to meet the end sought.”

Yet, the various court opinions contain nothing like the bald utilita-
rian analysis. There are two potential explanations for this. First, the
courts may be lying about what they are doing, because the reality is too
threatening to the public moral order. There is some implication of this
in the persistent concern with the slippery slope in both its incarnations,
mistake and indifference. In the alternative, the courts may be strug-

44. Parfit regards this as reason to be sanguine in face of death. After one’s death, someone or
several ones will have pieces of memory of one’s passage across life; they will be different in degree,
rather than in kind, from the self who would survive the replacement of consciousness over years
absent death. Id.

45. See, e.g., WILLIAM M. LANDES & RICHARD A. POSNER: THE ECONOMIC STRUCTURE OF
TORT LAW (1987); RICHARD A. POSNER: ECONOMIC ANALYSIS OF LAW 357 (1st ed. 1972); Paul
H. Rubin, The Economics of Crime, 28 ATLANTA ECON. REV. 38, 41 (1978); George J. Stigler, The

46. Cruzan, 760 S.W.2d at 413.

47. This surfaces whenever discussion of medical triage does. Richard Posner’s economic anal-
ysis of law, which articulates more frankly than most the efficiency calculations about human life
behind, for example, tort law, is often criticized for its cold-bloodedness. Lynne Henderson, Authori-
tarianism and the Rule of Law, 66 IND. L.J. 379 (1991); Richard H. Weisberg, Entering With a
Vengeance: Posner on Law and Literature, 41 STAN. L. REV. 1597 (1989); James B. White, What
Can a Lawyer Learn from Literature?, 102 HARV. L. REV. 2014 (1989); Robin West, Submission,

48. Cruzan, 110 S. Ct. at 2854 (“An erroneous decision to withdraw life-sustaining treatment
gling to articulate an underlying normative commitment, which may produce utilitarian results, but which they believe is more compatible with underlying public moral/political commitments. Since judicial opinions are one way in which social norms are articulated and advanced, an analysis that neglects judicial rhetoric loses a critical aspect of the available material. Moreover, some of the bizarre developments in the evolving legal doctrine can be understood as an unarticulated tug of war between these competing claims on the decision-makers, which are imperfectly understood both at their cores and in their points of conflict and congruence.

D. Autonomy theories of personhood

Most of the opinions in the *Quinlan* cases articulate a norm of the preeminence of the separate individual, exercising conscious, autonomous will. The reasoning goes as follows:

1. A competent, terminally ill patient would be legally protected in a decision to cease life support.
2. There is no basis for discriminating against an incompetent patient in obtaining the same result.
3. Therefore, the only question is in ascertaining "whether she would exercise [her right] in these circumstances.”

In step one of the analysis, the conscious will is deciding to cause the death of the body, including the sapient and cognitive regions of the brain. In honoring that decision, where the legal system would not honor a similar decision simply made by another—for economic reasons—for instance, the legal system tacitly recognizes some superior claim of the conscious will. In *Quinlan*, this conclusion is buttressed by the Court’s placement of the right in the penumbra of the Bill of Rights, which evolved under the rubric the “right to privacy.” From its origins in the not unrelated notions of solitude and secrecy, privacy was early and has recently been revived as protecting “personality,” in the sense of a

... is not susceptible of correction.”); and *id.* at 2859 (Scalia, J. concurring) (“the point at which life becomes ‘worthless’ and the point at which the means necessary to preserve it become ‘extraordinary’ or ‘inappropriate’ are neither set forth in the Constitution nor known to the nine Justices of this Court...”).

49. This idea, and the norm to which the opinions seem so wedded, comes from Kim Scheppele’s study of the common law of legal secrets. KIM L. SCHEPPELE, LEGAL SECRETS (1988).
50. *Id.* at 98-108.
51. *Quinlan*, 355 A.2d at 663-64.
52. *Id.* at 663.
sphere of freedom for individual decision-making adequate to allow a human to develop and enjoy personhood. Not surprisingly, the subjects of choice are clustered closely around the body, the other major contender for the carrier of bounded, individualist personhood. The other privacy decisions include such issues as whether or not to be sterilized, whether to bear or beget a child, certain gross bodily invasions, and how to educate one's children.

Several things flow from this linkage of personhood to the exercise of conscious choice as demonstrated at the time of decision to disconnect. One might reason that, absent such a capacity or the hope of ever recovering the capacity, patients like Karen Quinlan have ceased to be persons, and, although her death should not be compelled, it may be allowed despite the criminal law, as if she were an animal, indeed, less than an animal, because she lacked even the utilitarian claim to feel pain. Thus, in this particular case, the autonomy formulation would support a utilitarian result. But the thought experiment of the non-cognitive patient, with the express desire to stay on life support, illustrates that strictly construing personhood as the capacity for present conscious choice might allow ignoring the past expressions of choice, which, in turn, depends on weakening the claim to continuity of personhood over time. This exercise thus reveals interestingly the importance to the choice/autonomy theories of the temporal continuity that Parfit attacks.

One might come to a different result, however, without resolving the temporal identity debate, by arguing that the choice theory of personhood allows for the primacy of the capacity for conscious choice in defining personhood, but not its hegemony. It would follow, therefore, that only a conscious choice can operate to terminate the body's life. Unless such a choice is made when possible, the accidental loss of higher choice functions would not suffice to allow disconnection. This primacy formulation is more consistent with the retreat from mind/body dualism in modern philosophy of personal identity. This is so, because the decision under this formulation to cut off life support would indeed be self-inflicted death, involving without distinction both the mind, and the


brain, representing the body (assuming the mind and body are at least minimally distinct), operating without distinction at the time of the decision. However, once ascertained, the primacy of conscious choice would dictate—not merely allow—following the choice to discontinue life support, because it would tie into personhood as a constitutional trump. Within this second formulation, the system would pursue evidence of the patient's choice, and what factors are allowed to play a role would reflect more aspects of the kind of choice thus powerfully linked with personhood.

Under the respect for conscious choice formulation, the presence or absence of pain in the first problem case should be of no moment in the decision. Given adequately explicit choice, the patient should be disconnected. Thus, both autonomy formulations produce the same result in this instance; the problems with the outcome lie in the willingness to participate in the infliction of pain in the interest of autonomy and the willingness to bear social costs in the form of hardening of the sensibilities about such an act. On the other hand, contrary to the hegemony of autonomy formulation, under the primacy of autonomy theory, the patient with the explicit instruction not to disconnect would be maintained.

As set forth above, the cases have not involved a substantial likelihood of pain associated with termination of life support. Interestingly, none of the cases has involved an express will to stay on life support, either, although last year the media reported a case where a spouse was claiming to know the patient's will to do so. The hardest cases the system has had to face are what to do with silence or ambiguity regarding the patient's desires. But the above exercise of considering those cases has revealed some of the stress points in both of the formulations: the utilitarian producing problematical results in the case of ignoring the explicit directive to maintain at all costs, and the autonomy formulation producing similarly problematical results in the case of participating in the willed painful death.

61. Id.
62. Interestingly, Sartre's theory of personal identity, involving the possibility of radical reformulation of self at any time, fits either outcome (he should like that). Under Sartre's formulation, no past indication of will should be informative of what the incompetent patient would do. Donald Beschle has articulated this insight at greater length. Donald L. Beschle, Autonomous Decisionmaking and Social Choice: Examining the "Right to Die," 77 Ky. L. J. 319, 344 (1989). On the other hand, lacking the capacity to reformulate one's self radically ever again, Sartre might consider the person already dead. Finally, since being includes nothingness, maybe someone in a persistent vegetative state is a complete person under Sartre's theory.
63. This is the argument against the death penalty, for instance.
64. Judy Mann, When The Hospital Sues to Pull the Plug, WASH. POST, May 31, 1991, at 83. The patient died naturally three days later.
II. Legal Doctrine

As set forth above, since the landmark decision in the *Quinlan* case finding a "right to die" in the penumbras of the Bill of Rights, the American legal system has, by and large, articulated the primacy of autonomous choice analysis, purporting to scan the record of the patient's past life for indications of what he or she would do at present.\(^6\) Legislatures followed suit, enacting statutes allowing the execution of a living will, which dictates or restricts allowable treatment in various contingencies.\(^6\) Several states also legislated authority for a durable power of attorney, designating a person to make such decisions in the event of incompetency.\(^6\)

In this context, it is interesting to note that the plurality opinion in *Cruzan* explicitly refuses to endorse the concept of a "right of privacy,"\(^6\) choosing to call the constitutional protection (if any) "liberty."\(^6\) In the trench warfare over the meaning of the Bill of Rights, particularly the "penumbral" protections that have evolved over the rubric of privacy, "liberty" stands for a thin protection, little greater than physical freedom and self-determination,\(^7\) and, unlike the concept of privacy, not nearly as dependent for its meaning on the necessary appurtenances of full personhood. As thus articulated, the "liberty" concept may stretch to a narrow understanding of conscious choice, but it certainly is no greater.

In any case, even these apparent commitments to honoring the individual's will fall short of an ideal of pure personal choice. First, any such effort suffers from the epistemological problem of knowing from past behavior what the person's present wishes are. Under either the existential or the utilitarian theories of personal identity, even the most compelling living will or well-established statement of intent may be seen as seeking to bind a self only problematically related to the speaker.\(^7\) But, more interestingly, the legal system, whether the legislature or the courts, whether state common law courts or federal courts interpreting the U.S. Constitution, has consistently put its finger on the scale when allegedly attempting to ascertain the free choice of its autonomous subjects.

\(^{66}\) *Quinlan*, 355 A.2d at 664 (family and physicians to decide what patient would wish); see also *In re Peter*, 529 A.2d 419 (N.J. 1987); *In re Conroy*, 486 A.2d 1209 (N.J. 1985).

\(^{67}\) *Cruzan*, 110 S. Ct. at 2858 n.3 (O'Connor, J., concurring).

\(^{68}\) See, e.g., *Cruzan*, 110 S. Ct. at 2858 n.4 (O'Connor, J., concurring) (collecting statutes).

\(^{69}\) Id. at 2858 n.3 (O'Connor, J., concurring).

\(^{70}\) Id. at 2851 at n.7.

\(^{71}\) *Farfit*, supra note 12, at 302-06.
Thus, some living will statutes are heavily restricted, for instance, to cases of incompetents facing fatal illnesses, rather than embracing all instances of incompetency, or, in another instance, forbidding the testator to refuse nourishment and hydration. In other cases, the courts have imposed rigorous standards of proof of intent not to sustain life, making it difficult, if not impossible, to prove. Justice O'Connor's concurrence, making the necessary majority of five votes for affirmation of the restrictive standard, indicated constitutional support, but only for explicitly written instructions like those contained in the living will and power of attorney statutes. Few people have the forethought and discipline to take advantage of them.

There are many explanations for these restrictions. The system may fear that people seeking to disconnect the patient are dishonest or self-serving. But there are safeguards such as requiring a sort of devil’s advocate guardian ad litem or excluding unsupervised nursing home patients to avoid such problems. There was no implication of any such issue in Cruzan, and many of the restrictive statutes apply without regard to the patients’ particular situations.

The system may fear that ascertaining the patient’s prospects is uncertain, and mistakes may kill patients who did have the capacity to return to sentient life. But the restrictions do not speak to medical uncertainty. They apply to manifestations of the choice regardless of the certainty of hope of recovery.

Some limitations on the acceptable manifestation of choice in the critical area of bodily death are understandable as a reflection of the distinction between honoring conscious choice of first order desires and the desires of persons with the desire to have certain kinds of desires, that is, persons with at least one level of distance on their impulses. Put an-
other way, the claim for the primacy of choice in personhood such that the conscious choice may dictate death is a claim for a *kind* of choice itself reflective of personhood. This is the choice of a creature with at least one level of check on its impulses, with all that implies: the consciousness of self, the time to consider what kind of self to be, and the claims in such a decision of, for example, consistency over some or all of life. The language in the key decisions, of "firm and settled commitment," 79 fits with this philosophical notion of the person as a self-reviewer.

But even this sophisticated version of the person does not encompass all of the issues in the cases. As set forth above, although most states do not prosecute for suicide regardless of the state of the victim's health, 80 and, although the right to refuse medical treatment when competent is theoretically unlimited, 81 no such open-ended choice is honored in the cases of incompetent patients. In many jurisdictions, the limitations are quite severe. Thus, although the opinions eschew utilitarian language, both the opinions and the statutory schemes stop well short of embracing autonomy either.

Alasdair MacIntyre and Charles Taylor, commentators of the communitarian persuasion, have suggested that the difficulty of squeezing the decision about death into the pure autonomy model or the utilitarian balancing model reflects the impoverishment of any such theories to explain personal identity. 82 Instead, they suggest, any theory must recognize the critical factor in personhood of relationships to other people.

One writer of this school suggests an objective standard to determine when people are no longer eligible for life support based on whether they are capable of human relationships, however minimal. 83 This formulation suffers from the same structural defect as the utilitarian and autonomy theories: all would decide this important issue with the broadest of brushes—a concept of abstract rights or attributes applicable to any living human. Such concepts are necessary in certain unavoidably rule-based systems, but they suffer from too thin a concept of the human being, 84 and, as the facts of the *Quinlan* cases and the two thought experi-

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79. *See, e.g.*, *Cruzan*, 110 S. Ct. at 2855 n.11.


81. *Cruzan*, 110 S. Ct., at 2851, 2852; *Id.* at 2865-66 (Brennan, J., dissenting) (reviewing decisions).


84. *See, e.g.*, Charles A. Taylor, *Sources Of The Self* 91-107 (1989). "A series of dis-
ments suggest, such concepts are also too inflexible for questions of such complexity and richness as when to cut off life support.

III. THE NARRATIVE SOLUTION

Not surprisingly, people's behaviors are enacting a rebellious scenario, generating data which a system in a free society cannot forever ignore: people are acting inconsistently with explicit social rules. As Missouri Supreme Court Justice Blackmar noted, dissenting from his court's approval of the restrictions in *Cruzan*, when the responsible persons in a *Quinlan* case want to disconnect their "ward," they will find a way to do so.

The ways they have found are enlightening. In the *Quinlan* case, the New Jersey Court, having explicitly found that it was impossible to ascertain Karen Quinlan's will from the record, left it to her family and guardian to determine what she would have done. In the *Cruzan* matter, after the Supreme Court of the United States put its imprimatur on the state selection of a very tough standard of proof, the lower court found that Cruzan's informal statements to two other friends were adequate. The lower court obtained this result even though the statements did not remotely approach the level of reliability required by the Missouri living will statute, and the act—disconnecting food and water—was expressly excluded from allowable options had the statute been used. Most revealing, however, is the dirty little secret that many people die by having their life support systems disconnected without any living will, power of attorney, or court order. What's going on?

Professor Fentiman has captured the structural part of the issue, in suggesting that the system must admit forthrightly that the decision is out of the hands of the individual and must be made in a dialogue within the patient's community—doctors, family, and, if necessary, institutional


86. *Cruzan*, 760 S.W.2d at 412 n.33.

87. 366 A.2d at 653 ("such statements . . . were remote and impersonal, lacked significant probative weight").

88. *Id.* at 664.

89. Tamar Lewin, *Nancy Cruzan Dies, Outlived by a Debate over the Right to Die*, N.Y. TIMES, Dec. 27, 1990, at A1 (The probate court decision appears to be unreported.).

The problem is that, although Fentiman's formulation is flexible, like much of dialogism, it stops short of giving guidance to the decision-makers. I suggest that juries, trial courts, families, hospital staff, and doctors are manifesting the reality of a different theory of personhood: that people are "self-creating animals," whose personhood is captured in stories, or what Charles Taylor calls "the kinds of narratives in which we make sense of our lives." What the cases reflect, however, is that peoples' story lives are not in the mode of new criticism, where the critic is forbidden to go outside the text for understanding. In limiting the inquiry into personal identity by the canons of the New Criticism, one might treat as the text the person's internal story, as manifested in any unassailable circumstantial evidence of what that internal story was. It is interesting to note that even this relatively impoverished version of narrative identity is capable of substantially more richness of resources than the narrow search generated by the autonomy formulation, looking only for the person's will regarding disconnection from life support technology.

I suggest that the philosophy of narrative identity should function more in the way modern deconstructionists see the story. The person writes his or her story for herself, with all the associated charged memories and self-deception and selective remembering that the story theorists of personal identity articulate. What is different is that, as the cases and thought experiments illustrate, the text of personhood can never belong entirely to the author. As soon as it leaves his or her pen, it falls into the hands of others. Indeed, the very materials from which the story is written—personal history, community background, and the literary materials of self-creation (what Harold Bloom calls the "anxiety of influence")—are extrinsic. But when the person has used her materials to their ful-

91. Fentiman, supra note 82, at 840-48.
93. Taylor, supra note 17, at 102.
97. See generally Harold Bloom, et al., Deconstruction And Criticism (1979); see also Taylor, supra note 17, at 103, 106; MacIntyre, supra note 17, at 106:

[I]t is central to the notion of a setting as I am going to understand it that a setting has a history, a history within which the histories of individual agents not only are, but have to be, situated, just because without the setting and its changes through time the history of the individual agent and his changes through time will be unintelligible.
lest and written as much as she can and lies unconscious and sustained by mechanical support, the readers of her life unassisted will write the last act—the deathbed scene, if you will. They can try to reproduce the ending the individual would have written for herself, but the intractability of ascertaining the authorial intent outlined above (and the artificiality of separating that intent from the other elements of the story) reflects the inadequacy of radically individualistic formulations to answer questions of such biological and temporal imprecision as personhood.

What people are doing—around the rigid structures required by a legal system—is a kind of middle ground. By allotting the decision to the people close enough and close for long enough to the patient to have played a role in the ongoing story of her personhood, they are reproducing as faithfully as possible in the last scene the elements of a person’s life story: the authors will know her and be constrained by what they know of her autobiography; this is the difference between the story theory and the pure community dialogue solution set forth above.98

Yet the authors will represent the intractability of the social aspects of personhood, including the imprecise, indeed, often erroneous, understandings of the person they are writing. The last act will also include the role the patient plays in the authors’ own narratives in progress, including the authors’ utilitarian balancing of their interests and the patient’s, interests as perceived along with claims of guilt on the authors and the authors’ own capacity to envision a world without the patient.

The last act—a kind of Kantian pension—involving fulfillment of the contributions the person made in writing her life story while able, as well as the capacity of the persons who participated with her in the enterprise to understand and pay her off—will thus reflect the linearity as well as the commonality and, ultimately, the unavoidable dependency of persons on one another.

98. See supra notes 92-93.