Living Will statutes or the clear and convincing inherently reliable evidence absent here" may have recognized that future possibility. It is, of course, conceded that such inherently reliable evidence was not present in Nancy's case.

Unfortunately, the *Cruzan* decision does not resolve the broad scope of right to die questions in Missouri. *Cruzan* prohibits the withholding or withdrawal of nutrition or hydration from incapacitated persons either under a Living Will Declaration or otherwise. *Cruzan* leaves unanswered the question of whether or not a competent adult may refuse nutrition and hydration as was the situation in the *Bouvia* case. The decision seemingly would permit a competent adult to decline to accept a procedure which is clearly "medical treatment." The decision appears to prohibit a guardian from making any right to die decision on behalf of an incapacitated ward. If the ward, while competent, had executed a Living Will Declaration, such a declaration apparently supersedes the guardian's authority. Clearly reserved for another case on another day is the extent of a guardian's authority to act on behalf of an incapacitated person where clear and convincing evidence of the ward's wishes not to prolong life exists.

By ignoring the "but not be limited to" language of the delegatory statute, the Court has unnecessarily obscured the extent of a guardian's authority in connection with an ordinary medical consent situation. This hiatus presents perplexing problems for the guardian and physician alike. If the guardian declines to consent to a medical treatment recommendation, is the physician justified in relying on that refusal, or is he required to ignore the refusal and risk a charge of battery in a subsequent malpractice action? Obviously, a Hobson's choice should not be permitted to exist in these cases. Absent legislative action clarifying this problem, a physician confronted with such a dichotomy could only resort to court action for guidance. Since it is assumed that medical treatment is recommended only when it is imminently necessary, the delay encountered by even the most expeditious court hearing cannot be in the patient's best interests. Because the personal welfare of the individual is at risk, this problem should be given prompt legislative attention.

Competing philosophies of interest groups involved with the right to die question have made "Right to Die" legislation in Missouri difficult to accomplish. Nevertheless, the difficulties of the question should not be a deterrent to an effort by all concerned persons and organizations to arrive at a consensus which meets the needs and desires of a substantial and growing elderly population in this State while, at the same time, preserving the right to life involving those persons whose desires and intentions cannot be clearly established by acceptable evidence. If, indeed, the United States Supreme Court ultimately finds that a constitutional right of privacy to make a right to die decision is vested in all persons, competent or otherwise, it is the duty of the legislature to find a workable procedure for implementing such a decision where the individual is presently unable to express his or her wishes.

The Reason of the Reasons in *Cruzan*

by Patrick D. Kelly

This article is intended to focus on the **legal** issue underlying the principal basis for the *Cruzan* majority decision, its ruling that Nancy's constitutional right of privacy, and her common-law right to refuse treatment, did not outweigh the State's interest in "the preservation of life" and in "the sanctity of life." The basis in law for the right of one to refuse treatment is detailed elsewhere in this issue (Mahoney article). The separately raised legal issue as to whether a guardian has the lawful power to issue a directive resulting in termination of life also is discussed elsewhere in this issue (J. Borron article). Still another legal question inherent in the decision, whether the appellate court acted properly in rejecting the trial court's explicit findings as to what would have been the patient's wishes, if competent, will not be discussed, in the belief that an issue as to the scope of appellate review would be of little interest outside the legal community.

Before directly discussing the majority's exposition of a controlling State interest in the preservation and sanctity of life, technical commentary on some of the court's language seems desirable. In its statement of the issue, the Court several times declared the State's interest to be "unqualified." Such ascription adds nothing, and incurs the risk of being interpreted to mean "absolute." Since the majority opinion also goes on to consider whether Nancy's rights outweighed the State's interest, it necessarily follows that the majority did not intend "unqualified" to mean "absolute." And, of course, the Court has never considered the interest in the preservation of life to have no exceptions; in the same term it entered an opinion which condemned a death row inmate to capital punishment.

Some people will be disappointed in the Court's disposition of the issue as to the constitutionality of that portion of the Missouri Living Will statute which excluded from applicability in a person's own Living Will any directive as to withholding nutrition or hydration. The majority did summarily declare error in the trial court's finding of unconstitutionality, but apparently in the sense of error because "...that statute is not at issue in this case" (necessarily so where it was enacted after the onset of incompetency of the patient).

Still, the majority opinion does quote that statutory provision as pronouncing "the policy of this State with regard to the sanctity of life." More exactly, what is stated in the Living Will statute is the particular policy of the State about actions or conduct as to which absolute immunity from criminal prosecution or civil suit shall be extended. Public policy as to sanctity of life would more directly be expressed in a statute

Patrick D. Kelly, J.D., is Professor of Law in the University of Missouri-Kansas City, School of Law.

which declared withholding of food and nutrition to constitute a crime, or as constituting actionable conduct supporting a civil suit for damages. In all events, the statute itself disclaims any decrease in the separately existing rights of a patient to make decisions regarding use of medical procedures. Though that disclaimer also is phrased "so long as the patient is able to do so," courts have uniformly accorded to incompetent patients the same rights as to competent persons. By its terms then, the statute does not state any policy depriving one of a constitutional or common law right to refuse treatment.

The pronounced consideration of the State's interest in preservation of life has been articulated in a substantial number of earlier court opinions which related to withholding or withdrawing medical treatment. As acknowledged by the majority opinion, the other courts were not nearly so troubled in finding that the patient's rights outweighed the State's general interest in the preservation of life. While disavowing the rationale stated in certain of the cases, the majority did not report or discuss the rationale of many of those other cases in which reasons were noted for finding patient rights to outweigh the State interest.

In *Colyer*, the court stated, "This interest [preservation of life] weakens, however, in situations where continued treatment serves only to prolong a life inflicted with an incurable condition." That language, in turn, was quoted in *Rasmussen*. The same recognition of diminishment appeared in *Severns*, where the court stated "...where a human life is doomed to continue into the indefinite future in a vegetative state, the interest of the State in the preservation of human life is diminished in importance by the concomitant rise in the right of an individual, expressed through a guardian, to decline to be kept alive as a veritable vegetable." A more elaborated statement appeared in *Saikewicz*, where it was stated, "The interest of the State in prolonging a life must be reconciled with the interest of an individual to reject the traumatic cost of that prolongation. There is a substantial distinction in the State's insistence that human life be saved where the affliction is curable, as opposed to the State's interest where... the issue is not whether but when, for how long, and at what cost to the individual that life may be briefly extended."

In a number of other decisions, the courts noted that it should not be considered in the State's interest to maintain the patient's corporeal existence where to do so "...degrades the very humanity it was meant to serve," or denies "death with dignity," *Brophy*. In *Gray*, the court stated, "The duty of the State to preserve life must encompass a recognition of an individual's right to avoid circumstances in which the individual himself would feel that efforts to sustain life demean or degrade his humanity." In *Saikewicz*, it was stated, "The constitutional right to privacy...is an expression of the sanctity of individual free choice and self-determination as fundamental constituents of life. The value of life...is lessened not by a decision to refuse treatment, but by the failure to allow...the right of choice." Similar arguments, that preserving the sanctity of life actually requires according the choice of non-treatment to the patient, were announced in *Corbett*, *Conroy* and *Foody*.

The *Cruzan* majority opinion advanced the proposition that its finding the patient's rights as not outweighing the state's interest in preservation of life was influenced by the fact that the patient, though suffering from an incurable disease, was not "terminal" and not at risk of imminent death. Such proposition was expressly rejected in *Delio* and, in fact, was said to support a decision for non-treatment. That court stated,

> We do not believe that the panoply of rights associated with a competent person's right to self-determination is limited by reason of a person's age or medical condition. ...While the terminal nature of an illness may be relevant in treatment decisions made by a competent person, it is of little practical relevance in cases involving a person existing in a chronic vegetative state with no hope of recovery. In fact, the absence of a terminal illness may serve to reinforce the decision to discontinue life-sustaining treatment of the potentially long and indefinite period that a young person without a terminal illness may continue to live in a vegetative condition, deriving no benefit other than mere existence from the life-sustaining treatment, but suffering the continued indignities and dehumanization created by his or her helplessness.

It is difficult to visualize how to balance the patient's personal rights against the State's interest in preservation of life, neither of which is quantifiable or readily weighable.

In *Drabick*, responding to just such argument, the court stated, "To speak of the State's interest in preserving life is really to miss the point. To put it more precisely, the State has an interest in protecting [the patient's] right to have appropriate medical treatment decisions made on his behalf....A conclusive presumption in favor of continuing treatment impermissibly burdens a person's right to make the other choice."

A better analysis would be to recognize the State's interest in the preservation of life merely as "a given" in any civilized nation, and instructive to surrogate decision makers on the gravity of the decision under consideration. Otherwise, the principle should only serve as underlying the justification for imposition upon surrogate decision makers, and upon courts, of the substantial requirements of establishing **by clear and convincing evidence** first the status of the patient as suffering from an incurable condition without hope of regaining cognitive ability and thereafter in determining, by substituted decision making, the patient's wishes.

> One's comfort level over a ruling at complete variance with a significant number of like cases would have been increased if the *Cruzan* majority had provided persuasive rationale for rejecting the commonly stated premise of the other decisions that the existence of an incurable condition lessens the State's interest in preserving life.

The majority's self-laudatory assertion that their decision "is firmly founded on legal principles and reasoned analysis" may be questioned. Explaining its acknowledged disagreement with the many other decisions relating to withholding treatment from permanently comatose patients (now from courts of fourteen states) it states its refusal "to eat 'on the insane root which takes the reason prisoner.'" Reasoned legal analysis might be expected to cite authority and scholarship more legal than a Shakespearean excerpt.

The majority opinion rejects the premise advanced by other courts th

the clearly shown fact of an incurable condition diminishes the weight of the State's interest in preserving life, arguing such to be "dangerous." Yet, when a determination of the patient's wishes is involved, it seems reasonable that the presence of an incurable condition would be an important consideration to a patient.

The majority opined that the feeding tube treatment was not "oppressively burdensome," not "particularly burdensome," not "substantial." However, the issue should not have been posed as what they, the four who joined in that opinion, would characterize as burdensome. Other courts more precisely have considered, as can best be determined from the testimony of family and acquaintances, whether **the patient** would have considered it burdensome.

The majority stated **their** further opinion that the feeding tube treatment was not "heroically invasive," and stated their perception that "[t]he invasion took place when the gastronomy tube was inserted." Judges of the other courts likely recognized the invasion as continuing for so long as it was the source of sustenance for the patient; and, importantly, more rightly assessed the **patient's** opinion as to whether such permanent method of receiving sustenance was invasive. Invasiveness to other courts has meant more than the temporal act of tube insertion (likely done under anaesthesia), but rather has meant the measure of being unnatural, dehumanizing, and depriving of dignity.

One's comfort level over a ruling at complete variance with a significant number of other like cases would have been increased if the majority had provided more persuasive rationale for rejecting the commonly stated premise of the other decisions that the existence of an incurable condition lessens the State's interest in preservation of life. Better the majority had not advanced a questionable, and earlier rejected, proposition that the rights of the patient are fewer if death is not imminent. It is discomforting that, as to whether the treatment was unduly burdensome or invasive, the majority pronounced its own opinions. The proper issue was whether Nancy Cruzan would have believed so, and would she have chosen non-treatment. The trial court concluded, upon hearing from family and friends, that the evidence was clear and convincing that Nancy, if competent, would have refused.

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Rabbi Michael Zedek

CONTRIBUTING MEMBERS

Patrick D. Kelly
Robert Riederer

CENTER ASSOCIATES

Gary Beauchamp
Patrick Berry
Cheryl Brady
Fr. Dennis Brodeur
R.A. Cunningham
Dr. and Mrs. Rich Davis
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