

# FROM CRUZAN TO SCHIAVO: SIMILAR BEDFELLOWS IN FACT AND AT LAW

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## I. INTRODUCTION

Whatever else may be said about it, Terri Schiavo's death was legal. It scrupulously complied with Florida state law.<sup>1</sup> Under similar facts, a similar result would occur under the laws of most (if not all) states.<sup>2</sup> Further, those state laws are constitutional. They comply with the letter and spirit of the constitutional regime outlined in the key United States Supreme Court decision dealing with the issue of terminating life-sustaining medical treatment for incapacitated patients, *Cruzan v. Director, Missouri Department of Health*.<sup>3</sup> Indeed, Terri Schiavo's case cannot be materially distinguished from Nancy Cruzan's case. Reaching a different result in the Schiavo case would require

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1. Robert T. Miller, *The Legal Death of Terri Schiavo*, FIRST THINGS, May 2005, at 14–16. Miller, a critic of the process, evaluates all of the legal claims brought by Schiavo's parents to stop the removal of the feeding tube, showing that none had merit under Florida law.

2. *Id.* at 14; Thomas A. Eaton and Edward J. Larson, *Experimenting with the "Right to Die" in the Laboratory of the States*, 25 GA. L. REV. 1253, 1279–80 (1991) ("When the evidence is 'clear' that the patient would refuse life-sustaining treatment, courts have consistently upheld the authority of the surrogate decisionmaker to withhold consent, regardless of whether the patient is deemed 'terminal' or of the nature of the treatment to be withheld.")

3. 497 U.S. 261 (1990).

that *Cruzan* be ignored, overruled, or distinguished to the point that its meaning would be reversed. This article examines how the result in *Schiavo* inevitably follows from the reasoning in *Cruzan*. Pro-life reformers intent on preventing future Schiavo-type deaths must change both (1) state laws like that of the Florida Health Care Advance Directive Act<sup>4</sup> and (2) the larger body of common and constitutional law in which they are situated.

## II. THE FACTS OF *SCHIAVO* AND *CRUZAN*

Although some partisans dispute various details of the *Schiavo* case, for purposes of this article I presume that the following material facts are true. In 1990 at age 26, Terri Schiavo suffered brain damage caused by a cardiac arrest possibly brought on by a potassium deficiency in her blood due to bulimia. Every doctor who personally examined her determined that she was in a "persistent vegetative state." A feeding tube was used to provide nutrition and hydration, without which she would die. In the annals of medicine, virtually no one has regained consciousness after being in a persistent vegetative state for as long as Schiavo, and no one has ever done so without suffering severe, permanent physical and mental impairment.<sup>5</sup> In 1998, after seven years of continuing medical care for Schiavo, her husband requested removal of the feeding tube. Her parents objected, and the issue went to court.

Schiavo had not executed any form of health care advance directive (such as a living will or durable power of attorney for health care). A Florida circuit court found (1) that Schiavo was in a persistent vegetative state and (2) that she would not want to be kept alive in this condition "on a machine." This second finding was based on the testimony of Michael Schiavo and his siblings regarding oral statements that Schiavo had made to them prior to her illness, which the court found to be clear and convincing evidence as to Schiavo's wishes. The court ordered that Schiavo's feeding tube be removed. Schiavo's parents appealed this decision, but it was upheld by nineteen separate judges over an eight-year legal battle. On March 18, 2005, in compliance with the court order, Schiavo's feeding tube was disconnected. She died 13 days later.

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4. FLA. STAT. § 765 (2000).

5. The severe and irreversible nature of Schiavo's brain damage was confirmed by a post-mortem autopsy. David Brown and Shailagh Murray, *Schiavo Brain Damage 'Irreversible' Autopsy Finds*, WASH. POST, June 16, 2005, at A-01.

Compare these facts with those of the *Cruzan* case, as stated in the majority opinion by Chief Justice Rehnquist.<sup>6</sup> On December 11, 1983, at age 25, Nancy Cruzan suffered severe brain damage after she lost control of her car and the vehicle overturned. When paramedics arrived at the accident scene, Cruzan was not breathing and her heart had stopped. An attending neurosurgeon concluded that she had suffered cerebral contusions compounded by significant lack of oxygen. Permanent brain damage results from a lack of oxygen after just six minutes; it was estimated that Cruzan lacked oxygen for at least twice that long. In the weeks that followed her accident, Cruzan passed from a coma to a persistent vegetative state from which she never recovered. A feeding tube was used to provide her nutrition and hydration. As an adult resident of Missouri, Cruzan was cared for in a state hospital at government expense. Five years later, after it became apparent that Cruzan had virtually no chance of regaining her mental faculties, her parents (as next of kin) asked that the feeding tube be disconnected and that Cruzan be allowed to die from a lack of food and water. Hospital employees refused to honor this request without a court order, and the parents took the issue to court.

The *Cruzan* case then began its long odyssey in court. Reasoning that a person in Cruzan's condition would have a constitutional right to terminate tube feeding that she should not lose simply because she could no longer exercise it, a state trial court authorized Cruzan's parents to exercise it on her behalf based on evidence of Cruzan's wishes. The evidence offered at trial consisted of Cruzan's "expressed thoughts at age twenty-five in somewhat serious conversation with a housemate friend that if sick or injured she would not wish to continue her life unless she could live at least halfway normally."<sup>7</sup> The state appealed, and the Missouri Supreme Court found that Cruzan's comments to her friend were "unreliable for the purpose of judgment on [Cruzan's] behalf."<sup>8</sup> Absent a valid living will, the Court insisted on "clear and convincing, inherently reliable evidence" of Cruzan's intent before discontinuing life-sustaining treatment.<sup>9</sup> By a 5 to 4 margin, the U.S. Supreme Court affirmed, as against a challenge that Missouri's determination violated Nancy Cruzan

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6. *Cruzan*, 497 U.S. at 266-68.

7. *Id.* at 268 (quoting App. to Pet. for Cert. at A98-99, *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261 (1990)).

8. 497 U.S. at 268 (quoting *Cruzan v. Harmon*, 760 S.W.2d 408, 424, 426 (1988)).

9. 497 U.S. at 269 (quoting 769 S.W. at 425).

of liberty without due process of law.<sup>10</sup> Returning to the state trial court, Cruzan's parents submitted testimony from three new witnesses regarding Cruzan's wishes expressed when she was competent, which the court found to establish clearly and convincingly that she would want her treatment terminated. The Missouri Supreme Court affirmed, and the U.S. Supreme Court refused to review the decision. On December 15, 1990, in compliance with the court order, Cruzan's feeding tube was disconnected. She died eleven days later.

Under the law, similar facts should lead to similar results—and here the facts are remarkably similar. Terri Schiavo and Nancy Cruzan both grew up in suburban, white, middle-class, Roman Catholic homes—Schiavo in Pennsylvania and Cruzan in Missouri. While still in their twenties, both women suffered severe trauma and slipped into persistent vegetative states from which they were unlikely to recover. Due to the lack of oxygen to their brains during their initial medical emergencies, both women probably incurred permanent brain damage. In both cases, their lives were sustained for years by tubes supplying nutrition and hydration directly into their stomachs and, given their age and medical conditions, both women could have lived for decades more with little or no other treatment than what they received through their feeding tubes. Without the tubes, however, they would die in a matter of days from lack of food and water.

Assuming the facts outlined above, which were those found by the relevant courts, there were two potentially significant differences between the *Schiavo* and *Cruzan* cases. First, Cruzan's family uniformly supported the decision to end tube feeding while Schiavo's family was sharply divided. Schiavo's husband initiated the legal process to discontinue tube feeding while her parents and siblings opposed it. Second, the two women resided in different states: Schiavo in Florida and Cruzan in Missouri. As Justices O'Connor and Scalia stressed in their concurring opinions in *Cruzan*, and as the court later underscored when upholding Washington State's law against assisted suicide in *Washington v. Glucksberg*,<sup>11</sup> different states can impose different laws governing end-of-life medical care. In her *Cruzan* opinion, Justice O'Connor spoke of entrusting such matters "to the 'labora-

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10. *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 287 (1990).

11. 521 U.S. 702 (1997).

tory' of the states."<sup>12</sup> In his concurring opinion, Justice Scalia bluntly asserted that "federal courts have no business in this field." It is for the states to decide "the point at which life becomes 'worthless,' and the point at which the means necessary to preserve it become 'extraordinary' or 'inappropriate,'" he wrote.<sup>13</sup> Thus, under current constitutional analysis, the state in which a person like Schiavo or Cruzan live can impact what treatment they do (or do not) receive.

Under the reasoning of *Cruzan*, however, neither of these two potentially significant differences should distinguish these two cases. This follows as a matter of Missouri and Florida law.

In *Cruzan*, the U.S. Supreme Court upheld the ruling of the Missouri Supreme Court that, under its state law, the legal right to refuse life-sustaining treatment (including tube feeding) resided solely with the patient and not with the patient's family.<sup>14</sup> Thus, for her parents to obtain a court order terminating Cruzan's treatment, they were required to submit clear and convincing evidence of their daughter's wishes on the subject, not their own wishes. Chief Justice Rehnquist eloquently emphasized this point when he wrote for the Court:

No doubt is engendered by anything in this record but that Nancy Cruzan's mother and father are loving and caring parents. If the State were required by the United States Constitution to repose a right of "substituted judgment" with anyone, the Cruzans would surely qualify. *But we do not think the Due Process Clause requires the State to repose judgment on these matters with anyone but the patient herself.* Close family members may have a strong feeling—a feeling not at all ignoble or unworthy, but not entirely disinterested, either—that they do not wish to witness the continuation of the life of a loved one which they regard as hopeless, meaningless, and even degrading. But there is no automatic assurance that the view of close family members will necessarily be the same as the patient's would have been had she been confronted with the prospect of her situation while competent. All of the reasons previously discussed for allowing Missouri to require clear and convincing evidence of the patient's wishes lead us to conclude that the State may choose to defer only to those wishes, rather than confide the decision to close family members.<sup>15</sup>

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12. *Cruzan*, 497 U.S. at 292 (O'Connor, J., concurring).

13. *Cruzan*, 497 U.S. at 293 (Scalia, J., concurring).

14. *Id.* at 268–69.

15. *Id.* at 286–87 (emphasis added).

Under this reasoning, it would not have made any difference if some members of Cruzan's family had opposed the end of tube feeding; under Missouri law as upheld by the U.S. Supreme Court, Cruzan's wishes controlled. Only when her parents subsequently supplied sufficient evidence of Cruzan's wishes did the state court issue its order to remove the feeding tube.

In this respect, Florida law is similar to Missouri law. The relevant Florida law is set forth in the state's Health Care Advance Directives Act.<sup>16</sup> Under that Act, when a patient in a persistent vegetative state like Schiavo has not executed an advance directive, authority to make health care decisions on her behalf is entrusted to a "proxy."<sup>17</sup> If the patient has a court-appointed guardian, then the guardian serves as the proxy.<sup>18</sup> Otherwise, the proxy is the patient's closest relative as designated in the statute, beginning with the patient's spouse.<sup>19</sup> The Florida statute provides in pertinent part that:

... a proxy's decision to withhold or withdraw life-prolonging procedures must be supported by clear and convincing evidence that the decision would have been the one the patient would have chosen had the patient been competent or, if there is no indication of what the patient would have chosen, that the decision is in the patient's best interest.<sup>20</sup>

The statute expressly provides that "life-prolonging procedures" include "artificially provided sustenance and hydration," such as tube feeding.<sup>21</sup> To assure that the patient's wishes are followed, the statute provides that "the patient's family" or "any other interested person" may seek judicial review of a proxy's decisions if that person believes that the "proxy's decision is not in accord with the patient's known desires."<sup>22</sup> This statutory regime applied in the *Schiavo* case because Terri Schiavo did not have an advance directive. Rather than use his statutory authority as proxy, Terri Schiavo's husband Michael petitioned a state trial court to decide the issue of Terri's continued tube feeding, and that court appointed a guardian for Terri. Thus Michael did not act as Terri's proxy in making the decision to withdraw tube feeding, which put him in much the same legal position as the

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16. FLA. STAT. § 765 (2000).

17. FLA. STAT. § 765.101(15) (2000).

18. FLA. STAT. § 765.401(1)(a) (2000).

19. FLA. STAT. § 765.401(1)(b) (2000).

20. FLA. STAT. § 765.401(3) (2000).

21. FLA. STAT. § 765.101(10) (2000).

22. FLA. STAT. § 765.105(1) (2000).

parents in Nancy Cruzan's case—suppliants to the court rather than statutorily empowered decision makers. Even if Michael had acted as Terri's proxy in requesting the termination of tube feeding, other family members could have contested his decision in court. In either event, so long as there was any evidence of her wishes, in Florida (as in Missouri), clear and convincing evidence of the patient's wishes must support a decision to withdraw life-sustaining procedures. Just as the Missouri courts ultimately ruled in Cruzan's case, the Florida courts held that this standard was satisfied in Schiavo's case.

In short, the *Schiavo* case followed *Cruzan*. The decision to terminate tube feeding was based on clear and convincing evidence of Terri Schiavo's wishes. This was precisely what the courts required in the *Cruzan* case. Family disputes and state differences should have had no impact on their outcomes.

Of course, critics of the decision in *Schiavo* can (and do) contest the facts of the case, and thus dispute whether it comports so neatly with *Cruzan*. Some question whether Schiavo was in a persistent vegetative state. Some deny that the evidence of her desire to terminate tube feeding was clear and convincing. Some allege that her husband's personal interests in the outcome should have precluded him from having any say in the decision. Yet all of these same issues could have been (and were) raised by critics of the decision in *Cruzan* and each of them can arise in any similar case. No medical diagnosis of a persistent vegetative state is beyond question, particularly by family members who hope or pray for the patient's recovery. No evidence, except perhaps an explicit advance directive, is likely to be clear and convincing to everyone concerned. And as the Supreme Court noted in the above-quoted passage from *Cruzan*, even loving and caring family members can bring personal interests into proxy decision-making.<sup>23</sup>

None of these hypothetical factual disputes reaches to the heart of the matter for pro-life critics of the Schiavo decision, however. Even if the patient's condition and wishes were clear, and even if family members agreed and were wholly disinterested, some pro-life proponents would still equate the termination of tube feeding in *Schiavo*-like cases with assisted suicide, euthanasia, or even murder. Perhaps America's most respected pro-life bio-ethicist is Valparaiso University philosophy professor Gilbert Meilaender, a charter member of the President's

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23. See *supra* text accompanying note 14.

Council on Bioethics. When asked in an interview about the Christian ethical guidelines for removing the feeding tube in the *Schiavo* case, Meilaender responded:

There have normally been two kinds of grounds on which one could reject a treatment: if it is useless, or if it is very burdensome for the patient. In *Schiavo*'s case, it is counterintuitive to say it's useless when it kept her alive for so long, and she did not seem to experience it as a burden.<sup>24</sup>

He went on to question whether tube feeding should ever be considered a form of medical treatment by noting that “[n]ourishment is something we all need to stay alive, and the fact that for certain people it has to be provided in different ways doesn’t alter the fact that nourishment is fundamental to human life in a way that various treatments are not.”<sup>25</sup> To him, it would not necessarily matter whether *Schiavo* was in a persistent vegetative state<sup>26</sup> or if she had indisputably expressed her wishes to die in such a situation.<sup>27</sup> “Autonomous choice doesn’t count for everything. We don’t give unlimited free rein to autonomy,” he stated, citing legal limits on physician assisted suicide as an example.<sup>28</sup> Most critically, he added, “morally, there are certainly limits on what we may rightly choose.”<sup>29</sup> For people who think like Meilaender—and Meilaender is a very clear-thinking bioethicist—the fundamental issue in the *Schiavo* case was the termination of tube feeding. On this critical issue, there was no factual difference between the *Schiavo* and *Cruzan* cases whatsoever. Both involved the intentional termination of a life by removing a useful, non-burdensome feeding tube from an incompetent patient. For some, doing so is immoral and should be illegal—but *Cruzan* may limit constitutional options.

### III. CONSIDERING OPTIONS IN LIGHT OF *CRUZAN*

In 2005, after Terri Schiavo died in the glare of national publicity, I asked the students in my Law and Medicine course on their final exam: “[a]fter reviewing the Florida statute in light

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24. Jeff M. Sellers, *When to Pull a Feeding Tube*, CHRISTIANITY TODAY, May 2005, at 48 (interview with Gilbert Meilaender).

25. *Id.*

26. *Id.*

27. *Id.* at 49.

28. *Id.*

29. *Id.*



of the Schiavo case, please propose and analyze the constitutionality of any changes or additions to the statute that you believe would improve the legal handling of such situations in the future." In their answers, most students praised the Florida statute for permitting all parties to have their say and then allowing Schiavo's wishes to control her fate. Many students criticized the statute, however, and proposed various changes in it to discourage another *Schiavo*-like case. Their proposals, which parallel those that I have heard coming from pro-life critics of the *Schiavo* case, fell into three basic categories. Some would require consensus among family members before withdrawing a feeding tube from an incompetent patient. Others would raise the standard of proof regarding the patient's wishes to terminate tube feeding, such as requiring a written advance directive or proof beyond a reasonable doubt. Still others would require that the tube feeding continue so long as it benefited the patient. The issue then becomes, can these proposals be squared with *Cruzan*.

#### A. REQUIRING FAMILY CONSENSUS

Requiring that all close family members agree before life-sustaining treatment is withheld or withdrawn from an incompetent patient has the advantage of avoiding the type of intra-family dispute that characterized the *Schiavo* case. Nevertheless, the requirement is at odds with the emphasis on patient autonomy that underlies *Cruzan* and the entire body of state constitutional, statutory, and common law that has developed in this field. When faced with the issue, state courts virtually always uphold the right of competent individuals to forego life-sustaining treatment, including tube feeding.<sup>30</sup> Indeed, after reviewing a series of such state-court decisions, the Court in *Cruzan* wrote: "[w]e assume that the United States Constitution would grant a competent person a constitutionally protected right to refuse life-sustaining hydration and nutrition."<sup>31</sup> Further, by statute, virtually every state authorizes its residents to execute some form of legally-enforceable advance directive to withhold or withdraw life-sustaining procedures, including tube feeding.<sup>32</sup> Except perhaps in the case of a minor, none of these decisions or statutes qualifies as an individual's right to refuse treatment by

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30. Eaton and Larson, *supra* note 2, at 1272.

31. *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 279 (1990).

32. For a discussion of various forms of advance directives and their widespread acceptance, see Eaton and Larson, *supra* note 2, at 1295-1318.

requiring the consent of one's family members. Quite to the contrary, they typically stress that this is an individual's intensely personal right.<sup>33</sup>

Beginning with the landmark case of *In re Quinlan*,<sup>34</sup> courts have extended the right to refuse treatment to incompetent individuals, reasoning that it should not be lost merely because the individual can neither exercise it nor sense its violation.<sup>35</sup> As in *Quinlan*, so long as clear evidence exists of the incompetent individual's intent, courts regularly allow a surrogate decision-maker to exercise the right to refuse treatment on behalf of the individual.<sup>36</sup> This happened in *Cruzan*, where the issue became simply the standard of proof required to establish Nancy Cruzan's intent, not whether treatment could be terminated at all. The Missouri Supreme Court stressed that the right to terminate tube feeding belonged exclusively to Cruzan, based on clear and convincing evidence of her wishes, and not to her parents.<sup>37</sup> The United States Supreme Court upheld this approach.<sup>38</sup> Requiring the consent of family members before giving effect to a patient's wishes would fly in the face of the individual-autonomy rationale for granting individuals the right to refuse treatment in the first place. It can not easily be squared with *Cruzan*.

#### B. HEIGHTENING THE STANDARD OF PROOF

It is easier to reconcile the *Cruzan* decision with a heightened standard of proof regarding an incompetent's desire to terminate life-sustaining treatment than to reconcile it with requiring family consensus for terminating such treatment. It was the standard of proof, not family consensus, that was the central issue in *Cruzan*. For terminating life-sustaining treatment for an incompetent individual, Missouri had imposed a higher standard of proof regarding the individual's intent than normally required in civil actions.<sup>39</sup> In *Cruzan*, the United States Supreme Court simply held that imposing this higher standard did not violate the

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33. For example, in her concurring opinion in *Cruzan*, Justice O'Connor wrote that "the liberty guaranteed by the Due Process Clause must protect, if it protects anything, an individual's deeply personal decision to reject medical treatment, including the artificial delivery of food and water." 497 U.S. at 289 (O'Connor, J., concurring).

34. 355 A.2d 647 (N.J. 1976), cert. denied sub. nom. Garger v. New Jersey, 429 U.S. 922 (1976).

35. See, e.g., *In re Conroy*, 486 A.2d 1209, 1229-33 (N.J. 1985).

36. *Eaton and Larson*, supra note 2, at 1279.

37. *Cruzan v. Harmon*, 760 S.W.2d 408, 424-46 (Mo. Sup. Ct. 1998).

38. *Cruzan*, 497 U.S. at 285-85.

39. *Cruzan v. Harmon*, 760 S.W.2d at 425.

United States Constitution.<sup>40</sup> It never suggested that other states could not impose different standards. If some state raised the bar still higher, such as by requiring proof beyond a reasonable doubt or a written advance directive, the Supreme Court could uphold that heightened standard of proof without overruling or even distinguishing *Cruzan*.

Nevertheless, any state statute further elevating the standard of proof for *Schiavo*-type cases would be vulnerable to constitutional challenge. No state imposes a standard higher than clear and convincing evidence for such cases.<sup>41</sup> Although all states authorize advance directives, as a practical matter no state requires them as a prerequisite to withhold or withdraw any form of medical treatment, including tube feeding.<sup>42</sup> The Court's opinion in *Cruzan* simply upheld Missouri's clear and convincing standard.<sup>43</sup> It did not opine on the constitutionality of other standards.<sup>44</sup> Only Justice Scalia, in his concurring opinion, expressed the view that states may freely impose whatever legal limits they chose on terminating of life-sustaining medical treatment so long as those limits apply to everyone.<sup>45</sup> In her concurring opinion, Justice O'Connor countered that the Constitution "may well" constrain a state's legal options in this field,<sup>46</sup> and went on to add, as if for emphasis: "[t]oday we decide only that one State's practice does not violate the Constitution."<sup>47</sup> Four Justices dissented in *Cruzan*, with three of them joining in an opinion expressing the view that even Missouri's clear and convincing standard of proof exceeded constitutional limits.<sup>48</sup> This dissenting opinion states:

Missouri may constitutionally impose only those procedural requirements that serve to enhance the accuracy of a determination of Nancy Cruzan's wishes or are at least consistent with an accurate determination. The Missouri "safeguard" that the Court upholds today does not meet that standard. The determination needed in the context is whether the in-

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40. *Cruzan*, 497 U.S. at 280.

41. See Eaton and Larson, *supra* note 2, at 1278-80.

42. See *id.* at 1280-86.

43. *Cruzan*, 497 U.S. at 280.

44. *E.g., id.*, at 287 n.12.

45. *Id.* at 300 (Scalia, J., concurring).

46. *Id.* at 289 (O'Connor, J., concurring).

47. *Id.* at 292.

48. *Id.* at 315-16 (Brennan, J., dissenting).

competent person would choose to live in a persistent vegetative state on life support or to avoid this medical treatment.<sup>49</sup>

The dissenting justices presumably would draw the line at imposing a normal, civil “more-likely-than-not” standard of proof in right-to-die cases, and clearly would oppose raising the bar still higher. I simply do not know how the current Court would rule on a state statute imposing a beyond-a-reasonable-doubt standard or requiring a written advance directive to terminate tube feeding for an incompetent person.

### C. OUTLAWING THE WITHDRAWAL OF TUBE FEEDING

As discussed in section II above, many people (like pro-life bioethicist Gilbert Meilaender) differentiate sharply between artificially administered nutrition and hydration (especially tube feeding) and life-sustaining medical treatment generally. Reflecting this widely-held view, statutes in many states encourage or even require that persons who execute living wills or other forms of advance directives to express their intent regarding the termination of artificially administered nutrition and hydration.<sup>50</sup> Such statutes further the interests of individual autonomy and informed consent that underlie *Cruzan* and the series of state “right-to-die” decisions (beginning with *Quinlan*) discussed with apparent approval in the Court’s *Cruzan* opinion.<sup>51</sup> Carrying this distinction further, however, to the point of imposing specific statutory limits solely on the termination of tube feeding, or outlawing it altogether, raises significant concerns under *Cruzan*.

Unlike its silence on the issue of imposing an evidentiary standard higher than clear and convincing for right-to-die cases, the Court’s opinion in *Cruzan* expressly links “artificially delivered food and water essential to life” with other forms of “life-sustaining medical treatment.”<sup>52</sup> It refers to both as “treatment” and assumes that competent persons have a constitutionally protected right to refuse them.<sup>53</sup> Citing authoritative statements of the American Medical Association and the Hastings Center, Justice O’Connor added in her concurring opinion: “[a]rtificial feeding cannot readily be distinguished from other forms of

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49. *Id.* at 316.

50. *E.g.*, MINN. STAT. § 145B.03 subd. 2(b)(1) and (2) (2002).

51. *Cruzan*, 497 U.S. at 270–77.

52. *Id.* at 279.

53. *Id.*

medical treatment.”<sup>54</sup> The dissenting Justices made this point as well.<sup>55</sup> Of the nine Justices deciding *Cruzan* in 1990, only Justice Scalia would seem willing to allow the states to differentiate between the termination of tube feeding and medical treatment.<sup>56</sup> When faced with the issue, state courts have not distinguished between withholding artificially-administered nutrition and hydration and withholding life-sustaining medical treatment generally.<sup>57</sup> To uphold a state statute that generally outlawed or significantly restricted the termination of the tube feeding, the Supreme Court would have to overturn or sharply distinguish *Cruzan*, which is only likely to happen if it contains more Justices who think like Justice Scalia on this matter.

#### IV. CONCLUSION

The tragic cases of Terri Schiavo and Nancy Cruzan have undoubtedly prompted many Americans to reflect on their own personal wishes regarding tube feeding and to share those reflections with others. I have several friends who executed or revised advance treatment directives in the wake of these cases—with some declaring that they would want to be kept alive on tube feeding in a persistent vegetative state and others declaring just the opposite. They all remain my friends, and I respect their choices. My own pre-*Cruzan* living will expresses my desire to receive nutrition, hydration, and pain medication so long as they are beneficial. Personally, I hope that more people execute advance directives so that their wishes can be better known, accepted and followed, but I know that most Americans will not do so. As a consequence, there will be more cases like those involving Terri Schiavo. So long as the general approach set forth in *Cruzan* is followed, those cases will come out much like the *Schiavo* case.

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54. *Id.* at 288 (O'Connor, J., concurring).

55. *Id.* at 307–08 (Brennan, J., dissenting) (“Artificial delivery of food and water is regarded as medical treatment by the medical profession and the Federal Government.”).

56. *See Cruzan*, 497 U.S. at 300 (Scalia, J., concurring).

57. *E.g.*, In re Estate of Longeway, 549 N.E.2d 292, 296 (1989) (court adopts the “consensus opinion [that] treats artificial nutrition and hydration as medical treatment.”) The passage from Longeway is quoted with apparent approval by the Supreme Court in *Cruzan*. *Cruzan*, 497 U.S. at 276.