MIDWEST MEDICAL ETHICS

Vol. 6, No. 4 Fall 1990

The *Cruzan* Decision: 9.5 Theses for Discussion

by Gilbert Meilaender

In its long-awaited decision in the case of Nancy Cruzan, the United States Supreme Court upheld the decision of the Missouri Supreme Court. Although that is the decision for which I had hoped and which I think correct, I am not greatly encouraged by the rationale provided in the opinion issued by the Court's majority and am even less encouraged by Justice O'Connor's concurring opinion and the dissenting opinions authored by Justices Brennan and Stevens. The theses below seek to explore some of the reason for this judgment.

(1) If we concentrate on moral rather than legal issues, it is hard to find important differences between the majority opinion authored by Chief Justice Rehnquist and the dissenting opinion authored by Justice Brennan. The majority opinion assumes "for purposes of this case" what Justice Brennan certainly asserts: that a competent person has "a constitutionally protected right to refuse lifesaving hydration and nutrition." In the case of an incompetent person, the Court majority holds that any of the states is entitled to require rigorous proof that this person, when still competent, authorized removal of a feeding tube in the event of his or her future incompetence. The majority does not demand that the states require as rigorous a demonstration of clear and convincing evidence as Missouri had; it simply views such a requirement as constitutionally permitted.

Justice Brennan's dissent, although it regards the "right to be free of unwanted medical intervention" as a fundamental constitutional right, does not describe that right as absolute. Justice Brennan grants that this right may be limited by countervailing state interests, but holds that the kind of evidence Missouri required is so strict that it will result in failure to honor what were genuinely the desires of many now incompetent persons.

> An act that causes death and an act that results in death are—for all of us who still think there is a distinction between killing and allowing to die—quite different morally.

Justice Brennan is less inclined than the Court majority to defer to Missouri's judgment about the kind of evidence needed to establish a person's desire to refuse treatment. He is more inclined than the Court majority to find that Missouri's rigorous evidentiary requirement would not achieve its supposed purpose: assuring that the wishes of the now incompetent person are accurately determined and enacted. This relative willingness or unwillingness to defer to the judgment of a state legislature is no doubt important in a variety of ways, but it does not point to any very important difference in understanding the moral issues at stake in *Cruzan.*

(2) Between the majority opinion and the Brennan dissent there may, however, be the following difference, which would be important for moral reflection and judgment. Although the facts of the Cruzan case lead all of us to concentrate on patients who were once competent but are no longer, there are also patients who have never been competent (e.g., infants, the profoundly retarded). Only Justice Scalia in his concurring opinion seems to realize this. But the majority opinion, without precisely noting the significance of this fact, seems to make room for its possible implications. The majority opinion, considering the claim that incompetent persons have the same right to refuse treatment as the competent, notes the difficulty with such a claim: "[A]n incompetent person is not able to make an informed and voluntary choice to exercise a hypothetical right to refuse treatment or any other right. Such a 'right' must be exercised for her, if at all, by some sort of surrogate." In the circumstances of the Cruzan case, the Court majority then simply notes that the state of Missouri is entitled to require clear and convincing evidence that a surrogate decision maker is really choosing what Ms. Cruzan herself, when competent, desired.

If, however, we think of cases unlike Cruzan—involving persons who have never been competent—it is clear that no surrogate can know what that person would have desired. The concept has no application in such cases. In such instances some have turned to "substituted judgment," but the Court majority seems (rightly, I think) to doubt the coherence of such a move. The Court may therefore be suggesting that we can quite properly have stricter rules governing treatment refusals for incompetent than competent patients. The issue of artificial feeding is a good one to consider here, since (as I will argue again below) withdrawal of a feeding tube often can only be construed as aiming at the patient's death. The majority opinion may be pointing us toward a compromise in public pol-

continued on page 3

Gilbert Meilaender, Ph.D., is Professor of Religion at Oberlin College.

continued from page 1

icy that would go something like this: Even if we permit competent patients the liberty to make choices that seem to aim at their death (and, hence, are suicidal), we might well surround the lives of incompetent persons with greater protection against choices that, in effect, aim to end their lives—against, that is, injustice. Even while holding that it is never morally right to choose to die or to aim at another's death, we could grant competent adults the liberty to make such a morally wrong choice while protecting the incompetent against the infliction of such injustice. Such a vision may be buried within the majority opinion. But in my view only Justice Scalia really discerns the possibility of such a compromise, and he is quite right to ask why such a possible public policy should be a matter for constitutional adjudication rather than public argument and debate.

(3) Between Justice O'Connor's concurring opinion and Justice Brennan's dissent there is relatively little to choose. Her view differs from Brennan's only in her somewhat greater willingness to defer to a state legislature when it attempts to establish procedures to ensure that the wishes of incompetent persons are truly ascertained and honored. She goes out of her way, however, to emphasize the right of competent adults to refuse any care provided by medical personnel, including feeding. Moreover, she adds the conjecture—not really required by this case—that if a now incompetent patient previously executed an advance directive refusing treatment of any sort (including feeding), the Constitution might well require the states to implement and enforce the wishes expressed in that directive. And in her eagerness to endorse various forms of surrogate decision making she is likely to blur the distinctions needed for the sort of compromise position outlined in (2) above.

(4) If the majority opinion, the O'Connor concurring opinion, and the Brennan dissent shape the contours of future thinking, we may safely predict the following: The trend toward an absolutist understanding of patient autonomy, which so dominated medical ethics from the mid-1970s to the mid-80s, will win the day legally. From all sides we will be encouraged and enjoined to execute advance directives; that is, to attempt to outline our treatment desires and extend our autonomy even into any period of our future incompetence. Whether this view is grounded constitutionally in a supposed right to privacy or in a liberty interest to refuse unwanted treatment will not be terribly important. Commentators of all stripes discussing a wide variety of social ills will continue to be disturbed by the fragmentation of our society, but—in our characteristically schizophrenic way—we will continue to bemoan that fragmentation while enshrining it in our understanding of the principles that should govern treatment refusals.

> We must distinguish between those whose aim is to reject burdensome and invasive treatment and those whose aim is to stop nourishing a person without cognitive capacity in order to bring about that person's death.

(5) We seem destined to continue to describe the facts of the Cruzan case in ways that are mistaken and misleading. The majority opinion is not without fault on this score. (Its sins are, however, not even in the same league with those of Justice Stevens, to which I will turn later.) Discussing the request by Nancy Cruzan's parents to stop nutrition and hydration, the majority opinion states: "All agree that such a removal would cause her death." Later, however, a decision to withdraw Ms. Cruzan's feeding tube is characterized as a decision which "all agree will result in her death." Granting the difficulties in law of articulating and applying a concept of proximate cause, an act that causes death and an act that results in death are—for all of us who still think there is some point to the distinction between killing and allowing to die—quite different morally. Confusion increases when only a few sentences later the majority opinion describes withdrawal of the feeding tube as "a decision to terminate a person's life." Justice Brennan is guilty of the same confusion when he characterizes a decision to withdraw Ms. Cruzan's feeding tube both as a "right to avoid unwanted medical care" and as a right "to choose to die with dignity."

(6) How we describe a decision to stop feeding someone like Nancy Cruzan is crucial. Her case is persistently described as one dealing with removal of a feeding tube; that is, removing intrusive, unwanted medical care. That description is inaccurate. Ms. Cruzan's parents did not seek removal of the tube, they wanted it in place for administering medications and fluids that would reduce seizures while she died. What they wanted stopped was not the intrusion of the tube but its use to nourish and sustain her life. What they wished to decline was not medical intrusion but nourishment. To see this is to begin to appreciate the force of a sentence from Justice Scalia's concurring opinion: "Suppose that Nancy Cruzan were in precisely the condition she is in today, except that she could be fed and digest food and water without artificial assistance." Indeed! We would then distinguish very quickly between those whose aim was to reject burdensome and invasive treatment and those whose aim was to stop nourishing a person without cognitive capacity in order to bring about that person's death.

> If Justice O'Connor's view about the enforceability of advance directives wins the day, we will have developed a constitutional right to assisted suicide.

(7) This suggests a difficulty with the possible public policy compromise outlined in (2) above. Those desiring to refuse nourishment in order to die, or those for whom such a desire, convincingly documented, is asserted by a duly appointed surrogate, do not wish to die without assistance. They want a considerable amount of help from medical personnel, although this help is no longer characterized as intrusive. What they want may properly be described as assistance with suicide. That may pose, and we should hope it poses, grave difficulties for many caregivers. And it may also permeate our caregiving institutions with a kind of profound symbolic dissonance. If Justice O'Connor's view—that wishes expressed in clear advance directives have a constitutional right to be enforced—wins the day, we will have developed a constitutional right to assisted suicide. The sense that all of us are aggrieved when one of our fellow citizens takes his life (a sense

enshrined in the common law tradition which Justice Scalia admirably unpacks) will finally give way to the belief that we are isolated, autonomous individuals. The majority opinion seems to recognize that such questions may be involved, though it does not coherently address them. Noting that "the majority of States in this country have laws imposing criminal penalties on one who assists another to commit suicide," the Court majority writes: "We do not think a State is required to remain neutral in the face of an informed and voluntary decision by a physically able adult to starve to death." But that claim, potentially so far-reaching in its implications for artificial feeding cases, is never precisely related to the Cruzan case in the majority opinion. Once, however, we see that assisted suicide is under debate here we might well think Justice Scalia correct when he says that such an issue ought to be a matter for public debate rather than constitutional determination.

It needs to be said clearly that withdrawing a feeding tube—at least in cases like that of Nancy Cruzan—is properly construed as an act that aims at her death.

(8) In the face of the terminological confusions that abound in the majority opinion and in Justice Brennan's dissent, it needs to be said again that withdrawing a feeding tube—at least in cases like that of Nancy Cruzan—is properly construed as an act that aims at her death. The care she is receiving, even if we call it medical treatment, is not experienced by her as burdensome; hence, withdrawing the feeding tube is not simply rejecting the burdens of treatment. Nor is the care useless, since it preserves her life. Of course, the life she lives is not one that would be the first choice of any of us. But our responsibility is to benefit the life she has, not to determine whether her life has any benefit or worth. Moreover, as I noted in (6) above, when we stop feeding we do not necessarily cease all medically intrusive intervention. We stop feeding not to free her from a burden but to see to it that she dies. Up to the present time we have been unable to face this truth—hence, the terminological confusions. Perhaps a frank acknowledgment that we were indeed recommending assisted suicide would be more honest.

I am aware, of course, that my characterization of withdrawing a feeding tube as aiming at her death will continue to be disputed. For example, Richard McCormick, S.J., has suggested that we consider the following analogy: "Suppose hurricane winds bend and break a sapling tree. We prop it up, hoping to revive it, but see that it will never return to full budding form, even though it will stand and possibly produce a few anemic leaves. So we remove the prop and the tree dies. What killed the tree? Was it not the hurricane winds? Analogously, if we remove nutritional props from Nancy, was it not the original anoxic trauma that caused her death, that killed her?" The short answer to this no doubt rhetorical question is "no." Moreover, as the language of assisted suicide comes increasingly to the fore, it will become apparent to all that the answer is "no." McCormick's claim that we are simply "letting die" those in Ms. Cruzan's circumstances when we stop nourishment will prove to have been a stopgap measure—language needed to tide us over while we worked up the gumption to face a more adequate description of the act. A human being who does not or cannot achieve "full budding form," who puts forth only "a few anemic leaves," but who can continue indefinitely to live this less-than-fully-flourishing life with some assistance (propping) from us, is not a dying human being. She may be ill or seriously disabled, but she is not dying. And, therefore, she cannot be "allowed to die," though she can be killed.

As infants, all of us were in need of a good deal of propping—including, significantly, feeding. Some of us have flourished and, we like to imagine, now get along without propping. Others of us are more anemic and still need a great deal of propping. If we need it, others should try to give it. If others need it, we should try to give it. The fact that one of us is very anemic and in need of endless propping means simply that others must benefit that weak life as best they can and refrain from judging it as a life of no benefit to the one who lives it.

(9) The viewpoint outlined in (8) above may be grounded in religious belief, but it needs no such ground. Its warrant may be simply a firm commitment to treat human beings equally, making no comparative judgments about the worth of others' lives. Justice Stevens in particular seems to worry that "faith," "some theological abstraction," "theology" or "speculative philosophy" may without any constitutional warrant be inserted into these deliberations. He need not fear. In fact, something almost the opposite is true.

The position held by the dissenters in the Cruzan case would be safe only in a community with certain widely shared religious beliefs. We can see how this may be if we recall an argument made by Albert Camus about capital punishment. He suggested that the justice or injustice of the death penalty depends on the ultimate frame of reference within which it is used and understood. Capital punishment could be justified only where there was a socially shared religious belief that the final verdict on any person's life was not given in this world. In such a religious society, to condemn a fellow human being to death would not involve divine pretension. Those who issued and executed the verdict would know that, however necessary it seemed to be, it could still be overturned by the only perfectly competent judge, God himself. But what of a society lacking such shared beliefs? In it, Camus thought, execution must mean elimination from the only community that indisputably existed; and, hence, execution would be a godlike activity. Only in a society that believed in the Eternal could it be right to exercise an ultimate mastery over this finite life.

Our responsibility is to benefit the life Nancy has, not to determine whether her life has any benefit or worth.

Similarly, it would be one thing to judge Nancy Cruzan's life no longer worth our care, to aim at her death, if we shared the belief that in so doing we were handing her over to One who might discern in her worth beyond our ability to discover. It is quite another when our decision eliminates her from the only community we are agreed in valuing. The worth of her life, however disabled she may be, lies simply in the fact that she shares with us the human community. As far as we as a publicly constituted people are concerned, she is either valued and treated equally within this community or she is deemed less than our equal.

(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?"

Rabbi Mark Washofsky, Ph.D., is Associate Professor of Rabbinics at the Hebrew Union College-Jewish Institute of Religion in Cincinnati.

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.