28. R. Moshe Feinstein, Resp. Igrot Moshe, Hoshen Mishpat II, no. 74, sec. 3.

29. Steinberg, op. cit., p. 448; R. S.Z. Auerbach, cited in Nishmat Avraham, Yoreh De'ah 339, pp. 245-246.

30. Sanhedrin 77a; Maimonides, Hilkhot Rotseach 3:10; Jakobovits in Ha-Pardes, p. 18.

31. See Fred Rosner, "Rabbi Moshe Feinstein on the Treatment of the Terminally Ill;" Feldman, *op. cit.*, pp. 91-96. Nothing in the leading Reform responsum on the subject indicates dissent from this position; see American Reform Responsa, *loc. cit.*

32. See the "Correspondence" section of the *New England Journal of Medicine* 319 (1988), pp. 306-307, and John J. Paris, "When Burdens of Feeding Outweigh Benefits," *Hastings Center Report* 16 (February 1986), pp. 30-32.

33. See Feinstein, *op. cit.*, no 74.

34. See Kevin O'Rourke, "The A.M.A. Statement on Tube Feeding: An Ethical Analysis," *America*, Nov. 22, 1986, pp. 321ff.

35. See S.H. Wanzer and eleven others, "The Physician's Responsibility Toward Hopelessly Ill Patients," *New England Journal of Medicine* 320 (1989), p. 848: "All but two of us...believe that it is not immoral for a physician to assist in the rational suicide of a terminally ill person."

36. On the changing conception of "happiness" in American moral discussion and its effect on legal development, see Carl E. Schneider, "Moral Discourse and the Transformation of American Family Law," *Michigan Law Review* 83 (1985), pp.1803-1880, and David C. Blake, "State Interests in Terminating Medical Treatment," *Hastings Center Report* 19 (May/June 1989), pp. 5-13.

Clear and Convincing Evidence: The Case of Nancy Cruzan

by Richard A. McCormick, S.J.

My initial reaction to the Supreme Court decision in the case of Nancy Cruzan was quite critical. Why? Four reasons especially. First, I judged that one of its primary repercussions would be to remove families from participating in decisions concerned with the best interests of their dear ones. I view such distancing as highly undesirable. There should be in morality and public policy a presumption that family members are best positioned to determine what an incompetent family member would choose or what is in the incompetent's best interest. A presumption yields, of course, to contrary evidence. But to disallow Lester and Joyce Cruzan's testimony to qualify as a source of clear and convincing evidence struck me as a presumption in the opposite direction, and therefore divisive of families.

My second reason for a critical response was that the Supreme Court, very much as Missouri had done, left totally unprotected those who have been incompetent from birth and babies. Missouri's Supreme Court had asserted that its interest in the preservation of life was "strong enough to foreclose any decision to refuse treatment for an incompetent person unless that person had previously evidenced, in clear and convincing terms, such a decision for herself." (Justice Stevens in his dissent.) Absent that previous evidence, the interest in preservation of life prevails. This means that the always incompetent (e.g., Joseph Saikewicz, John Storar) must be kept alive no matter what. When the Supreme Court says that such an evidentiary requirement (clear and convincing, from the patient herself) is not unconstitutional, it means that it does not violate the liberty interest of the incompetent contained in the due process provisions of the 14th Amendment. But that seems to imply that the always incompetent have no such liberty interest. Strictly speaking, I suppose, they do not. That is, those who were never really free hardly have liberty interests. But at the root of the liberty interest is the dignity interest. And they certainly have that.

My third reason for an initial negative response was the lack of a sustained and enlightening analysis of the state's interest in the preservation of life. Justice Stevens adverted to this in his dissent. Indeed, by failing to make this analysis, the Supreme Court seemed to equate the preservation of life with the preservation of the biological persistence of Nancy's bodily functions.

> There should be in morality and in public policy a presumption that family members are best positioned to determine what an incompetent family member would choose or what is in the incompetent's best interest.

Finally, if evidence must be clear and convincing from the patient herself, it struck me that the *Cruzan* decision would foster a general reluctance to start life-preserving interventions if it is to be so difficult to stop them when they are no longer beneficial to the patient.

My second reaction was much less critical. Once again, for several reasons. First, it is clear that the decision was crafted along the most narrow grounds. It stated only that Missouri's heightened evidentiary requirement was not unconstitutional. It did not say it was necessary or wise or the only available approach. In other words, the Constitution permits, but does not require, a heavy burden of proof. I believe it was to be expected that the Court's ruling would be strictly constructionist. That did not help the

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Cruzans very much; but it leaves a lot of room for future development, what Justice O'Connor refers to as "the more challenging task of crafting appropriate procedures for safeguarding incompetents' liberty interests."

Second, the Court explicitly acknowledged for competent persons the existence of a constitutionally protected (14th Amendment) liberty interest in refusing unwanted medical treatment. Indeed, it agrees that such a liberty interest perdures into incompetency when it, along with Missouri, supports a surrogate's decision to reject treatment as long as there is clear and convincing evidence of the patient's wishes.

> Central to both the constitutional and moral issues is a balancing of interests, specifically those of Nancy and those of the state.

Third, there are indications in the dicta that the Court would find lesser evidentiary demands and other arrangements constitutionally acceptable. For instance, writing about surrogate decision makers and the duty of a state to accept such decisions, Justice O'Connor states: "In my view, such a duty may well be constitutionally required to protect the patient's liberty interest in refusing medical treatment."

Finally, I am relieved that the Court did not anchor the right to refuse treatment in the right to privacy. Indeed it explicitly rejects such a basis when it notes (footnote 7) that "we believe this issue is more properly analyzed in terms of a Fourteenth Amendment liberty interest."

At this juncture it is appropriate to make two points. First, I am not a constitutional lawyer or historian. Therefore, I read the constitutional aspects of this decision as an amateur. Second, however, it is remarkable how indistinguishable is so-called constitutional reasoning from straight-out moral reasoning. Because of this considerable overlap I am emboldened to continue the discussion and raise some philosophical issues that seem to me to be incomplete.

The Supreme Court has clearly acknowledged a liberty interest in refusing unwanted medical treatment. It has also acknowledged relevant state interests. It describes the constitutional problem as follows (citing *Youngberg v. Romeo*): "Whether respondent's constitutional rights have been violated must be determined by balancing his liberty interests against the relevant state interest." This is the structure not only of the constitutional issue, but also the structure of the moral issue. Central to both the constitutional and moral issue is a balancing of interests, specifically those of Nancy and those of the state. Before a balancing of interests can be successfully accomplished, an accurate statement of those interests must be made. It is here that I find the Court's analysis quite vulnerable.

Let me begin with the state's interest. As the Court notes, "Missouri relies on its interest in the protection and preservation of human life, and there can be no gainsaying this interest."

Realizing that this is a very general statement, the Court tries to particularize it by noting that the state's interest is really in safeguarding "the personal element of this choice [between life and death] by heightened evidentiary requirements." These "heightened evidentiary requirements" refer, of course, to the patients' own earlier statements made while competent. One can bicker all day whether clear and convincing personal statements are the best way to protect the "personal element." Obviously, Justice O'Connor thinks other ways would be constitutionally acceptable. She notes that the *Cruzan* decision does not "prevent States from developing other approaches for protecting an incompetent individual's liberty interest in refusing medical treatment."

But this is not my concern. It is rather "the personal element of this choice" as the state's interest to be protected. What does this phrase mean? The Court notes that "the choice between life and death is a deeply personal decision of obvious and overwhelming finality" and it wants to protect this personal dimension. True enough, but perhaps not enough of the truth. Decisions that can lead to life or death are indeed ordinarily "of obvious and overwhelming finality." The Court includes the removal of Nancy's gastrostomy tube in this category. But Nancy's situation is not ordinary. She is in a persistent vegetative state. Release from this state is hardly a matter of "overwhelming finality." What is or was of overwhelming finality, I would argue, was the original cerebral insult that left Nancy in this condition. Let me put this in another way. The Court professes an interest in "the personal element of this choice." It was precisely this "element" that led it to support the constitutionality of Missouri's heightened evidentiary requirements. At this point, however, I want to question the significance of this "personal element" in these circumstances. Once a person is in a persistent vegetative state, there would seem to be no "personal element of this choice" remaining to protect. What I am suggesting is that the analytic soft spot in the Court's approach is the equation of a decision about the persistently vegetative Nancy Cruzan with an "ordinary" decision between life and death.

> The urgent question is the evaluation of life in a persistent vegetative state. Is such a life a value to the one in such a condition? Is its preservation a benefit to the patient and therefore a state interest?

The point I am making can be urged from several different perspectives. For instance, in allowing Missouri's heightened evidentiary requirements, the Court asserts that "we think a State may properly decline to make judgments about the 'quality' of life that a particular individual may enjoy, and simply assert an unqualified interest in the preservation of human life to be weighed against the constitutionally protected interests of the individual." In short, no "quality-of-life" judgments. Paradoxically, in refusing to allow any quality-of-life dimension, the Supreme Court (with Missouri) is actually making precisely such a judgment. It is saying that preserving a life even in that condition represents a value to the person and a state interest.

But does it really? I believe Justice Brennan is much closer to the truth when he argues that "no state interest could outweigh the rights of an individual in Nancy Cruzan's position." Brennan immediately continues: "The only state interest asserted here is a general interest in the preservation of life. But the state has no legitimate general interest in someone's life, completely abstracted from the interest of the person living that life, that could

outweigh the person's choice to avoid medical treatment." Justice Stevens is getting at the same idea when he asserts that Missouri's policy "is an effort to define life, rather than to protect it." He continues: "Missouri insists, without regard to Nancy Cruzan's own interests, upon equating her life with the biological persistence of her bodily functions." He sees this as aberrant. So do I. And it is at the very heart of every key notion in this discussion (state's interest, patient benefit).

The urgent question is the evaluation of life in a persistent vegetative state. Is such a life a value to the one in such a condition? Is its preservation a benefit to the patient and therefore a state interest? Avoiding this question is obviously the more comfortable path. But it cannot be avoided, it can only be delayed. Missouri gave its answer when it referred to "the immense, clear fact of life in which the state maintains a vital interest." Obviously, then, the "immense clear fact of life" is identified with any life regardless of condition.

For several years I have asked audience after audience if they would want artificial nutrition and hydration were they irreversibly unconscious. With virtual unanimity the answer has been no.

Some philosophers also take this point of view. Writing about artificial nutrition and hydration for permanently vegetative patients, William May and others stated: "In our judgment, feeding such patients and providing them with fluids by means of tubes is not useless in the strict sense because it does bring to these patients a great benefit, namely, the preservation of their lives." (*Issues in Law and Medicine,* vol. 3, no. 3, 1987.) This "great benefit" and Missouri's "immense, clear fact of life" strike me as examples of biologism or vitalism. By these terms I refer to a positive evaluation of circulation and ventilation regardless of what personal goals it enables for the individual.

We are understandably afraid of allowing a quality-of-life ingredient a role in decision making for the incompetent. It is dangerous. But I agree with Bernard D. Davis, professor emeritus at Harvard Medical School, that "irreversible coma is so clearly definable, as a special class, that it could be given special treatment without starting on a slippery legal slope." (*Wall Street Journal,* July 31, 1990.) What is that special treatment? A reversal of the presumption currently honored. At present, absent any prior expression of preference, we must presume an interest of the patient, or the state, in continuing life support. Davis proposes that in this extreme case (persistent vegetative state) evidence of a prior request should no longer be required. With appropriate safeguards we should presume a preference for termination of treatment.

What is the basis for this shift of presumptions? Davis refers to a "meaningful estimate...of public attitudes" and suspects that a survey of such attitudes would find a large majority opposed to continuing life-preservation for persistently vegetative patients. I do not have to suspect this. I am convinced of it. For several years I have asked audience after audience if they would want artificial nutrition and hydration were they irreversibly unconscious. With virtual unanimity the answer has been no. These people were saying that they did not regard continuing in that condition a benefit to them. For if they regarded this as a benefit, especially a "great benefit," they would be inconsistent in rejecting it if the treatment were otherwise not burdensome. If the vast majority of people do not regard existence in a persistent vegetative state as a genuine benefit, why should the state assert such continuance as an interest? In Justice Stevens' words, "life, particularly human life, is not commonly thought of as a merely physiological condition or function." For that reason Stevens concluded "there is no reasonable ground for believing that Nancy Beth Cruzan has any personal interest in the perpetuation of what the State has decided is her life."

The Supreme Court has judged that Missouri's heightened evidentiary requirements are not unconstitutional, that they are not an infringement of Nancy's liberty interest. Implied in such a view, I believe, is a further judgment that continuance in a persistent vegetative state is a patient benefit and therefore a state interest. I cannot accept that. So, while the *Cruzan* opinion has in my view analytic soft spots, it does leave the door wide open for further development. In that there is hope.