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THE CHURCH, THE LAW, AND THE ADVANCING ARMIES OF DEATH

NAT HENTOFF

Everywhere I go I am a heretic. Why not here? There is a case that is on its way to the Supreme Court.¹ It is another case from Missouri, but not an abortion case. Among the certiorari petitions urging the Court to accept the case are petitions from the American Medical Association, the American Academy of Neurologists, and, in spirit, Father Kevin O'Rourke.

The case is about Nancy Cruzan, a young woman who, some six years ago, was in an automobile accident and has since been diagnosed as being in a persistent vegetative state. Her parents want the feeding tube removed. She is not on a respirator. The first state court that decided the case agreed with them, as would practically all state courts in the nation these days, but that decision was reversed by a divided Missouri Supreme Court.

I will get to the decision somewhat later, but one of the key points made by Judge Robertson, who wrote the majority decision, was that the state has a compelling interest—life. In not only quality of life, but life itself. One of the leading and most forceful critics of that decision has been Father Kevin O'Rourke, who is a faculty member of the St. Louis University School of Medicine and who has considerable influence, I am told, on Catholic hospitals around the country. He believes that quality of life should be paramount in deciding whether people should live or die. I met Father O'Rourke recently in Washington. He is a formidable person, not quite as formidable in these matters as Father John Paris, who has been described as "Father Death."

The *Cruzan* case bears on these central constitutional questions. When should people be allowed to die? Or, rather, and here is where the

¹ *Cruzan v. Harmon*, 760 S.W.2d 408 (Mo. 1988), *cert. granted*, 109 S. Ct. 3240 (1989).

opinionated commentator comes in, when should they be killed for their own good and to relieve the suffering of their families? There is also a cost factor involved in some cases. Who decides? The family? The physician? The courts? Should food and water ever be withdrawn in a society that considers itself civilized unless the patient is imminently dying and the food and/or the water would be a burden on the patient? What constitutional protection is there for incompetent patients whose families say they know what the patient would have wanted if he or she had become a burden. Usually the family says the patient would have wanted to end it all. Is that a sufficient basis to kill the patient if he or she might otherwise have lived for a good many years? The prognosis for Nancy Cruzan is that, with the feeding tube, she might live another thirty years.

Ah, but "kill" is the wrong word, say such bioethicists as Father O'Rourke. I heard him at a recent conference in Washington on The Right to Live and Right to Die. In his paper and later in a conversation with me, Father O'Rourke insisted that when nutrition and hydration are taken away, the patient dies, but not of starvation. The patient dies of the underlying medical condition that has brought him to this crepuscular state. I respectfully told O'Rourke that this was nonsense. You take someone who has been diagnosed as being in a persistent vegetative state with a possible life expectancy of another thirty years and if you remove food and water from her, she will die because you have taken away food and water—even someone who is not a bioethicist knows that.

The increasing number of physicians who have become genteel proponents of euthanasia are also dainty in their choice of language. The *New England Journal of Medicine* has become a forum for these prescribers of death as a medical treatment. The *Journal* agrees with them in its editorials. It is interesting to note that the one problem the *Journal* has in its editorials is that it agrees that not only is euthanasia inevitable (and in many cases in the best interest of the patient and the family), but it is even accepting the concept of assisted suicide (or active euthanasia) where the doctor actually will, by lethal injection or other means, end the life of the patient for the patient's own good. The problem is, and this was in a recent editorial in the *Journal*, that most physicians do not want to do that. They approve of it, but they do not want to do it. It has been suggested that people be trained to administer these lethal doses. Of course, it might help the unemployment problem but the *Journal* says that is not good. You do not want people walking around and when you ask them what do you do for a living, they say they kill patients, so that is still a subject of debate among physicians.

The most recent article on this subject in the *Journal* noted accurately and with satisfaction, "Currently the courts are moving closer to the view that patients are entitled to die whether or not they are terminally ill or suffering." Are patients being *allowed* to die by removing a

feeding tube or a respirator, or by giving just enough of an extra shot of morphine to settle the patient into the hereafter?

Further, let us suppose that the extra morphine is the humane way to end that particular life. In all these cases, the life is indeed ended, which means that the patient has been killed. I keep focusing on precise language because society does not benefit by using euphemisms to mask the naked lunch at the end of the fork. Such euphemism further encourages us to hide from reality and its consequences. Also, what due process does the patient get before the sentence of death is passed upon him or her? Again, who decides? With what constitutional safeguards? The Supreme Court is finally entering this thicket in the 1989-90 Term with the *Cruzan* case.

There is another thorny constitutional problem. What about the nurses and doctors and hospital administrators who are ordered by a court to kill an incompetent patient, even though they claim their conscience forbids them? The source of this conscience may be religious or secular.

In Massachusetts, Rhode Island, New Jersey, and most recently in New York, judges have told these conscientious resisters that they must kill the patient if there is a court order and if no other hospital can be found who will do it. That sounds like the bioethics of the Third Reich, but few moral leaders in this nation have objected to forcing nurses and doctors to kill and, so far as I know, I do not think the Church has said anything official about this.

In Boston several years ago, the late Dr. Richard Field, who was then Chief of Staff at New England Sinai Hospital, absolutely refused to end the feeding and hydration of Paul Brophy, even though the Supreme Judicial Court of Massachusetts gave that order.² During World War II, Dr. Field had been part of an infantry division that liberated Dachau. There he saw thousands of people who had been subject to both dehydration and starvation. He pointed out that bringing about death through dehydration and starvation is barbaric and savage, and he would have no part of it.

Removing the feeding tube, Dr. Field emphasized, "would be done with the willful intention of producing a man's death and for no other reason." The nurses and doctors at that hospital agreed with Dr. Field and would not obey the court order. Fortunately for them, another hospital said it would do the deed.

But what if another court were to make prisoners of conscience of doctors and nurses who will not kill? What will the Supreme Court say? Who would come to the support of these prisoners? I wonder if Amnesty

² Brophy v. New England Sinai Hosp. Inc., 398 Mass. 417, 497 N.E.2d 626 (1986).

International would adopt them. The Catholic Church perhaps would come to their aid—perhaps—because of the Church's respect for life. It depends on which priests and prelates you ask.

When I first began to cover this minefield some years ago, I expected the Church to have an official anti-euthanasia position because it supports the consistent ethic of life. (I used to prefer the earlier term, the "seamless garment," but apparently that raised too much of a political problem and has been retired.)

Since the Church was against the taking of life of the unborn, and since the American Bishops are against capital punishment, the Church, I figured, must be opposed to the killing of patients who may be incompetent but surely alive. However, there is no official understandable Catholic position on the hastening of death in hospitals and nursing homes. Instead, there is much division.

A friend of mine, a priest, is an academic and is extraordinarily knowledgeable about the history of euthanasia in many countries and he is deeply opposed to it. I do not use his name because his superiors are paladins of euthanasia and consider my friend, the priest, teetering on the edge of insubordination. He told me on the telephone a couple of weeks ago that some academic positions have been closed to him not because he doesn't have the qualifications, but because of his views on this subject.

One of the most illuminating disputes within the Church on the killing of patients centered on a case last year in Providence, Rhode Island.³ The exchange of views illuminates not only Catholic dissonance, but also reflects much the same kind of arguments that go on among non-Catholics who joust with each other in medical and legal journals, and in conferences on euthanasia. Marcia Gray, who was 49 years old and severely brain-damaged after a stroke three years before, lay comatose in General Hospital, and her husband asked a federal district court to remove her feeding tube. Paul Tremblay of the Boston College Legal Assistance Bureau was appointed guardian ad litem to look after the interest of the incompetent patient. He found no one at General Hospital who would agree to become involved in any way with the withdrawal of Mrs. Gray's feeding tube. Moreover, Tremblay reported that the nurses he interviewed claimed that Marcia Gray could indeed interact and understand—at least at some basic level. Each of the nurses also related anecdotes of comatose persons who have regained consciousness.

Meanwhile, with a great deal of attention being given to the case, the Providence Diocese asked Father Robert McManus, who is a theologian, to provide moral guidance to the family and to legal counsel. I suspect

³ Gray v. Romeo, 697 F. Supp. 580 (D.R.I. 1988).

that this guidance also affected the court. McManus, who had recently returned from Rome with a Doctorate in Moral Theology, said that withholding nourishment from Marcia Gray would be morally defensible. Bishop Louis Gelineau of Providence affirmed that McManus' conclusion "does not contradict Catholic moral teaching."

When that came over the wire services, I was with a renowned Catholic prelate—a rather fiery one—who was furious at Gelineau and McManus for presuming to say, or imply, that this was the official doctrine of the Church. I asked the prelate, "Are you going to issue a statement?" He said, "I certainly am," but he never did. One prominent Catholic did make his dissent public, William May, Professor of Moral Theology of Catholic University. May focused on three areas that are constant battlefields in the debate over euthanasia. Keeping the feeding tube in, said Father McManus, the Providence theologian, is futile as a treatment and, thereby, unduly burdensome to the patient. In the lingo of the field, it is "disproportionate." It also involves "a significant and precarious economic burden" on Mrs. Gray's family. The Providence theologian further stated that when you take the tube out, the clear primary intent is to alleviate the burden and suffering of the patient and not to cause her death. George Orwell would have loved that sentence.

Under the circumstances, the artificial feeding, he went on, constitutes extraordinary means that are not justified. Therefore, there is no requirement to sustain life.

In our "Sunday Visitor," Pete Sheehan, in an article, gave this report of William May's answer, which I consider logically inescapable. Among Father McManus' false assumptions, said May, is that the woman was dying. Mrs. Gray was not dying, May emphasized, although she had little hope of recovering from her coma. Second, said Dr. May, "I do not think providing nutrition is useless. Tubal feeding preserves life and it prevents her from dying from starvation and dehydration—a terrible way to die."

By the way, Father Kevin O'Rourke assured me, as have other euthanasia supporters and as the Academy of Neurology officials say, that people in a persistent vegetative state can feel no pain. In fact, O'Rourke says this with such assurance that it is as if he has been there and has come back. I, however, in the course of doing a number of these stories, have asked a number of neurologists what they thought. Most of them tell me, including Dr. Edmund Pellegrino of the Kennedy Center of Ethics at Georgetown, that they would not dare give any such absolute conclusion because they do not know.

Pellegrino further told me, and I have now read this in a number of other places, that when people do come out of a coma or out of a supposed persistent vegetative state, some of them remember their sensations while they were in that state. I would think that starving people to death who are supposedly or actually in a persistent vegetative state is

indeed, as Dr. Field says, barbaric.

Dr. May further said that the tubal feeding of the late Mrs. Gray was not excessively burdensome. It did not cause excessive discomfort and it was not expensive, costing about \$10 day.

The case was decided by Chief Judge Boyle of the Federal District Court in Providence on the basis of privacy rights. He mentioned a constellation of previous cases, but the one on which he really based his decision to have the feeding tube removed was *Roe v. Wade*,⁴ which I thought was a nice ironic turn. The logic, of course, was that if there is a privacy right for a woman to kill the fetus then the privacy right extends to her right, at least through substituted judgment in this case, to kill herself.

The Director of Communications for the Providence Diocese, William Halpin, said that it was disappointing that Judge Boyle based his decision on the legal principles of abortion cases but diocesan support for the ruling remained unchanged.

This civil war inside the Church includes, as I mentioned earlier, Father Paris of Holy Cross. There is also, on the other side, William Borders, the Archbishop of Baltimore, who in a recent letter to the State Attorney General said the deliberate denial of water and food to the long-term unconscious as well as the severely disabled is homicide.

People in journalism seldom mention that among the organizations that are against the slide toward euthanasia are disability rights groups. They can foresee—in terms of a slippery slope—a situation where if you are conscious but severely disabled, and Father O'Rourke comes by your bedside and looks at your chart and you do not have enough quality-of-life points, then, you may go too. I like Archbishop Borders' statement that the deliberate denial of water and food in order to bring about death is homicide. But, answering Archbishop Borders in the *National Catholic Register* was a priest, Father Eugene Parnisari, of Joliet, Illinois. The good Father is a lawyer for Catholic Legal Services for Seniors and is representing a woman who wants her mother's feeding tube removed. Father Parnisari told Archbishop Borders that his position was crazy. It is only homicide when the law says it is.

Thus, what should the Church's teaching be? Let me go back to the *Cruzan* case because this was the first time a state court had gone this far in favor of a presumption of life. The lower court judge, as I mentioned, had told the parents that it would be all right to remove the feeding tube. The young woman's father, Joe Cruzan, said that decision was "a victory for Nancy and hopefully a victory for other cases to come." As often happens with these cases, much of the national coverage of the case was in agreement with the father. A *Frontline* documentary on public television

⁴ 410 U.S. 113 (1973).

was called "Let My Daughter Die." And *Nightline's* treatment of it was titled "Nancy Cruzan's Right to Die," not "Does Nancy Cruzan Have a Right to Die," which would also be a misnomer because nobody asked her.

Let me cite part of Judge Edward Robertson's decision for the Missouri Supreme Court, which reversed the lower court, and said that this is "not a case in which we are asked to let someone die. Nancy is not dead. Nor is she terminally ill. This is a case in which we are asked to allow the medical profession to make Nancy die by starvation and dehydration."

The debate is thus not between life and death; the debate is between quality of life and death. Were quality of life an issue, persons with all manner of handicaps might find the state seeking to terminate their lives. Think about that. Think about, for example, those in many state hospitals who have no families, who are in the wards, who have to depend—I am talking about incompetent patients—on the substituted judgment of the personnel there to decide whether they should live or die.

As this criterion of *quality* of life—otherwise not really defined—takes hold in the courts, what happens to these people? They get killed.

Robertson also addressed, by now, the standard argument by physicians and bioethicists, that feeding tubes are an artificial means of medical treatment. Therefore, they are as extraordinary and invasive life sustaining mechanisms as respirators. But, Robertson said common sense tells us that food and water do not treat an illness, they maintain life. He also said that using the patient's quality of life to justify causing her death ignores the fact that Nancy is alive and the burdens of treatment are not excessive for her. The evidence at the trial showed that the care provided did not cause her pain. The quality of her life is severely diminished, to be sure, yet if food and water are supplied, she will not die. Father O'Rourke, in an article in the *St. Louis Post Dispatch*, thought this was a dreadful decision.

If her family were trying to cause her death, Father O'Rourke said, that indeed would be ethically unacceptable. But their entire series of actions belies this interpretation, he claimed. According to O'Rourke, a more accurate description of the action proposed by the Cruzan family would state that they wish to withdraw the gastronomy tube because it is ineffective therapy and imposes a grave burden upon their daughter. If the gastronomy tube is removed, he said, her death may be anticipated. No kidding? But the cause of her death will be the inability to swallow, which the gastronomy tube has temporarily circumvented. So how come the actual cause of death will be listed as starvation?

Do you know another case, that of an 83-year-old woman in upstate New York? A divided New York Court of Appeals decided the case of Mary O'Connor, an elderly woman whose daughters wanted to remove

her feeding tube.⁵ She was not in a coma. She was not in a persistent vegetative state. She was conscious, was not very coherent most of the time, but she was conscious. She could feel pain and she could feel pleasure.

What made many of the disability rights people in New York very, very apprehensive was that if this conscious woman was killed, they might come after other disabled people, even themselves. Two lower courts agreed with the daughters that the tube should be removed.

The case went up to our highest court, the Court of Appeals. The Court of Appeals said, through Sol Wachtler, the Chief Judge, that the daughters had indeed given anecdotal evidence that Mary O'Connor, during her long life, had said that she did not want to be a burden on people, she did not want all those tubes if anything happened to her. But, Judge Wachtler noted, there had not been clear and convincing evidence that she had ever really thought about the choice she might have to make some day between either dying or having a tube in order to be fed and get hydration. That had not come up in any conversation. Nor was anything written as to whether she would prefer to be starved to death rather than have the tube. So Wachtler said the anecdotal evidence would not stand. You cannot, by substituted judgment, take this inconclusive information conclusive and make it the basis for her death warrant. There was a lot of unpleasant reaction to this decision by the various Right-to-Die groups—and various judges around the state.

One of those judges was Joseph Harris, who is in the Supreme Court, a lower court in New York. He had a case not long ago of an 86-year-old woman, Carrie Coons, who suffered a massive stroke last October. For the four and a half months, she had been diagnosed as being in a persistent vegetative state. Her doctors said her chances of recovery were "nil." The Judge, in a long opinion finally said, with a swipe at Wachtler, that the Court of Appeals' regulations were far too restrictive and he begged the state legislature to make it easier for relatives to dispose of incompetent patients. In Carrie Coons' case, he decided to have the tube removed in two weeks because that is what Carrie Coons would have wanted if she were here right now.

This part of the opinion got into the papers and was read by the nurses at Memorial Hospital in Albany and it was read by a roommate of Carrie Coons. The roommate began to spur her on in hope of a reprieve. She kept whispering to her, "Carrie, you have two weeks and in two weeks they are going to kill you, EAT!"

The nurses began to urge Carrie to beat the clock. She began to eat

⁵ *In re Westchester County Medical Center*, 72 N.Y.2d 517, 531 N.E.2d 607, 534 N.Y.S.2d 886 (1988).

custard and pudding, and she was drinking apple juice and water. And do you know what? She was no longer in a persistent vegetative state. Her doctor came in. He had been described previously by Judge Harris as one of the nation's leading specialist in geriatric medicine. Now, he saw that his patient was aware of his presence. And she could understand a good deal of what he was saying.

When the doctor explained that her life expectancy, if she should decide later on that she still wanted the feeding tube to be removed, would not be long, Carrie Coons looked at him and said, "These are difficult decisions." That line was widely quoted in the press and this next line was not. She also said "I have never really thought of it in quite that way." What she meant, according to her doctor, was that she had never actually thought of the feeding tube in the context of life and death.

As I have seen in intensive care units—and many other people have seen more cases—the most specific right-to-die intentions expressed around the dinner table or watching Johnny Carson or even put down in a living will can change. And they often do change drastically, if the patient is competent, when death is no longer an abstraction. Her physician is not quite sure how Carrie Coons returned to us. But Stanley Russell, who is an attorney representing the hospital which did not have the tube removed and was ordered to remove it anyway, gives considerable credit to the nurses. He said that they really cared about the patient and persevered to see that eventually the right thing occurred.

Carrie Coons said, "I did not realize anyone cared." Keep in mind those patients without family in the wards of state hospitals. Meanwhile, Judge Harris held a hearing. He was somewhat embarrassed by all this and wanted to find out why this patient was no longer hopeless. In his original decision, as I noted, he had recommended that the state legislators make it less cumbersome for families to hasten the deaths of those hopelessly trapped in what he called "technological medical limbo." He now asked how he could be sure that a reported persistent vegetative state had been accurately diagnosed. The judge looked at the doctor, one of the nation's leading specialists in geriatric medicine. The doctor looked at the judge and said, "I do not think there is any mechanism to establish that without absolute certainty. You are on your own, judge." Carrie Coons may have saved other lives.

Rose Gastner, a lawyer with the Society for the Right to Die, said that this case gives us all pause. It emphasizes, she said, that these decisions should never be undertaken lightly. Not by the courts or by the legislatures. Judge Harris vacated the order that would have removed Carrie Coons' feeding tube. I told Father O'Rourke about the Carrie Coons case and I must say that he is unflappable. He said to me, just like that, "Of course the two doctors who diagnosed her as being in a persistent vegetative state were not neurologists." I said, "What about the case

of Nancy Ellen Jobes⁶ in New Jersey where you had four admittedly first-class neurologists from various parts of the country and they split two and two. Two said that Nancy Ellen Jobes would never come out of it, and two said she was not even in a persistent vegetative state and there was no reason to kill her." So, I went on, with an evenly split decision, is not there a presumption for life? And in that case, should not the court have decided on the basis of a presumption for life? Father O'Rourke changed the subject.

As a last note, there is a woman in Providence named Anna Sullivan, who is chairman of the Rhode Island Right to Life Committee. I owe her a lot because she has sent me material through the years that I have found very useful. She was much involved in the Marcia Gray case, and she wrote a letter not long ago to the *National Catholic Register* in which she said, "A Catholic can take no comfort and feel no safe harbor in Catholic hospitals any more." In fact, here in Rhode Island one would be safer in a state hospital than in a Catholic institution where withdrawal of food and fluids are concerned. On that cheery note, I will end the formal part of this.

Any questions, denunciations, excommunication?

QUESTION: As a civil libertarian, have you worked out with your opponents your argument that really what is at stake here is your personal liberty? How would you respond to an ACLU member who says we have to maximize personal liberty in this situation, particularly in education where the differences are stronger?

NAT HENTOFF: The ACLU has their packaged response to such points because it also includes their attitude towards abortion. The personal liberty in abortion belongs exclusively to the woman and in this kind of case, to the patient. But how do you know what the patient really wants? They are still debating this and they have had a committee of various so-called experts that have been going over this material for at least three years and they have had their first board meeting on it. All they have decided so far is to debate surrogate motherhood. I anticipate that what they will ultimately say is what Father O'Rourke says. As a matter of fact, the ACLU affiliate in San Diego co-sponsored a Right to Die Festival, as it were, over one recent weekend, with Hemlock Society people and Right to Die people. In other words, what I am trying to say is that they have, from my polemical point of view, blocked out any difficulties in this, just as they have in abortion. You cannot discuss abortion with ACLU folks and I know a lot of them. They are just beginning to come to a policy on euthanasia, but most ACLU people are liberals and almost all staff people are liberals. The liberal approach to euthanasia, without

⁶ *In re Jobes*, 108 N.J. 394, 529 A.2d 434 (1987).

much thinking, is who cannot be in favor of compassionate treatment? They see this as a compassionate way to let people "die in dignity." There will be no help from the ACLU on this, I can assure you.