

7-17-2003

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Recommended Citation

Charles H. Baron. "Life and Death Decision-Making: Judges v. Legislators as Sources of Law in Bioethics." *Journal of Health and Biomedical Law* 1, (2003): 107-124.

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LIFE AND DEATH DECISION-MAKING:
JUDGES V. LEGISLATORS AS SOURCES OF LAW IN BIOETHICS

per

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Much substantive law in the United States is created not through the legislative process but, rather, by the common law courts of the various states and, to a lesser extent, the federal courts. During the Nineteenth Century, when American society was challenged by the development of new technologies such as the railroad and the telegraph, it was the common law courts of the various states that crafted legal responses attempting to balance the various interests involved. The justices of the state supreme courts worked together in developing a new body of common law to govern these new technologies. They wrote opinions in which they claimed to be drawing their norms from basic values already recognized in past common law decisions in both America and England and to be applying those norms to the facts of the cases before them. The Supreme Judicial Court of Massachusetts was one of the leading courts in this effort. The Court's Chief Justice, Lemuel Shaw, came to be called "America's Greatest Magistrate" in recognition of his contribution to the framing of law in this area. But justices from many courts, building on each other's decisions, contributed to the establishment of these legal norms on a case-by-case basis.

In much the same way, the Twentieth Century has seen the common law courts of the several American states serve as an important source – perhaps the most important source – of legal norms responding to the technological challenges of our times. This is particularly true in the field law regulating what has come to be called "the right to die." When, in 1976, Karen Quinlan's father sought approval from the Supreme Court of New Jersey for removing his daughter from artificial ventilation in order to end her meaningless existence in a persistent vegetative state, no legal norms directly on point for deciding the case were available to the court.¹ The New Jersey statutes most nearly relevant were those dealing with homicide and assisting suicide. However, the court could see that such criminal statutes were inadequate tools for dealing with the problems of modern high-technology medicine. Therefore, the court set out on a process of crafting new common law that would achieve an appropriate balance of the interests at stake. In doing so, it drew upon state and federal case law that it saw as providing helpful sources of societal values that could inform its judgment. But, it drew also upon a great many non-legal sources of norms. The most influential of these were statements of existing or proposed norms of medical practice respecting care of terminally-ill and comatose patients.

There are, of course, obvious tensions that the phenomenon of law-making by judges has with the ideal of political democracy in a republic such as the United States.

¹ See *In re Quinlan*, 355 A.2d 647 (N.J. 1976).

In a political democracy, it is typically assumed that law-making power ultimately rests with the elected representatives of the people – the legislature. The value choices that are to be made in the process of law-making are supposed to be those of the majority of the people -- not those of an elite professional class such as judges. Judges are, after all, graduates of colleges and law schools. They are among the top stratum of the country from a socio-economic perspective. They typically do not have to face frequent elections in which they may be defeated at the polls on the basis of the choices they make as the people's representatives.

There are also tensions that exist between the phenomenon of law-making by judges and notions of fairness and the rule of law. Whereas, legislative acts typically apply only prospectively, and after citizens have been given fair notice of the law's import by publication in some written form, judge-made law is typically applied retroactively to the parties to the very case in which the rule is announced. When the legislature acts, the United States Constitution prohibits passage of ex post facto laws – laws enacted by the legislature after the commission of the acts that are made illegal by the law.² Although the ex post facto clause has been held to apply only to criminal laws, civil laws that are applied retroactively may well be held to violate the Due Process clauses of the fifth and fourteenth amendments to the United States Constitution.

Moreover, judge-made rules are developed in circumstances where the judge knows the identities of the persons who will benefit by the rule and those of the persons who will be burdened by it. This is the opposite of the ideal of justice proposed by philosophers such as John Rawls – the notion that the just rules are those that are made behind a “veil of ignorance” so that the lawmaker does not know in advance whether he himself, his family, his friends, or his class will be winners or losers under the new rule.³

Nonetheless, there are many things to be said for the operation of judge made law in even a political democracy dedicated to due process of law. And many of the defects of law-making by judges are also, paradoxically, its advantages as well. The fact that judges are not immediately answerable to the public for the law that they make works to the advantage of the public in many instances. Likewise, the fact that the law judges make will be applied retroactively to the actions that were taken in the case before it provides an important safeguard in the process of the development of common law. And, the fact that the judge knows the identities of the parties and the full facts of the situation that calls for the development of the law to be applied to it so as to provide relief – these qualities of judge-made law also have the capacity to make the law more just rather than less. To see how this is so, let us try to make a list of those characteristics of law-making by judges that arguably make it superior to law making by legislatures.

1) The first, and most important, of these characteristics is the requirement that judges, when they make law, must write opinions that attempt to justify the law that is there announced. The judge who writes such an opinion knows that his audience will include not only other judges and practicing lawyers, but also law professors and law

² U.S. Const., Art. 1, §9, cl. 3 and §10, cl. 1.

³ See generally, John Rawls, A THEORY OF JUSTICE (1971).

students – who will make such opinions grist for their teaching mills in “Socratic Method” law school classes where the questions will be “What does this case mean?” “Is it consistent with earlier case law?” “Is it good law?” “Does it make any sense whatsoever?” In many cases, it will also be read by journalists and reported on (and maybe published) and criticized in the media. And of course, the opinion is open to being criticized by the other judges sitting on the case, who may write concurring or even dissenting opinions.

The legislature, when it passes a law, need give no argument for the law’s validity beyond the fact that a majority of the legislature voted in its favor on a particular day at a particular time. Not a word need be said about its quality in order to justify it. In contrast, the judge cannot rely merely on the fact that a majority of elected representatives voted for the law that he makes. He must convince the reader that the rule announced follows on precedent and that it is good law.

2) A second characteristic to note is that the burden on the judge of proving “rightness” of his decision is reinforced by the fact that the rule announced is to be applied retroactively to the case before it. Not only must the judge convince the reader of his opinion that the rule applied is the “right one,” he must convince everyone, including the losing party in the case, that it is “so right” that the losing party should have anticipated the fact that it would be applied in the case. The model is of Solomon the Wise. The losing party should be able to walk away feeling: “Such a wise judge.” “I should have known.” “In any event, now we all know.”

3) A third characteristic is the fact that, because the court must justify the rules it develops by convincing the reader of their “rightness,” judges typically are not required to justify them by standing for election on the basis of whether they have properly applied the public will. This frees the court to do what it believes to be right rather than what will keep it from being voted out of office. Even in those American jurisdictions where judges are elected, the public does not expect them to produce rules of law on the ground that they are the rules that the public would vote for. It expects them to exercise legal reasoning to produce the “just rule” based upon prior case law. This insulation from direct political accountability frees the court to do the right thing in a way that a legislature may be fearful to do.

These advantages of courts in making law over legislatures as law makers begin to explain why it was that Mr. Quinlan sought out the courts of New Jersey – rather than its legislature – when he looked to find release for his daughter from her living death in a persistent vegetative state.

4) This is especially true when we combine the above three characteristics with a fourth: Yet another of the qualities of common law courts that was critical for Mr. Quinlan is the fact that the courts of common law are held to be open to all at any time for the rendering of justice. Unlike a legislature, they cannot decide merely not to consider a matter once it has been brought to their attention. Indeed, many state constitutions contain provisions drawn from Chapter 40 of Magna Carta “requiring that justice shall be administered without sale, denial, or delay” that are interpreted by state

supreme courts to require that the courts render a legal decision in any case brought before them.⁴ It is the rare instance in which a lower court can just “decide not to decide.”

Mr. Quinlan knew that it was unlikely that he would get the relief that he needed for his daughter from the New Jersey State Legislature if he applied to it for a change in the laws regarding homicide and assisted suicide. Unlike a common law court, the state legislature was not bound to rule one way or another on a legal problem placed before it. And it was clear, in the wake of Roe v. Wade⁵ and the “right to life” political activism that the decision spawned in the United States, that any legislator who voted in favor of amending homicide or assisted-suicide laws in a way that seemed to relax bans on euthanasia risked political suicide. The fact that the legislature much preferred to have this problem taken from its hands and solved by the courts is made very clear by the fact that it took some fifteen years from Quinlan for the New Jersey State legislature to pass any sort of “right to die” legislation -- despite repeated calls from the New Jersey Supreme Court to do so. And then it responded only with legislation regulating some of the procedures for the handling of cases involving incompetent patients.

Thus, the courts were a better body in which to look for relief because they could not, like the legislature, simply duck the issue, and, being forced to decide it, they could also feel relatively immune from political retribution if they decided to find a means for avoiding the laws regarding homicide and assisted suicide.

5) Yet another reason why the courts might feel “safer” dealing with these issues is provided by a fifth advantage of law-making by common law courts. When legislatures amend laws or pass new laws, they do so in sweeping general fashion. When the law is changed in such a way, the law maker must worry about what sort of Pandora’s Box is being opened that later may be difficult to shut without undue harm to society. Thus, in creating loopholes in existing criminal laws for patients in a persistent vegetative state, the legislature would have to draft in advance a law that attempted to cover all and only those cases where it thought that society could tolerate allowing death to be hastened by the intentional acts of family members and attending physicians. But when a common law court creates law, it does so in incremental fashion – case by case – on the facts of those cases – in a way that allows it to take one step at a time and with room for it to take steps back if need be.

This process produces several related advantages of the common law process.

6) A sixth advantage stems from the fact that the law made by the judge on the facts of the case responds to the specific problem before the court and the judge sees the beneficial consequences in that case. It may well be that human beings are much better at deciding what is the best solution in a particular case than they are in developing

⁴ See, for example, Oregon Const., Art. I, §10: “No court shall be secret, but justice shall be administered, openly and without purchase, completely and without delay, and every man shall have remedy by due course of law for injury done him in his person, property, or reputation.”

⁵ 410 U.S. 113 (1973).

sweeping general rules that will apply without exception in a large class of cases not before them at the moment

7) A seventh advantage stems from the fact that the judge not only gets to determine the rule with the facts and the consequences of the ruling before him in the case, he also must face the losing party and tell him or her that he or she is being asked to bear the consequences of the ruling. In this respect, the legislature is like the B-52 pilot who drops bombs in Aghanistan and then returns to his base in the United States. The judge is like the infantryman who must look his enemy in the eyes if he is to shoot him.

8) An eighth advantage, and the final one I will address today, is the on-going dialectic context in which judge-made law is developed. In his law-making, the judge is assisted by the adversarial process conducted by counsel who make the best arguments for their clients regarding the law that the court should develop to apply to their clients' cases. And he is also assisted by the opinions of other judges from his own jurisdiction and other jurisdictions who have considered the same or similar questions, by scholars who have discussed these cases and these issues in published articles, and by attorneys for various interested groups who may file briefs *amicus curiae*.

This kind of constant dialectic process among legally-trained judges, lawyers, legal scholars, and students of the law over the proper reasoning to be applied in the development of rules of common law is what lead Lord Coke in his day to say of the common law:

[R]eason is the life of the law, nay the common law itself is nothing else but reason. . . This legal reason est summa ratio. And therefore, if all the reason that is dispersed into so many several heads, were united into one, yet could he not make such a law as the law in England is; because by many succession of ages it had been fined and refined by an infinite number of grave and learned men, and by long experience grown to such a perfection, for the government of this realm, as the old rule may be justly verified of it, Neminem oportet esse sapientiorum legibus: No man out of his own private reason ought to be wiser than the law, which is the perfection of reason.⁶

All of these advantages can be shown at work in the Quinlan decision and its aftermath.

It was clear to the New Jersey courts that Mr. Quinlan, his daughter, and all the attending medical personnel found themselves caught in a very painful situation. Although Karen Quinlan could not herself feel any pain, her family, after many years of holding out hope for her recovery and struggling for what they believed to be best for Karen, came to the conclusion that everyone would be better off if she were allowed to die a natural death. Karen's physicians were sympathetic to the request, but were fearful of legal and professional sanctions if they acceded to it. The court realized that it had to decide the case. Not to decide would also be a decision. It would leave the Quinlan

⁶ SIR EDWARD COKE, COMMENTARY UPON LITTLETON 97b (Charles Butler ed., 18th ed., Legal Classics Library 1985) (1628).

family and the medical profession to continue to suffer in confusion. Thus, the court realized it had to make a decision.

The court also realized that it had to write an opinion in which it justified that decision – and with a level of persuasion that would convince even those who might have originally opposed the court’s decision that the rule it applied in reaching it was sufficiently just that it could govern the case before it.

In doing so, however, the court knew that it could decide just the case before it on the facts and merits that it presented. Unlike the legislature, it did not have to devise a sweeping general rule of law that would apply to a vast range of cases in the future. (Its members also did not have to worry about losing an election because of the positions they took in the case. New Jersey’s judges are among the those in the US that are appointed to serve on good behavior until a specified retirement age.) Of course, it was not enough just to decide the case before it. In its opinion, the court needed to draw upon and state general rules that would give the reader a fair idea of how the present decision was justified in past opinions and how similar cases would be decided in the future. But the rules did not need to be too general. They could always be extended in future cases. And, if it was decided that they were too sweeping – or even that the decision taken in the Quinlan case was wrong in some way -- there was always the possibility of limiting too sweeping principles in later cases – or even overruling the earlier case.

Moreover, if the state legislature were truly unhappy with the result reached by the court, it could always overrule what the court had done (assuming that the case was not decided on the basis of constitutional principles) and set the court on a new course of development in the future.

Thus, in Quinlan, the court ultimately decided the questions brought to it by Mr. Quinlan and Karen’s attending medical personnel. They did so by giving legal authority to Mr. Quinlan and Karen’s attending physicians to end Karen’s vegetative existence by terminating her artificial ventilation – so long as a hospital “ethics committee” agreed with the decision. And, in writing the opinion in which they justified that decision, they attempted to set out a preliminary set of legal rules for governing the case before them and tentatively governing future cases as well. They also explicitly called upon the legislature to help them in this process – but they realized that, until the legislature did act, the courts had to make the best decisions that they could in the cases before them.

Of course, Quinlan was just one part of a process of common law development of principles in this area. Decisions of courts in other states, and later decisions of the Supreme Court of New Jersey as well, conducted a process of adjusting and refining the principles of Quinlan that is ongoing. I will here only sketch a few highlights of that process.

The decision in Quinlan, it is important to observe, did not rest upon recognition of a patient’s absolute right to refuse treatment. Indeed, as the New Jersey court notes in its opinion, recognition of such a right would have been inconsistent with decisions it had rendered only a decade before in which it had authorized physicians to force blood

transfusions upon Jehovah's Witness patients who objected to such treatment on religious grounds.⁷ The court's holding in Quinlan was restricted to cases like Karen's where medical treatment offered no hope of being restored to a meaningful "quality of life." Her case was different from that of the Jehovah's Witnesses, said the court, in that the latter were "most importantly [patients] apparently salvable to long life and vibrant health; -- a situation not at all like the present case."⁸ The driving factor in the Quinlan case appeared to be the fact that allowing a PVS patient to die was the reasonable and humane thing to do. In the end, the court did not even require that Karen Quinlan's wishes be taken into consideration in deciding whether or not she should be removed from life support. Testimony that had been offered at trial of what she had told friends she would want if she were ever permanently on life support was rejected by the court as being "without sufficient probative weight."⁹ Instead of attempting to establish Karen's wishes, the court gave discretion to her physicians to decide whether or not life support should be withdrawn – so long as that decision was agreed to by her guardian, her family, and a hospital ethics committee.

Quinlan, in many ways, represented an effort on the part of the medical profession to take back a freedom from regulation it had enjoyed prior to the advent of modern high-technology medicine. When patients died at home, under the care of family physicians, and in a context that did not afford seemingly-unlimited options for prolonging life, attending physicians regularly made decisions for patients and families that "enough was enough." But by the 1960's and 1970's, hospital staff was being confronted with the need to make increasingly stark life and death decisions in a frighteningly public environment. The very recent history of legal treatment of abortion decision-making was not such as to inspire confidence that doctors could consider themselves immune from legal prosecution. In the wake of the Thalidomide abortion controversy in the United States, professional practices regarding abortion had come under public scrutiny and legal control had been tightened in many jurisdictions. The solution to this problem had come with the 1973 decision of the Supreme Court of the United States in Roe v. Wade. On the basis of a "right to privacy" it had previously found in the Due Process Clause of the Fourteenth Amendment to the United States Constitution,¹⁰ the Roe Court had delegated to the pregnant woman's attending physician almost all aspects of the determination of whether or not an abortion could be performed.

In Quinlan, the New Jersey Supreme Court essentially followed the lead of Roe. Where Roe had used the federal constitutional right to privacy to protect professional autonomy at the beginning of life, Quinlan used that right (and a right to privacy that the court found in the New Jersey Constitution as well) to protect professional autonomy at the end of life. Because the patient was in a persistent vegetative state, and there was no reasonable chance that medical treatment could restore her to a higher "quality of life," the patient's right to life was outweighed by her right to privacy. Thus, her physician could lawfully hasten her death by removing her from her ventilator so long as this was agreed to by her guardian, her family, and an appropriate hospital ethics committee.

⁷ Quinlan, 355 A.2d at 661-62.

⁸ *Id.* at 663.

⁹ *Id.* at 664.

¹⁰ See Griswold v. Connecticut, 381 U.S. 479 (1965).

In 1977, the year following Quinlan, the Supreme Judicial Court of Massachusetts rendered a decision in a case that was very like Quinlan in many ways but unlike it in significant respects as well, and the Massachusetts court extended the principles of Quinlan in some ways and restricted them in others. The case was Saikewicz v. Superintendent of Belchertown State Hospital.¹¹ It was brought by physicians at a state hospital for the mentally retarded who were seeking permission to withhold chemotherapy treatment from a 67 year old, profoundly mentally retarded inmate who was terminally-ill with cancer. Without chemotherapy, the patient would die of his cancer within weeks or months. With the treatment, the patient might live for as much as a year, but at the cost of the serious side effects of chemotherapy. A decision to treat him was complicated by the fact that his profound state of mental retardation would prevent him from understanding why he was being subjected to the discomforts of chemotherapy. It would also prevent him from enjoying the sense of hope that a competent patient might obtain from the sense that every effort was being made to defeat the disease.

The Massachusetts court, like the New Jersey court in Quinlan, provided the physicians with legal permission to withhold treatment. Like the Quinlan court, the Saikewicz court based its decision on the right to privacy (which it, like the New Jersey court, found in its state constitution as well as in the federal constitution), and it held that this right outweighed interests in preserving life in circumstances, like those in the case before it, where treatment could not significantly improve the patient's "quality of life." Thus, Saikewicz followed Quinlan and even extended its holding to apply to patients who were being treated for a terminal illness – not just to patients in a persistent vegetative state. However, in other important respects, Saikewicz represented a significant break from Quinlan. Rather than empowering physicians to make decisions for incompetent patients (so long the patient's guardian, family members, and a hospital ethics committee agreed), the court held that physicians were bound to follow the wishes of the patient. The "informed consent" or "informed refusal" of the patient, and not professional discretion, were to govern. And where the power to consent or refuse could not be exercised by a patient because of mental incompetency, physicians looking for legal protection would be required to ask a court to decide what the patient would want for himself. "We do not view the judicial resolution of [the question] whether potentially life-prolonging treatment should be withheld from a person incapable of making his own decision [as] a 'gratuitous encroachment' on the domain of medical expertise," said the court. "Rather, such questions of life and death seem to us to require the process of detached but passionate investigation and decision that forms the ideal on which the judicial branch of government was created. Achieving this ideal is our responsibility and that of the lower court, and is not to be entrusted to any other group purporting to represent the 'morality and conscience of our society' no matter how highly motivated or impressively constituted."¹²

Over the next decade, the courts of Massachusetts made good use of this mandate to further refine the "informed refusal" principles of Saikewicz. By the end of this process, patient autonomy would become the bedrock norm of "the right to die." But

¹¹ 370 N.E.2d 417 (Mass. 1977).

¹² Id. at 435.

Saikewicz, like Quinlan, had not itself recognized an absolute right of patients to refuse life-saving treatment. In Saikewicz, the court limited its holding to cases where treatment could be characterized as merely “life-prolonging,” rather than “life-saving.” The Massachusetts court claimed it was relying upon “a substantial distinction in the State’s insistence that human life be saved where the affliction is curable, as opposed to the State interest where, as here, the issue is not whether but when, for how long, and at what cost to the individual that life may be briefly extended.”¹³ In a series of cases decided from 1978 to 1980, the Massachusetts courts supplanted such “quality of life” factors with criteria based on the objective “intrusiveness” of the proposed treatment. Thus, in Lane v. Candura,¹⁴ a 77 year old woman was permitted to refuse a life-saving amputation of her leg because “[t]he magnitude of the invasion proposed in this case is decisive in applying the balancing test.”¹⁵ And in the cases of Commissioner of Correction v. Myers¹⁶ and In re Spring,¹⁷ the Massachusetts Supreme Judicial Court decided that a patient could refuse life-saving kidney dialysis because such therapy was “intrusive.” Although dialysis did not “require the sacrifice of a limb or entail substantial pain,” said the Court, it was, nonetheless, “a relatively complex procedure, which requires considerable commitment and endurance from the patient who must undergo the treatment three times a week.”¹⁸ Finally, in 1986, in Brophy v. New England Sinai Hospital,¹⁹ the court reached the conclusion that even proof of objective “intrusiveness” should no longer be required as a condition for the exercise of the right of “informed refusal.” Mr. Brophy, a patient in a persistent vegetative state, had made very clear while mentally competent that, if he were ever forced to live on life support in an unconscious state, he would want someone to “just shoot me, pull the plug.” To comply with his wishes, his family asked to have him removed from all life support – including artificial nutrition and hydration. The court granted the family’s request despite the fact that Mr. Brophy was neither “terminally ill nor in danger of imminent death from any underlying illness” and despite the fact that nutrition and hydration might not be considered intrusive in any objective sense. It was enough, the court held, that Mr. Brophy would consider the treatment intrusive because it stood in the way of his dying with dignity.

These developments in Massachusetts were being closely observed by courts in other states including those of New Jersey. When, in 1985, the New Jersey Supreme Court was faced with In re Conroy,²⁰ its first “right to die” case since Quinlan, the court adopted most of the principal points of doctrine that had been developed in the courts of Massachusetts. The patient in that case, Claire Conroy, was a mentally-incompetent eighty four year old nursing home patient who was being kept alive by, among other things, artificial nutrition and hydration. “She suffered from arteriosclerotic heart disease, hypertension, and diabetes mellitus; her left leg was gangrenous . . . ; she had bed [bed sores] on her left foot, leg, and hip; an eye problem required irrigation; she . . . could

¹³ Saikewicz, 370 N.E.2d at 425-26.

¹⁴ 376 N.E.2d 1232 (Mass. App. Ct. 1978).

¹⁵ Id. at 1233 n.2.

¹⁶ 399 N.E.2d 452 (Mass. 1979).

¹⁷ 405 N.E.2d 115 (Mass. 1980).

¹⁸ Myers, 399 N.E.2d at 457.

¹⁹ 497 N.E.2d 626 (Mass. 1986).

²⁰ 486 A.2d 1209 (N.J. 1985).

not control her bowels; she could not speak; and her ability to swallow was very limited.”²¹ Believing that Ms. Conroy should be allowed to die, her guardian (who was also her nearest relative) applied to the courts for permission to have her removed from life support. Despite the fact that Ms. Conroy was not in a persistent vegetative state nor terminally ill, the court decided that she could be removed from life support if it could be proved that this is what she would have wanted if competent. The court admitted it had erred in Quinlan when it disregarded “evidence of statements Ms. Quinlan made to friends concerning artificial prolongation of the lives of others who were terminally ill.”²² And it made clear that it was placing no objective limits on Ms. Conroy’s right to refuse continued life support. “Ms. Conroy’s right to self-determination,” said the court, “would not be affected by her medical condition of prognosis.”²³ Indeed, said the court, “a young, generally healthy person, if competent, has the same right to decline life-saving medical treatment as a competent elderly person who is terminally ill.”²⁴

By 1990, when the U.S. Supreme Court decided the narrow constitutional question presented to it in Cruzan,²⁵ the Court could note that state supreme courts across the United States had made it the general law of the country that patients had a right to refuse any sort of medical treatment. By slow steps, on the facts of one case at a time, and by means of a cooperative dialogue, the courts had first recognized such a right only where the courts and the medical profession agreed that the decision seemed a reasonable one, but ended in protecting the autonomy of patients to make even choices that seemed “irrational.” As a capstone to this development, in 1992, in the case of In Re Hughes,²⁶ the New Jersey Supreme Court took the long-overdue step of making its earlier case law regarding Jehovah’s Witnesses consistent with developments since Quinlan. In a decision that essentially overruled those earlier cases, the court stated: “[A] competent Jehovah’s Witness or person holding like views has every right to refuse some or all medical treatment, even to the point of sacrificing life... Should a patient decide, with full knowledge of the potential situation, to refuse life-sustaining medical treatment and the patient communicates this decision via clear and convincing oral directives, actions or writings, the patient’s desires should be carried out.”²⁷

While these legal developments were taking place in the courts of New Jersey and Massachusetts, there was, for many years, no action taken by the legislatures of those states. This was unfortunate. Just as there are advantages to law-making by courts, there are, of course, advantages to law-making by legislatures. Such advantages are typically the correlatives of the advantages of law-making by courts. There are, for example, the

²¹ Id. at 1217.

²² Id. at 1230.

²³ Id. at 1226.

²⁴ Id.

²⁵ Cruzan v. Director Missouri Dep’t. of Public Health, 497 U.S. 261 (1990). The court’s narrow holding in the case was that Missouri had not violated the U.S. Constitution by requiring proof of the wishes of a PVS patient at a level of “clear and convincing evidence” before artificial nutrition and hydration could be removed.

²⁶ 259 611 A. 2d 1148 (N.J. 1992).

²⁷ Id. at 1153. For a detailed discussion of the legal developments in the United States regarding Jehovah’s Witnesses and blood transfusions, see Charles H. Baron, Blood Transfusions, Jehovah’s Witnesses and the American Patients’ Rights Movement, 3 JOURNAL OF CHINESE AND COMPARATIVE LAW 19 (2000).

obvious advantages of law-making by an elected body that can give the people what they want rather than what a court thinks they should want. There are the advantages of having general rules laid out in advance of the occurrence of problems so that the problems may be avoided. There are the advantages that stem from not having to justify law-making on the basis of principles of “reason.” When law-making calls for the establishment of essentially arbitrary rules, e.g., rules of the road regarding right of way, speed limits, minimum requirements of age and competence for a driver’s license, etc., the job cannot easily be performed by a court. And there are many other advantages as well. In Conroy, the New Jersey Supreme Court explicitly noted some of these advantages. “Perhaps it would be best,” said the court, “if the Legislature formulated clear standards for resolving requests to terminate life-sustaining treatment for incompetent patients. As an elected body, the Legislature is better able than any other single institution to reflect the social values at stake. In addition, it has the resources and ability to synthesize vast quantities of data and opinions from a variety of fields and to formulate general guidelines that may be applicable to a broad range of situations.”²⁸

By 1987, in the face of a continuing absence of “right to die” legislation in New Jersey, the state court felt obliged to take steps that might have been better left to the legislature. In the case of In re Peter,²⁹ the court noted with regret the absence of legislation providing for the execution of a “living will” – “a written statement that specifically explains the patient’s preferences about life-sustaining treatment.”³⁰ Many other states, the court observed, had passed statutes recognizing the validity of “living wills” and prescribing procedures for their execution. “Unfortunately,” said the court, “the New Jersey Legislature has not enacted such a law.”³¹ New Jersey also had not enacted a health care proxy law -- a type of statute, passed in many other states, that enabled patients to appoint health care agents empowered to make life-sustaining treatment decisions if the patients became mentally-incompetent. Despite the lack of such statutory authority, Hilda Peter, the patient in the case before the court, had executed a document purporting to appoint a friend as her agent to make health care decisions for her. The court decided to grant legal authority to the document. It did so by providing a strained construction to New Jersey’s general statute providing for the appointment of agents. “Although the statute does not specifically authorize conveyance of durable authority to make medical decisions,” said the court, “it should be interpreted that way.”³²

But, the court continued to make clear that it would prefer that the legislature play its proper role in law-making. In an effort to encourage action from the state legislature, the New Jersey court gave evidence of backing away from its reliance upon the right to privacy as its principal basis for the “right to die.” In 1985, in Conroy, the court held that the right to refuse artificial nutrition and hydration could be justified entirely upon common law principles of informed consent and refusal. There was no need, the court thought, to consider whether Ms. Conroy’s rights were protected as well by the federal

²⁸ Conroy, 486 A.2d at 1220-21 (footnote omitted).

²⁹ 529 A.2d 419 (N.J. 1987).

³⁰ Id. at 426.

³¹ Id.

³² Id.

and state constitutions. In 1987, in In re Farrell,³³ the court held that a patient's right to refuse treatment rested "primarily" on the common law. As a later court pointed out, these were decisions to "smooth[] the path for legislative action."³⁴ American legislatures have the power to overrule common law, but they do not have the power to override constitutional rights. Massachusetts and some other states that had earlier relied upon the right to privacy followed the New Jersey lead.³⁵ In 1991, the New Jersey legislature finally enacted legislation providing for "advance directives for health care."³⁶ Earlier, the Massachusetts legislature had passed legislation providing for the appointment of "health care proxies."³⁷ In doing so, the two state legislatures brought their jurisdictions in step with the vast majority of American states. By 1994, 47 states had enacted some form of living will legislation,³⁸ and all but two states had passed some form of health care agency act.³⁹ These statutes achieved progress of a sort that is difficult to work out on a case-by-case, common law basis. They laid out clear and precise general procedures for establishing the validity of living wills and for appointing health care proxy decision-makers. And, to deal with situations where patients failed to take advantage of living will or health care proxy laws before becoming incompetent, a growing number of jurisdictions also began to warn patients that, failing a choice on their part, health care proxies would be selected for them on the basis of criteria chosen by the legislature.⁴⁰

Some of the state statutes went beyond merely prescribing procedures for formalizing expressions of patient will. In such instances, tension could be generated between the courts and legislatures of the states. For example, in McConnell v. Beverly Enterprises,⁴¹ the Supreme Court of Connecticut found itself confronted with a statute in which the legislature seemed clearly to have eliminated a patient's right to refuse artificial nutrition and hydration.⁴² Mrs. McConnell, the patient in the case before the court, was a fifty-seven year old woman who had worked as a nurse in emergency medicine up until the time of an accident that had rendered her comatose. On the basis of her professional experience, she had communicated to her friends and family her firm wish never to be kept on any sort of life support in the event of permanent incapacity. Despite the clear language of statute, all of the judges of the Connecticut court held that Mrs. McConnell had a right to have artificial nutrition and hydration stopped. At least one of the justices would have decided the case on the basis of either the right to privacy (which would have overridden the statute) or the common law (which he argued had not been explicitly supplanted by the statute). A majority of the justices felt obliged to decide the case under the statute, but they did so only after giving the statute a strained interpretation that would avoid questions regarding the statute's constitutionality. The

³³ 529 A.2d 404 (N.J. 1987).

³⁴ Hennessey v. Coastal Eagle Point Oil Co., 609 A.2d 11, 27 (N.J. 1992) (Pollock, J. concurring).

³⁵ See

³⁶ Advance Directives for Health Care, N.J. STAT. ANN. §§ 26:2H-53 to -78 (West 1996).

³⁷ HEALTH CARE PROXIES, MASS. GEN. LAWS ch. 201D (1996).

³⁸ Alan Meisel, THE RIGHT TO DIE § 11.12 (1989 & 1994 supp. No. 2).

³⁹ Choice in Dying, 1991 REFUSAL OF TREATMENT LEGISLATION, Intro - 2 (1994 update).

⁴⁰ Id.

⁴¹ 553 A.2d 596 (Conn. 1989).

⁴² CONN. GEN. STAT. ANN. §§ 19a-570 to -580d (West. Supp. 1977).

court first noted how often it, like the Supreme Court of New Jersey, had called upon the state legislature to take action in this area of the law. “When the legislature has attempted to respond to this urgent request for statutory assistance, we have an obligation to pursue the applicability of statutory criteria before resorting to an exploration of residual common law rights, if any such rights indeed remain.” The court then interpreted the statute to prohibit only cessation of spoon feeding and water provided by mouth. This interpretation, said the court, permitted a decision employing the statute and, at the same time, avoided the possibility that the statute might be found unconstitutional. Subsequently, the Connecticut legislature amended the language of the statute, not to overrule the McConnell decision, but rather to bring it into explicit conformity with the interpretation that the court had given it in that case.

In the end, legislatures and courts both play important roles in the process of developing principles governing bioethics in the United States. In many instances, courts will take the initiative, making new law on the basis of new problems that are brought to them for resolution. The legislature may then supplement the common law or it may modify or overrule it. In reaction, the courts may then reinterpret the law or find it unconstitutional. Then the legislature may, yet again, react by passing more explicit legislation or by attempting to have the constitution amended. The driving force in this process is the fact that, in the American legal system, neither branch of the government feels truly, institutionally subservient to the other. Thus, in the process of law-making, the branches may well struggle with each other in crafting what the public will ultimately accept as the better law. Whether this phenomenon has parallels in the Italian experience in this field, I leave to my audience to decide.