(9.5) About all these matters Justice Stevens is very confused. I offer here only half a thesis for reasons of charity. He argues against equating Nancy Cruzan's life with "the biological persistence of her bodily functions." Is she no longer a living human being? Well, not exactly. "Nancy Cruzan is obviously 'alive' in a physiological sense. But for patients like Nancy Cruzan, who have no consciousness and no chance of recovery, there is a serious question as to whether the mere persistence of their bodies is 'life' as that word is commonly understood, or as it is used in both the Constitution and the Declaration of Independence." Yet, Justice Stevens does not recommend burying her while her heart still beats. It is clear that in wanting to let her die he is, in fact, turning against not her treatment but that physiological life (biological persistence) she still has.

> We stop feeding not to free Nancy from a burden but to see to it that she dies. Until the present time we have been unable to face this truth.

Justice Stevens is concerned that Ms. Cruzan's rights to life and liberty are in conflict. By holding that her "life expired when her biological existence ceased serving any of her own interests," he no longer needs to worry about her right to life—since she is dead. Yet, of course, he must presuppose some kind of ongoing existence if he is to be concerned for her interest in liberty, in freedom from unwanted medical treatment. He goes so far as to suggest different definitions of life and death for different people. Some of us might argue that our life ends when our continued biological existence no longer serves any of our other interests; others of us might define life "to encompass every form of biological persistence by a human being." Evidently we get to choose whether we are still alive, still a member of a community and entitled to its care, and we get to make different choices and "die" at different points along some spectrum of possibilities. Here is a recipe for chaos. More important, such confused and confusing views will make it only more difficult than it has already become to believe that we share a common life and have a stake in the lives of each other.

Nancy Cruzan and the "Right to Die" - A Jewish Perspective

by Rabbi Mark Washofsky

Lying unconscious in a hospital bed, sustained by artificial nutrition and hydration, Nancy Beth Cruzan became a tragic example of both the power and the limitations of a medical technology which can keep a person alive far beyond the point at which she would wish to live. Were Nancy's parents, as her legal guardians, entitled to disconnect her feeding tube? Did she, or any individual who suffers from a terminal illness with no hope of recovery, have a "right" to die? There can be no single response to these questions. The answers depend on the principles and conceptions by which particular legal or moral systems measure the extent of personal rights and obligations. Under American constitutional law, for example, the individual confronts a government charged with protecting his or her rights and whose authority to intervene against that person's life and liberty is severely circumscribed. Judaism, by contrast, sees the individual as standing before God, the Creator of the Universe. "Life" and "liberty" find their fulfillment when a person utilizes them to observe the commandments of the Torah and thereby to sanctify the divine name. It should come as no surprise that *halakhah*, traditional rabbinic legal and moral discourse, will approach the "right to die" issue in a manner fundamentally different than that which characterizes American law. In dealing with the Cruzan case, the justices of the United States Supreme Court sought to balance the rights of privacy, due process and informed consent against the possibility that the state has a "legitimate general interest in someone's life...that could outweigh the person's choice to avoid medical treatment."[1] These concepts and categories are foreign to Jewish law. *Halakhah* will not ask, "What are the rights of this individual against the state?" Instead, it will inquire, "What does God expect of a person in the last moments of his or her life?"

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Rabbinic legal analysis begins with the injunctions of Scripture, whose authoritative interpretations and applications are found in the vast literature of rabbinic law—Talmud, codes, commentaries and responsa—dating from late antiquity to the present.[2] Rabbis study these texts, drawing analogies to apply to contemporary problems, seeking definitive answers to the entire range of ritual and ethical questions which arise for traditional Jews in their quest for the religious life. The past several decades have seen a virtual explosion of halakhic writing by rabbis of all streams of Judaism on issues of medical ethics in general and the treatment of the terminally ill in particular.[3] These studies, analyses, and rulings, however they differ in their conclusions, invariably begin with the Jewish affirmation of the sanctity of human life. Jewish tradition sees the preservation of life as the supreme value. The primary verse, Leviticus 18:5, describes God's commandments as those "which a person shall perform and live by," to which the rabbinic commentaries add the words "and not die by them." No religious obligation normally enjoined by the Torah is to be upheld if its observance would place life in danger. Even the most stringent prohibitions of the Sabbath and the Day of Atonement are put aside for the sake of *pikuach nefesh*, the saving of life.[4] From the moment of birth to the instant of death, the life of the human being is sacred, inviolate; to take that life or to shorten it in the absence of legal warrant is to commit murder. This holiness is, moreover, indivisible; the brief life expectancy of the dying patient is as sacred as the indeterminate life span of the healthy individual. The *goses*, the person who lies in the very last throes of life, "is like a living person in all re-

> Traditional rabbinic moral and legal discourse will approach the "right to die" issue in a manner fundamentally different than that followed by American law.

spects."[5] He or she possesses all legal rights which pertain to a living person. He or she is to receive medical treatment, even when the medical procedures violate the laws of the Sabbath, even though medical prognosis holds that the illness is terminal. Just as it is forbidden to cause the death of a healthy person, so is it forbidden to take any action to speed the death of the *goses;* one who does so is guilty of bloodshed.[6]

The sanctity of life overrides any claim of "patient's rights" or autonomy over life itself. That which is sacred belongs by definition to the realm of the divine. God, the Author of human life, has the final say in its disposal; no person has "ownership" rights over his or her body. Various rules of Jewish law are based on this principle. A criminal, for example, cannot be executed on the strength of his confession because the human body and human life are God's possessions and "one's own statement cannot affect that which does not belong to him." [7] It is forbidden on the same ground to inflict unnecessary physical damage to oneself; indeed, some halakhic authorities have great difficulty in permitting cosmetic surgery. Suicide, as the ultimate act of self-destruction, is strictly prohibited. [8]

Halakhah will not ask about individual rights against the state. Instead, it will inquire about what God expects of a person in the last moments of his or her life.

The traditional Jewish approach carries some clear implications for the treatment of terminal patients. Euthanasia, "mercy killing" in whatever form, is unequivocally condemned in the halakhic literature. This judgment is not altered by the fact that the patient may suffer from great pain or that, lying in a vegetative state, his or her life seems bereft of all "quality" and purpose. It is similarly irrelevant that the patient has authorized euthanasia, whether verbally or in the form of a "living will." No person is entitled to appoint others to commit an action—suicide—forbidden to that person himself.[9] This stance would appear to indicate that all measures, including "heroic" ones, must be taken in order to prolong the life of a critically ill patient, no matter how hopeless the medical situation, no matter how imminent death may be. On this basis, it would seem that the petition of Nancy Cruzan's parents would be immediately and automatically rejected by a Jewish court.

Yet things are not always as they seem. Halakhic insistence on the inviolability of human life is balanced—and at times outweighed—by its concern for the alleviation of human suffering.[10] Thus, patients are allowed to undergo risky surgery to relieve severe pain, even though the operation places them in mortal danger. A physician may administer a powerful dose of morphine or other pain medication to a terminal patient, even when the drug may shorten the patient's life, for pain itself is seen as a disease deserving of treatment.[11] It is also permissible to pray for the death of a terminal patient suffering severe pain.[12] Moreover, the halakhic tradition distinguishes between "active" measures taken to hasten a patient's death and "passive" steps designed to allow the patient to die and "let nature take its course"; the former are always forbidden, while the latter are permitted. The *Shulchan Arukh*, the most authoritative statement of Jewish law, formulates this rule as follows:[13]

> It is forbidden to speed the death of the dying person. For example, in the case of a *goses* whose death is protracted, it is forbidden to remove the pillow and mattress from underneath him, on the grounds that some say that certain feathers hinder the soul's departure. It is likewise prohibited to move him from his place or to put the keys to the synagogue under his head so that his soul will depart. However, if there is present a factor which hinders the departure of the soul — for example a knocking sound, like that of a nearby woodchopper, or if there is salt on the patient's tongue—and these prevent him from dying, it is permitted to remove that factor, since this does not involve a positive act *(ma'aseh)* at all; it is simply the removal of an impediment.

Although expressed in the archaic language of medieval folk "medicine," this distinction is clearly of major practical significance in the modern medical context. If a particular treatment applied to a terminal patient can be defined as a "hindrance" or an "impediment" to his or her otherwise imminent death, the removal of that treatment—pulling the plug—would not qualify as euthanasia and would thus be permitted under *halakhah.*

Jewish tradition sees the preservation of life as the supreme value.

On the other hand, this approach is beset by difficulties. The text itself appears internally contradictory. If "removing an impediment" is permitted because it does not involve a positive act that hastens death, then surely asking the woodchopper to cease his work is such an act. Moreover, if it is forbidden to move the patient, how can the removal of salt from the tongue, which inevitably involves physical contact, be permitted? The commentators to the *Shulchan Arukh* have, with varying degrees of success, attempted to resolve these contradictions. Emerging from their discussions is the conclusion that the medical nature of the factor, rather than the question of physical contact, is the central issue.

While it is forbidden to take an action which hastens a person's death, it is equally forbidden to introduce into the situation any factor which serves as an impediment and needlessly prolongs the person's death. The woodchopper and the salt are "impediments" because they serve no legitimate medical purpose. Far from contributing to the therapeutic function of the physician's craft, these factors can do nothing but lengthen the process of dying. Their removal is not seen as a positive act but as a restoration of the proper *status quo ante.*[14]

It is not altogether certain that this exceedingly fine distinction between hastening and removing an impediment to death has any concrete, practical application in the world of contemporary medicine. Some authorities note that the legal sources do not speak merely of a patient in a terminal condition with no hope for recovery. Rather, the removal of an impediment is permitted only when the patient is a *goses,* that is, in a moribund state when death is otherwise imminent. It is surely difficult, if not impossible, for physicians to determine that the patient is in fact in this condition.[15] Moreover, the arsenal of technologies employed by today's physician cannot be compared to the "impediments" mentioned in the medieval texts. While the latter are not

recognized as tools utilized for therapeutic purposes, drugs and sophisticated life-support systems are legitimately "medical." "Pulling the plug" on a standard medical technology would constitute an unacceptable interruption of medical treatment and therefore a positive act designed to hasten death. Based on these considerations, some conclude that Jewish law requires that all therapies, including "heroic" ones, be employed in order to preserve the life of the terminal patient. As one scholar writes, "It is not only forbidden to hasten death; indeed, one is required to search for drugs and therapies that will keep the patient alive, even though the physician believes that this will prolong his suffering."[16] Still, halakhists are not required to draw such a restrictive conclusion. Some leading rabbinic scholars permit the physician to disconnect the artificial respirator when careful examination reveals that the patient, no longer able to sustain respiration and heartbeat on his own, lacks all "independent viability" and when vital signs are maintained totally and exclusively by the machine. There is no requirement that such a patient be resuscitated should he or she cease to breathe; indeed, such resuscitation may even be forbidden.[17] Other authorities allow withdrawal of medical treatments which in the physician's opinion cannot lead to the recovery of the terminally ill patient but serve only to prolong his suffering. Thus, even before the patient has reached the "last moment," there is no requirement that drugs and other therapies be administered if these have no effect but to lengthen the process of dying.[18]

This latter, more permissive viewpoint does not contradict the reverence shown by halakhic tradition for even the shortest span of life. Human life indeed is sacred. We are enjoined from any action which shortens it and we are obligated to undertake all legitimate means at our disposal in order to preserve it. At the same time, this position is informed by a particular conception of the nature of medical practice under Jewish law. The sources of the *halakhah* regard the saving of life through the practice of medicine as a *mitzvah*, a positive religious commandment. For this reason, physicians are permitted to administer potentially harmful drugs and surgical techniques to the patient and are, to a large extent, exempt from liability for damages so long as they are engaged in the legitimate practice of their profession. It follows that this obligation would not require physicians to apply measures that are in no way "medical," procedures which, in the considered judgment of the profession, cannot heal and which serve no therapeutic purpose.[19] We may remove the salt and the woodchopper not because we dismiss the value of the last moments of life, but because these factors are not legitimate medicine: they are not part of the recognized arsenal of the physician's art and should not have been introduced in the first place. Many halakhic authorities draw the analogy between these "technologies" and various modern treatments, both the heroic and the not-so-heroic, which qualify as legitimate medicine when first applied to the patient. At some point these measures lose that legitimacy, their therapeutic justification. At that point they cease to be "medicine" and there is no warrant for their continued use. Like the salt and the woodchopper, they have become impediments to the patient's otherwise imminent death. [20]

No moral distinction is to be made between a comatose patient who can survive through artificial feeding and others—babies, the feeble elderly, and the severely disabled—who require assistance in order to ingest food and water.

It is from within this textual and intellectual context that the Jewish legal tradition approaches the case of Nancy Beth Cruzan. Is it possible, even under the more lenient interpretation of *halakhah*, to regard artificial nutrition and hydration as a medical treatment which, having lost its therapeutic effectiveness, may be discontinued? Many physicians, ethicists, and jurists accept this reasoning. While food and water are not normally regarded as medicine, the use by medical professionals of an artificial feeding device is hardly to be characterized as a "normal" procedure. The device is utilized because the patient, as a result of illness or injury, is unable to ingest nutrients in the "normal" manner. As such it is a medical intervention, undertaken as a response to disease. Its withdrawal, like the withdrawal of other medical interventions, will result in the death of the patient from the very disease which warranted its introduction in the first place. There is, in other words, no reason to distinguish between artificial feeding and other indisputably "medical" procedures such as cardiopulmonary resuscitation or the artificial respirator.[21] The definition of artificial feeding as "medical treatment" has won increasing acceptance within the medical profession[22] and by American courts;[23] most of the opinions in *Cruzan* adopt this identification, whether explicitly or tacitly.[24] There is also substantial support for this position among medical ethicists.[25] It is therefore proper to speak of "an emerging medical, ethical, and legal consensus on the situations in which artificial feeding can be withdrawn." [26]

At the same time, not all observers are ready to jump on this bandwagon. Unlike sophisticated medical technologies, food and water are universal human needs. Most of us can survive quite well without those technologies; all of us, the well and the sick alike, require food and water to survive. While the discontinuation of a specific medical or surgical procedure does not guarantee that a patient will die (witness the case of Karen Ann Quinlan), the withdrawal of food and water causes with absolute and final certainty the death of a human being. Moreover, the fact that food and water are poured through a tube does not transform them into exotic medical substances; all of us, in fact, receive our food and water at the end of a long chain of production, transportation, and distribution technologies. A real and desirable distinction can therefore be made between artificial feeding and medical treatment. [27]

Halakhic scholars who have spoken to the issue accept this distinction. Even those who under certain circumstances permit the discontinuation of treatments for the terminally ill forbid the withdrawal of nutrition and hydration. "The reason, quite simply, is that eating is a normal process, required in order to sustain life, necessary for all, including those who are healthy."[28] Food and water, which "fulfill natural and physiological requirements," are not to be categorized as "impediments to death" since they are not medicine and their presence cannot therefore be defined as medically illegitimate.[29] No moral distinction is to be made between a comatose patient who can sur-

vive through artificial feeding and others, such as babies, the feeble elderly, and the severely disabled, who require assistance in order to ingest food and water. All of them possess "independent viability." As such, withholding food and water from a comatose patient is no different from any other instance of forced starvation, an act which the *halakhah* defines as murder.[30] This viewpoint seems wellnigh universal among Orthodox and Conservative halakhists, and it has not as yet been challenged by the rabbinic legal scholars of the liberal camp.[31]

> Halakhic insistence on the inviolability of human life is balanced —and at times outweighed—by its concern for the alleviation of suffering.

Still, this divergence between the halakhic community and advocates for the "emerging consensus" is more than a disagreement over the definition of "legitimate medical treatment." It results from a fundamentally different understanding of the obligations of patient, physician, and community and of the ultimate source of those duties. The governing principle in the "consensus" view is that of patient autonomy. Competent and informed patients have the right to make decisions about their medical treatment; caregivers are in the main bound to respect these decisions, even if the patient's life is thereby shortened. The decision to refuse or withdraw any life-sustaining treatment, including artificial feeding, is generally the result of a comparative assessment of the chances of recovery versus the burdens of continued treatment. Should the patient conclude that to accept those burdens would condemn him or her to a life bereft of quality and dignity, the decision to discontinue treatment and to "let nature take its course" is both legally permissible and morally justifiable.[32]

Halakhah, affirming the ultimate sanctity of life, denies the patient (or anybody else) the "right" to take action that will hasten his or her death. While acknowledging that there are medical situations in which we may well prefer death to continued suffering, Jewish law sees the effort to preserve the divine gift of life as the highest expression of human dignity. Halakhists accordingly take a dim view of "quality of life" arguments as grounds for withdrawal of medical treatment.[33] Such arguments assume that we are able to identify some minimum standard of health below which human life becomes intolerable or ceases to be meaningful. According to a familiar version of this assertion, patients in irreversible coma or persistent vegetative state lack that level of cognitive-affective function indispensable to the realization of life's "purpose" and should therefore be "allowed" to die by deprivation of food and water.[34] It is almost superfluous to point out that the same contention is made with increasing frequency regarding a host of other disabilities: defective newborns (the "Baby Doe" case), quadriplegics, patients on kidney dialysis, the feeble elderly, and those who suffer from AIDS or Alzheimer's disease. In each instance, it can and has been claimed that life for these individuals is no longer "meaningful" and that they are therefore "better off dead." *Halakhah* rejects this claim. Moreover, once we have accepted this proposition, it becomes difficult (if not impossible) to draw ethical distinctions among the various methods available to relieve suffering. If it is permissible to "allow" these unfortunates to die of starvation, why should we not speed their end mercifully by means of lethal injection or physician-assisted suicide? Indeed, the pages of recent medical journals indicate that these approaches to the treatment of the terminally ill are now considered a proper subject for ethical debate.[35] All such arguments trespass a bottom line which *halakhah* will not cross. If we hold life to be sacred, argue the sources of Jewish law, then we must accept that at some basic point it is off-limits to our will. Decisions which infringe upon life's essential inviolability—for instance, murder, suicide, and euthanasia —are beyond our authority to make.

For these reasons, Jewish tradition rejects the underlying assumptions which govern the Supreme Court's decision in Cruzan. The sanctity of life and the very real limitations which this places on the choices of patients and caregivers lead to the inescapable conclusion that *halakhah* does not recognize a "right to die." While medical treatments may be withdrawn when they lose their therapeutic effectiveness and become a mere impediment to otherwise imminent death, artificial feeding is not "medicine" and cannot be withdrawn from a terminal patient. It is possible that this stance renders Jewish tradition irrelevant to the contemporary medical-ethical discussion, dominated as it is by the postulate of individual autonomy. Alternatively, the "emerging consensus" may not be the last word in medical ethics. The position of *halakhah* is resonant with an older but by no means moribund Western ethical tradition, an approach which insists that ultimate human fulfillment is not a matter of exclusively private concern. "Happiness" is not to be found solely in the attainment of personal satisfaction but in the realization of ends, duties, and virtues which go beyond the psyche.[36] Such an end may well be the preservation of human life, even when in our estimation that life is lacking in quality or purpose. And although we cannot deny the heartbreaking tragedy of Nancy Beth Cruzan and her family, we must see that by asserting the dominion of human will over the most fundamental questions of life and death, we display more than a trace of arrogance and hubris. Accordingly, those who help shape ethical attitudes can benefit greatly from honest and informed conversation with this centuries old religious tradition. Teaching that life itself—the ultimate sanctity—lies outside the range of our arbitrary choice, Judaism offers a message of supreme ethical importance. Participants in today's moral debate may well disagree with that message; they are not, however, entitled to ignore it.

Notes

1. *Cruzan v. Director, Missouri Department of Health* 58 U.S. Law Week 4916 (1990). The quoted words are those of Justice Brennan, dissenting, at 4929.

2. For an excellent survey of the methodologies and source materials of Jewish law, see Elliot N. Dorff and Arthur Rosett, A Living Tree: The Roots and Growth of Jewish Law (Albany, New York: State University of New York Press, 1988). Also useful is Menachem Elon, "Codification of Law." Encyclopaedia Judaica, vol. 5, cols. 628-656.

3. No attempt can be made, in the space of this essay, to summarize the entirety of this literature, although it is possible to sketch in broad outline the general trends in rabbinic thinking. See also Fred Rosner, "The Jewish Attitude Toward Euthanasia," and J. David Bleich, "The Quinlan Case: A Jewish

Perspective," in F. Rosner and J.D. Bleich (eds.), Jewish Bioethics (Brooklyn, New York: Hebrew Publishing Co., 1979), pp. 253-276, for one side of the complex halakhic discussion. For balance, see David M. Feldman, Health and Medicine in the Jewish Tradition (New York: Crossroad, 1986), pp. 93-96, and I. Jakobovits, Jewish Medical Ethics (New York: Bloch, 1975) pp. 119-125 and 275-276. The most detailed summaries of the literature are in Hebrew and are often found in journals specializing in medical halakhic issues; one of the best of these is A. Steinberg, "Retsach Mitokh Rachamim Le'or Ha-Halakhah," Asya, Jerusalem, Reuven Mass, v. 3 (1983), pp. 424-457.

4. Yoma 85b; Shulchan Arukh, Orach Chayim 382:2; and numerous other citations. The great exceptions to this rule are the instances wherein the Jew is obliged to accept martyrdom rather than violate the Torah to save his or her life; see Sanhedrin, 74a-b.

5. A *goses*, in general, is one who is not expected to live for more than three days; Encyclopaedia Talmudit, v. 5, pp. 393 ff.

6. Semachot 1:1-4; Maimonides, Hilkhot Rotseach 2:7; Shulchan Arukh, Orach Chayim 329:4 and Yoreh De'ah 339:1.

7. Maimonides, Hilkhot Sanhedrin 18:6, and the commentary of R. David ibn Zimra *ad loc.*

8. Maimonides, Hilkhot Rotseach 2:2-3.

9. "There is no agency for sin" (Kiddushin 42b): an agent who performs a forbidden act cannot excuse himself on the grounds that he was simply carrying out his employer's instructions.

10. For this reason, the tradition insists that even a condemned criminal must be granted, if possible, a form of execution which will result in a speedy death. The Hebrew term for this is mitah yafah, literally "a good death," the equivalent of the Greek "euthanasia." This requirement is, in fact, derived from the famous verse (Lev. 19:18): "You shall love your neighbor as yourself." See Ketubot 37b and Sanhedrin 45a.

11. R. Ya'akov Emden, Mor U-Ketsi'ah, Orach Chayim 328; R. Eliezer Waldenberg, Resp. Tsits Eliezer, v. 13, no. 87. Waldenberg limits his permit with this proviso: the medication must be administered solely for the purpose of relieving pain and not as a subterfuge for hastening the patient's death.

12. R. Nissim Gerondi, commentary to Nedarim 40a.

13. Yoreh De'ah 339:1, Isserles, who in turn draws upon the thirteenth-century Sefer Chasidim.

14. See Beit Lechem Yehudah on the Shulchan Arukh passage: "From where did the salt originate? You must conclude that it is forbidden to delay the patient's death by placing salt on his tongue. Those who did so acted improperly in the first place; its removal is thus permitted."

15. Avraham Steinberg, M.D., "Retsach Mitokh Rachamim Le'or Ha-Halakhah," Asya, Jerusalem, v. 3 (1983), p. 454. See especially note 128: while a *goses* is often defined as one whose death is three days away, such a definition is at best retrospective given the power of today's sophisticated technologies to maintain the patient's life for long periods of time.

16. R. Natan Zvi Friedman in Ha-Torah Ve-Ha-Medinah, Jerusalem, vols. 5-6 (1953-54), p. 229. See, in general, the articles by Rosner and Bleich in Jewish Bioethics, as well as Rosner, "Rabbi Moshe Feinstein on the Treatment of the Terminally Ill," *Judaism* 37 (1988), pp. 188-198. Ya'akov Levy, M.D., in No'am, Jerusalem, v. 16 (1973), pp. 53ff. offers a clear formulation of the stringent position: the artificial respirator, unlike the salt or the woodchopper, is a medical technology vital to a patient's physiological needs. Its disconnection is thus a positive act, hastening the patient's death.

17. R. Eliezer Waldenberg, Resp. Tsits Eliezer, Jerusalem, v. 13, no. 89 (1985); R. Chaim David Halevy, Aseh Lekha Rav, Tel Aviv, v. 5, no. 30 (1983); R. Benzion Firer, Techumin, Gush Etsion, 1986, pp. 219-225.

18. R. Moshe Feinstein, Resp. Igrot Moshe, Bnei Brak, 1985; Choshen Mishpat II, no. 73; R. Dov Velner, Ha-Torah Ve-Ha-Medinah, Jerusalem, vols. 7-8 (1955-57), p. 318; R. Immanuel Jakobovits, Ha-Pardes, New York, v. 31 (1957), no. 1, pp. 28ff. and no. 3, pp. 16ff.; R. Walter Jacob, American Reform Responsa, New York, no. 79, 1983.

19. This position is stated clearly by Jakobovits, no. 3, p. 18: while we are permitted (resha'in) to administer medical technologies which cannot heal the terminal patient, we are not commanded (metsuvin) to do so.

20. Feinstein, op. cit., no. 74, draws a distinction between refu'ah, "healing," and the needless prolongation of the patient's life with drugs which "do not heal but rather lengthen the period of the patient's suffering."

21. For a forceful presentation of this case see George Annas, "Do Feeding Tubes Have More Rights than Patients?" *Hastings Center Report* 16 (February 1986), pp. 26-28.

22. Council on Ethical and Judicial Affairs of the American Medical Association, Current Opinions. "Withholding or Withdrawing Life Prolonging Medical Treatment." (Chicago: American Medical Association, 1986), Opinion 2.20; "Position of the American Academy of Neurology on Certain Aspects of the Care and Management of the Persistent Vegetative State Patient," *Neurology* 39 (January 1989), p. 125.

23. See especially *Brophy v. New England Sinai Hospital, Inc.* 497 N.E. 2d 626 (Mass. 1986); *In re Conroy*, 486 A. 2d 1209 (N.J. 1985); *Bouvia v. Superior Court,* 225 Cal. Reporter 297 (Cal. App. 2d Dist., 1986).

24. "But for purposes of this case, we assume that the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition" Chief Justice Rehnquist in *Cruzan,* supra, at 4920. See also the opinions of Justice O'Connor at 4923 and Justices Brennan, Marshall and Blackmun at 4928. Only Justice Scalia, at 4925, expresses any hesitation over this definition.

25. President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, Withholding or Withdrawing Life-Prolonging Medical Treatment (Washington, D.C.: Government Printing Office , 1983), p. 88; Guidelines on the Termination of Life-Sustaining Treatment (Briarcliff Manor, New York: The Hastings Center, 1987).

26. Robert Steinbrook and Bernard Lo, "Artificial Feeding—Solid Ground, Not a Slippery Slope," *New England Journal of Medicine* 319 (1988), p. 288.

27. Patrick G. Derr, "Why Food and Fluids Can Never Be Denied," *Hastings Center Report* 16 (February 1986), pp. 28-30.

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.

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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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