The Constitution and the Right to Die

by Philip G. Peters, Jr.

The United States Supreme Court's opinion in *Cruzan*[1] has several quite interesting implications beyond its immediate impact on the care given to Nancy Cruzan. First, the Supreme Court appears to have recognized that a patient's right to self-determination has constitutional stature. Second, the Court adopted a rarely used balancing test for deciding which future restrictions will be constitutionally invalid. Third, and lastly, the Court's newly adopted balancing test dictates a more sophisticated analysis of the state's justifications than has been necessary in the past. In doing this analysis, courts will benefit greatly if they borrow the insights of biomedical ethics.

To understand the novelty of the Court's framework and its implications for future state restrictions on medical decision making, a little background is necessary.

The History

Prior to the Quinlan[2] case in 1976, there was no consensus in the courts about how to handle cases where a patient or family wanted to decline life-sustaining medical treatments. Most cases involved curable patients who declined blood transfusions for religious reasons and the courts struggled inconclusively with those cases.

Karen Quinlan's pivotal case changed that. Like Nancy Cruzan, Karen Quinlan was in her twenties when deprivation of oxygen to her brain left her in a persistent vegetative state. In deciding her case, the New Jersey Supreme Court radically rewrote the law concerning the termination of life-sustaining medical care. Karen, said the court, had a constitutional right of privacy which could be asserted on her behalf by her guardian.

Although the Constitution does not explicitly mention privacy rights or medical decision making, the New Jersey Supreme Court relied on previous decisions by the U.S. Supreme Court which held that some areas of personal privacy are implicitly protected under the Constitution. In 1965 the Supreme Court, in *Griswold v. Connecticut*,[3] recognized constitutional privacy rights with regard to contraceptives, and in 1973 this protected area of privacy was extended to include abortion in *Roe v. Wade*.[4] Significantly, *Roe* was decided just three years before *Quinlan*. In the words of the New Jersey Supreme Court, "Presumably this [privacy] right is broad enough to encompass a patient's decision to decline medical treatment under certain circumstances, in much the same way as it is broad enough to encompass a woman's decision to terminate pregnancy under certain circumstances."[5] Soon thereafter, a number of other state courts followed this lead and recognized a constitutional right to forgo medical treatment.

> In *Cruzan*, the Supreme Court created a new tier of constitutionally protected liberty interests. These will receive some protection, but probably substantially less than previously recognized privacy rights.

The constitutional stature of the patient's right to self-determination had considerable legal meaning. It strongly suggested that states would need an extremely good reason before they could enact laws (judicially or legislatively) that limited the liberty of patients to decline unwanted medical treatments. The U.S. Supreme Court had already indicated that state laws infringing on constitutional privacy rights, like abortion, would be invalid unless they were necessary to serve a compelling state interest.[6] By contrast, laws that limit liberties which are not constitutionally privileged, such as speed limit laws, need only be rationally related to a permissible state purpose in order to survive challenge.

The choice of which test to apply typically determines the fate of the state law being challenged. In cases where the state is required to demonstrate a compelling state interest, it rarely succeeds in doing so. On the other hand, when the state need only demonstrate a rational basis, the state law is usually upheld. As a result, the decision whether to label the right to decline medical care as a constitutionally protected privacy interest had the potential to determine whether state regulations would survive constitutional challenge. If state regulations, such as the high burden of proof adopted in *Cruzan*, were subjected to the compelling state interest test, they would be much more vulnerable to successful challenge.

Since then, however, a fascinating journey has occurred in the law of death and dying. Soon after *Quinlan*, the courts started to move away from basing their rulings on the federal Constitution. They realized that they did not need to rule on the constitutional stature of the patient's rights in order to protect those rights. The common law of battery already prohibited unconsented medical care. At the same time, courts realized that the Supreme Court had never given its blessing to this new constitutional privacy right and that the composition of the Supreme Court in the 1980s made recognition of a new privacy right for medical care very unlikely.[7] So as more and more states came to decide refusal of treatment cases, fewer and fewer gave their opinion on whether the right to refuse medical care was a constitutional right as well as a right provided by state law.

Even so, reasonable requests by patients or their families to forgo life-sustaining medical treatment were routinely respected by nearly all state courts. And as long as state courts and legislatures were fashioning state laws which adequately respected patient autonomy, there was no need for an authoritative decision about whether the patient's rights were also constitutionally privileged. That time would come when a state decided to place serious restrictions on the withholding of care and an affected family decided to challenge those restrictions as violating the U.S. Constitution.

Cruzan

Then came *Cruzan*. In that case, a 4-3 majority of the Missouri Supreme Court declined to let Nancy Cruzan's family remove her feeding tubes. The Court insisted on clear and convincing proof of her wishes and was unsatisfied that proof of this kind had been pre-

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sented in her case. In addition, it refused to defer to her family or to consider her "quality of life" in making a treatment decision. As a result, the Missouri Supreme Court mandated further treatment for Nancy Cruzan despite the trial court's finding that she would not have wanted treatment.

The Cruzan family decided to appeal this decision to the U.S. Supreme Court. To succeed, however, they would have to convince the Court both that a patient's right to decline medical care had constitutional stature and also that Missouri's tight restrictions unduly interfered with that right. That meant convincing the Court either that Missouri was constitutionally obliged to accept the trial court's finding that Nancy would not want this treatment or else that Missouri was obliged to defer to a patient's family absent proof of their unfitness.

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The outcome of the appeal seemed likely to turn on whether the right to decline medical treatment would be recognized as a new privacy right akin to abortion or whether, instead, it would be treated for constitutional purposes as just another unprivileged liberty interest, like driving a car fast or riding without a seatbelt.

But the Court apparently decided not to be limited by this two-tier choice. Instead, it created a new tier of constitutionally protected liberty interests. These liberty interests will receive some protection, but probably substantially less than previously recognized "privacy" rights.

What did the U.S. Supreme Court decide? At one level, the answer is easy. It held that Missouri was free to require clear and convincing proof in order to avoid erroneous decisions about ending someone's life. It also held that Missouri need not let Nancy's family or guardian decide for her.

Is the patient's ability to control her treatment a constitutionally protected right of privacy like abortion and access to contraceptives? No (5-4 vote).[8] However, the Court strongly suggested that patients do have a constitutionally protected "liberty" interest of some sort in refusing unwanted medical care.

The opinion of the Court was clearest with respect to patients who are competent at the time that medical treatment is offered. Said Chief Justice Rehnquist, "The principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions." However, he expressed uncertainty about whether this liberty interest required respect for the wishes of patients who were no longer competent. Nevertheless, he examined Nancy Cruzan's appeal in a way that left open the possibility that these wishes were also constitutionally protected.[9]

One paragraph of his opinion, however, has led some observers to doubt that the decision establishes any constitutionally protected liberty interest whatsoever. In that paragraph he wrote:

> Although we think the logic of the cases discussed above would embrace such a liberty interest [in declining life-sustaining, artificially-delivered food and water], the dramatic consequences involved in refusal of such treatment would inform the inquiry as to whether the deprivation of that interest is constitutionally permissible. But for purposes of this case, we assume that the United States Constitution would grant a competent person a constitutionally protected right to refuse life-saving hydration and nutrition.

By merely "assuming" that such a right existed without expressly deciding the point, Rehnquist was apparently reserving for the future a final decision about whether a patient's constitutionally protected liberty interest in declining medical care generally would extend to *life-sustaining care* and, more particularly, to *food and water*. As he noted, however, the logic of prior case law would support that extension. Indeed, it appears that he, Justice O'Connor, and all four of the dissenters agreed on this point. If there is a significant message in his quoted language, it is not that the liberty interest is in doubt, but that the serious consequences of declining life-sustaining care may give rise to especially powerful state interests. Those interests must be considered before determining whether state restrictions on this liberty interest are constitutionally permissible.

Do constitutionally protected "liberty" interests receive any extra protection against state interference? Apparently. Although Chief Justice Rehnquist's opinion for the majority is not entirely clear on this point, his opinion makes it seem likely that this right is entitled to more protection than is afforded by the "rational basis" test. Instead, he proposed that the state's interests be balanced against those of the patient. Prior to *Cruzan*, a balancing test had never been explicitly endorsed in privacy cases.[10] If this reading of *Cruzan* is correct, then the Court has placed a patient's right to refuse medical care on a middle tier. It is more protected than ordinary liberties, but less protected than fundamental privacy rights.

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What is the significance of the balancing test adopted by the Court? It means that the case has something for both sides. For right-to-die advocates, it means that patient autonomy has constitutional stature and must be balanced against the state's interests. Depending upon how this balancing process is implemented (i.e., how much relative weight is given to the patient's liberty interests), there could well be some state restrictions that will be invalid under the *Cruzan* test which would have passed a rational basis test. Consider, for example, a future state law which requires that all admissible evidence of patient preferences be in writing (much like the laws governing last wills and testaments). This kind of restriction would readily survive a rational basis test. Such a rule is rationally related to the goal of insuring accurate evidence about a patient's settled convictions before making an irreversible decision to end her life. On the other hand, this statute might fail to survive a balancing test because its practical effect would be to deprive the great, great majority of patients of control over their future medical care. Only time will tell if the courts will

implement the *Cruzan* balancing test in this fashion, but it is certainly a reasonable possibility.

> What is the significance of the balancing test adopted by the Court? It means that the case has something for both "right-to-die" advocates and for people who believe that the state should more aggressively assert its interest in the preservation of life.

Alternatively, there are at least three reasons why people who believe that the state should more aggressively assert its interest in the preservation of life will be pleased by the Supreme Court's decision. First, the Court upheld the restrictions adopted by the Missouri Supreme Court even though they are probably more conservative than any other state except New York. In particular, Justice Rehnquist confirmed that the state interest relied upon by Missouri (the state's interest in the preservation of life) was constitutionally important. He also agreed that "a state [like Missouri] may properly decline to make judgments about the 'quality' of life that a particular individual may enjoy." And he suggested that a state's desire to protect against error or abuse in the ascertainment of patient wishes finds constitutional support in the Due Process Clause provisions that safeguard life along with liberty.

Second, the Court refused to characterize a patient's right to decline medical care as a fundamental privacy right. If it had, Missouri's tough burden of proof might well have been in jeopardy. Not only did the Court decline to recognize a new privacy right, but it also left some room to retreat from its "assumption" that patients have even a privileged liberty interest.

Third, the Court may have been setting the stage for demoting other previously recognized "privacy" rights, like abortion, from fundamental rights into mere "liberty" interests, thereby making them more vulnerable to state control.

Why did Rehnquist recognize the constitutional stature of patient autonomy and adopt a new test? Anyone's guess. Perhaps some recognition of constitutional stature was necessary in order to get the vote of Justice O'Connor. Perhaps, instead, he was trying out a role as mediator in the Court's internal debate over how much respect to give previously recognized privacy rights. In this role, he may have been testing the water before proposing that a balancing test also be used to evaluate state actions which interfere with other privacy rights, like abortion. Less probably, he may have intended to firmly establish a middle tier of liberty interests. This tier could be used for liberty interests that are more important than seatbelt decisions, but less important than previously recognized fundamental rights. There may even be other explanations. Only future cases will answer this question.

What kinds of state restrictions on patient freedom might be invalid? Consider the following possible state restrictions:

(1) A requirement that patient preferences be expressed in writing or that the writing be recent;
(2) Refusal to accept a patient's choice of a proxy to make health care decisions;
(3) Insistence on tube-feeding, even if the patient has expressed a desire to decline this treatment;
(4) A requirement that patient refusal of tube-feeding be made in writing;
(5) Nursing home regulations which require a minimum caloric intake and make no provision for contrary patient instructions.

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None of these possible restrictions are beyond the realm of possibility. Many citizens and some influential lobby groups are alarmed by the risks of error or abuse in cases where life-sustaining treatment is withheld. Each of these hypothetical restrictions would arguably reduce that risk.

Indeed, Oklahoma already greatly restricts the withholding of nutrition and hydration.[11] And Chief Justice Rehnquist invited a requirement that patient preferences be in writing by making a pointed analogy to the rules requiring that all wills and certain contracts be in writing. With respect to proxies, the Missouri Catholic Conference recently proposed a statute which would treat such proxies like guardians, thereby subjecting them to the same limits as the Missouri Supreme Court placed on guardians in *Cruzan*.

The constitutional stature of a patient's right to self-determination stands as a potential barrier to restrictions of the sort listed here. In each case, courts would be asked to decide whether the nature and extent of the state's interference with patient liberty is outweighed by the state's countervailing interest in the preservation of life.

A Role for Bioethics

Obviously, this balancing process will be extremely subjective. There are no fungible units of measure akin to pounds or kilograms by which to compare either a patient's interest in liberty or the state's interest in the preservation of life. Nevertheless, it may be possible to give some predictability and coherence to the balancing process.

When courts are asked to weigh the state's interest in regulating the withholding of medical care, particularly the state's interest in the preservation of life, they can improve their analysis if they insist upon a precise identification of the specific goals and values which underlie the state's generalized interest in the preservation of life. Previously, they have recognized a rather vague state interest in the preservation of life without much effort to explore exactly what that means or what specific concerns it reflects.[12]

Put differently, a better understanding of the *meaning* of the state's interest in the preservation of life is needed before a satisfactory assignment of *weight* can occur.

The courts can borrow usefully from bioethics here. The insights offered by bioethics could help the courts to recognize several categories of underlying state objectives which are familiar to bioethical discourse and which often lie beneath the surface of a purported state interest in the preservation of life. For example, some regulations, like

competency requirements, are intended to protect patient autonomy. Others, like rules requiring tube-feeding or rules requiring treatment of patients who may return to good health, may be designed to override patient autonomy in favor of objective patient welfare. Others, like rules requiring that a patient's condition be terminal, may also manifest a community morality which is offended by suicide-like refusals of treatment.

This list is not exhaustive and many state restrictions will have multiple and overlapping objectives. Still, it seems likely that judicial analysis of challenged state restrictions will be substantially more satisfying if courts borrow the tools of bioethics to help recognize the various values that may be subsumed within the state's generalized interest in the preservation of life. The weight assigned to each of these underlying interests may not be identical. Only after a careful identification of the specific objectives served by a particular challenged restriction can a weight be assigned. Only then can the courts assess the extent to which the regulation is really necessary to address the state's underlying goals.

By classifying the underlying state interests in this way, rather than merely assigning a weight to the state's general interest in the preservation of life, courts can potentially improve the coherence and predictability of their future decisions. As a result, we should educate and encourage the courts to utilize the analytical tools of bioethics in implementing the *Cruzan* decision.

Endnotes

1. *Cruzan v. Director, Missouri Department of Health,* 58 L.W. 4916 (June 26, 1990).
2. *In re Quinlan,* 70 N.J. 10, 355 A.2d 647. *cert. denied sub num.* Garger v. New Jersey, 429 U.S. 922 (1976).
3. *Griswold v. Connecticut,* 381 U.S. 479 (1965).
4. *Roe v. Wade,* 410 U.S. 113 (1973).
5. 355 A.2d at 663.
6. Interestingly, *Quinlan* did not borrow this test from *Roe*. Instead, the court devised a special test for balancing state and patient interests.

> "We think that the State's interest contra weakens and the individual's right to privacy grows as the degree of bodily invasion increases and the prognosis dims. Ultimately there comes a point at which the individual's rights overcome the State interest."

Many courts later endorsed this balancing test, but they were unwilling to implement it when the outcome might result in mandated treatment. See Peters, "The State's Interest in the Preservation of Life: From *Quinlan* to *Cruzan*," *Ohio State L.J.* 50 (1989), pp. 891, 897-900. As a result, the actual holdings of the cases were more consistent with a compelling state interest test than with the *Quinlan* balancing test.

7. In 1985, the Court confirmed this assumption. In *Bowers v. Hardwick,* 478 U.S. 186 (1986), the Court expressly refused to add private consensual homosexual conduct to the list of privacy rights.

8. Rehnquist's desire to abandon the search for future fundamental "privacy" rights was expressed in *Webster v. Reproductive Health Services,* 57 L.W. 5023 (June 27, 1989). In that case, Rehnquist suggested that "there is wisdom in not unnecessarily attempting to elaborate the abstract differences between a 'fundamental right'... or a liberty interest protected by the Due Process Clause." Seeing these omens, the attorney for the Cruzans made an interesting tactical decision at the oral argument. Instead of arguing that Nancy Cruzan had a fundamental privacy right which could not be restricted in the absence of a compelling state interest, he argued that Nancy's right was, instead, a liberty interest which should be protected against Missouri's unreasonable restriction. That rather surprising tactic can only be understood in light of the widespread belief that the Rehnquist court would not recognize any more fundamental privacy rights.

9. First, he noted that the precedent primarily relied upon by the Cruzans had not directly addressed this issue. Then he observed that the extension of autonomy rights to incompetent individuals "begs the question" because "an incompetent person is not able to make an informed and voluntary choice to exercise a hypothetical right to refuse treatment..." But he noted that Missouri had recognized to some extent the right of surrogates to effectuate the patient's wishes. He then went on to examine whether the state had interests which would justify its restrictions on these surrogates and concluded that it did. His decision to undertake this analysis suggests that he had not ruled out the possibility that previously competent patients have a constitutional liberty interest which might have been violated in the absence of adequate state interests. The presence of adequate state interests made a final decision about constitutional stature unnecessary.

10. Instead, Rehnquist cited a prior decision which had used a balancing test to evaluate whether a seriously retarded adult's liberty interests in safety and in freedom from bodily restraint had been violated. See *Youngberg v. Romeo* 457 U.S. 307, 321 (1982). In that case, the Court had not labeled the infringed right as either a "fundamental" interest or a "privacy" right. It is also worth noting that the Court seems to have deviated from the strict two-tier analysis in its post-*Roe* abortion cases. However, it has not explicitly endorsed a balancing test.

11. 63 OKLA. STAT. ANN. 3084. 3-5. The statute only permits withholding of nutrition and hydration if (1) the patient is incompetent and will die of some other cause before death by starvation or dehydration; or (2) the nutrition "will itself cause severe, untractable and long-lasting pain...or hydration is not medically possible;" or (3) the patient left clear and convincing instructions after contracting "a specific illness or injury" based on information sufficient to constitute informed consent."

12. Some possible meanings are explored in Peters, "The State's Interest in the Preservation of Life: From *Quinlan* to *Cruzan*," *Ohio State L.J.* 50 (1989), p. 891.