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I Have a Conscience, Too: The Plight of Medical Personnel Confronting the Right to Die

Issues underlying a person's so-called "right to die" are numerous and continue to be heatedly debated. While some courts have found a right to die, the Supreme Court previously declined to address the issue until recently. The Court will decide its first "right to die" case, Cruzan v. Harmon, this term.

Nancy Cruzan is in her early thirties at the time of this writing and lies in a persistent vegetative state. She is not dead, nor terminally ill. According to medical experts, she could live another thirty years. Her

1 Legal, medical and ethical questions in this area include, but are certainly not limited to, those addressing the definition of death itself; living wills; "ordinary" versus "extraordinary" means of sustaining life; under what circumstances a person can refuse medical treatment; and who should decide whether an incompetent patient should have various medical treatments withheld. See, e.g., President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research (U.S.G.P.O., March, 1983) (Commission members reported about various ethical issues in biomedicine—some reports directly addressed right-to-die issues), specifically, President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, Deciding to Forego Life-Sustaining Treatment, (U.S.G.P.O. March, 1983) [hereinafter the President's Commission Report]. See also Miles, Singer & Siegler, Conflicts Between Patients' Wishes to Forgo Treatment and the Policies of Health Care Facilities, 321 New Eng. J. Med. 48 (1989) (Three doctors voice concern over three recent cases in which courts held that a patient's right to refuse nutrition is paramount to the rights of the objecting institution and its staff); infra note 2.


3 See Note, supra note 2, at 399 n.22 (The United States Supreme Court previously declined to address the right-to-die issue).

4 760 S.W.2d 408 (Mo. 1988) (en banc), cert. granted, 109 S. Ct. 3240 (1989).

5 Dr. Fred Plum, Professôr and Chairman of the Department of Neurology at Cornell coined the phrase "persistent vegetative state" used in Quinlan and Jobes. During the Jobes trial he explained that: Vegetative state describes a body which is functioning entirely in terms of its internal controls. It maintains temperature. It maintains heart beat and pulmonary ventilation. It maintains digestive activity. It maintains reflex activity of muscles and nerves for low level conditioned responses. But there is no behavioral evidence of either self-awareness or awareness of the surroundings in a learned manner.

Jobes, 529 A.2d at 438. See also Brophy, 497 N.E.2d at 628 n.4:

A physician who performed a neurological evaluation of Brophy testified that a persistent vegetative state is a condition in which the patient:

"(a) shows no evidence of verbal or non-verbal communication;
(b) demonstrates no purposeful movement or motor ability;
(c) is unable to interact purposely with stimulation provided by his environment;
(d) is unable to provide for his own basic needs;
(e) demonstrates all of the above for longer than three months."
parents and co-guardians requested that Mount Vernon State Hospital employees discontinue Nancy's artificial hydration and nutrition. A Missouri trial court found that, "to the extent that [Missouri law] . . . set forth a public policy of the General Assembly prohibiting the withholding and withdrawal of nutrition and hydration under all circumstances . . . [it] violate[d] Nancy Cruzan's right to liberty, due process of law and equal protection under the state and federal constitutions."6

The lower court directed Missouri state employees to "cause the request of the co-guardians to withdraw nutrition or hydration to be carried out."7 In reversing the trial court holding, the Missouri Supreme Court found that the "trial court erroneously declared the law" governing the case's single issue: "May a guardian order that all nutrition and hydration be withheld from an incompetent ward who is in a persistent vegetative state, who is neither dead within the meaning of [Missouri law]8, nor terminally ill?"9

The Supreme Court of Missouri held that the co-guardians could not order state employees to withdraw hydration and nutrition. The co-guardians did not have the authority to do so. The court considered the evidence regarding Nancy Cruzan's wishes to be "unreliable and thus insufficient to support the co-guardians [sic] claim to exercise substituted judgment on Nancy's behalf."10 The court found that the emotional bur-
den of supplying hydration and nutrition was heavy on the family, but that the G-tube was not substantially burdensome for Nancy Cruzan. The court also emphasized that the state has an interest in preserving life, not just Nancy Cruzan’s life, but the lives of those in similar circumstances who may not have a supporting, loving family. The court concluded that the state’s interest in preserving life outweighed any right asserted on Nancy’s behalf to stop providing food and water.

This Note will not directly address the “single issue” Cruzan raises. Rather, it argues that Cruzan and cases like it present a fundamental issue that courts have thus far failed to fully address: whether a court may compel medical personnel to terminate artificial nutrition and hydration even though they are opposed for ethical reasons. Cruzan’s parents and co-guardians asked the hospital to remove her feeding tube. Hospital employees refused to comply without authority from a court. The Cruzan court stated that this case “is a case in which [they] are asked to allow the medical profession to make Nancy die by starvation and dehydration.”

This Note contends that some cases result in court orders which do not merely “allow the medical profession to make [someone] die,” but they in fact make the medical profession make someone die.

This Note addresses the medical professional’s right to refrain from participating in such acts for ethical reasons. Part I focuses on a Rhode Island case, Gray v. Romeo, to illustrate the problem. In Gray, the Federal District Court of Rhode Island ordered a hospital to terminate artificial nutrition and hydration. The court stated that continued feeding through the tube is not invasive nor is it painful. It is not burdensome to Nancy. Based on earlier cases, namely In re Jobes, 108 N.J. 394, 529 A.2d 434, stay denied sub nom. Lincoln Park Nursing and Convalescent Home v. Kahn, 483 U.S. 1036 (1987), and In re Conroy, 98 N.J. 321, 486 A.2d 1209 (1985), informal reactions to other people’s medical condition and care are not clear and convincing proof of what a patient would decide for himself. Therefore, Nancy’s informal comments regarding Karen Quinlan are insufficient proof of what Nancy Cruzan would want if she were competent.

11 The court states that continued feeding through the tube is not invasive nor is it painful. It is not burdensome to Nancy. 760 S.W.2d at 429-24.

12 Id. Based on earlier cases, namely In re Jobes, 108 N.J. 394, 529 A.2d 434, stay denied sub nom. Lincoln Park Nursing and Convalescent Home v. Kahn, 483 U.S. 1036 (1987), and In re Conroy, 98 N.J. 321, 486 A.2d 1209 (1985), informal reactions to other people’s medical condition and care are not clear and convincing proof of what a patient would decide for himself. Therefore, Nancy’s informal comments regarding Karen Quinlan are insufficient proof of what Nancy Cruzan would want if she were competent. 760 S.W.2d at 424.

13 760 S.W.2d at 410.

14 Id. at 412. See infra note 27.

15 760 S.W.2d at 412 (emphasis added).

16 There is a debate about whether these acts are in fact euthanasia. Euthanasia is an “act or method of causing death painlessly, so as to end suffering; advocated by some as a way to deal with victims of incurable diseases.” WEBSTER’S DICTIONARY OF THE ENGLISH LANGUAGE 631 (1986 unabridged). There is argument over what actions constitute euthanasia.

cial hydration and nutrition if it could not promptly transfer the patient to a hospital that would do so. Part II explains the dying process that occurs after medical staff remove the tubes supplying the patient’s hydration and nutrition. Part III discusses the federal legislation protecting medical personnel who refuse to perform abortions and sterilization procedures and whether there is a need for similar state and federal conscience clauses in this area of the law. Part IV then recommends that Congress and state legislatures enact conscience clauses protecting medical personnel.

I. Gray v. Romeo: Can a Court Order Medical Professionals to Terminate Hydration and Nutrition?

A. Facts and Holding in Gray v. Romeo

1. Facts of Gray v. Romeo

Marcia Gray was born in April, 1939. She married Glenn Gray in 1961. The couple had two children, Brian and Karen, both in their twenties at the time of the litigation.\textsuperscript{18} Marcia’s relatives and friends portrayed her as an “active, vibrant and very happy woman”\textsuperscript{19} who exercised regularly and was rarely ill.\textsuperscript{20}

While shopping with her husband on January 4, 1986, she suffered a major cerebral hemorrhage which began as a “sudden and severe headache with serious pain.”\textsuperscript{21} She was rushed to South County Hospital. She lost consciousness and was transferred to Rhode Island Hospital.\textsuperscript{22} She underwent numerous surgeries with her family’s consent, including an emergency surgery to save her life shortly after her transfer to Rhode Island Hospital.\textsuperscript{23} Doctors also performed a gastrostomy, better known as inserting a “G-tube” for hydration and nutrition.\textsuperscript{24} On July 24, 1986,

\textsuperscript{18} Id. at 581.
\textsuperscript{19} Id. at 582.
\textsuperscript{20} Id.
\textsuperscript{21} Id.
\textsuperscript{22} Id. Marcia Gray went from “an alert, normal neurological state to a comatose state within approximately two to three hours after the onset of the headache.” Joint Stipulation of Facts at 2, Gray v. Romeo, 697 F. Supp. 580 (D.R.I. 1988) (No. 87-0573B) [hereinafter Joint Stipulation of Facts].

At Rhode Island Hospital, doctors diagnosed cerebral hemorrhages—subarachnoid, subdural, and right infratemporal lobe hemorrhages.

In lay terms, this means that a blood vessel in the brain had burst and blood was being pumped into the brain matter, permanently destroying large parts of the brain. Among other brain-related activities, she lost all intellectual cognitive functions and almost all motor functions. The autonomous nervous system, which controls the functioning of the heart, lungs, digestive system, and other organic functions, is the only system which still functions, and even that operates only partially.

\textsuperscript{23} 697 F. Supp. at 582. At Rhode Island Hospital, she “underwent an emergency operation, including a right frontotemporal craniotomy with evacuation of the subdural and infratemporal lobe hematomas and clipping of the cerebral artery aneurysm. In lay terms, this means that her skull was opened surgically and large blood clots were removed, as was part of her cranium.” Joint Stipulation of Facts, supra note 22, at 3.

\textsuperscript{24} 697 F. Supp. at 582. On January 16, 1986, her husband consented to a gastrostomy “which involved the creation of a hole in the abdominal wall and into the stomach through which a tube (G-tube) is inserted by which nutrition and hydration may be directly provided to the stomach. Also, an endotracheal tube was inserted in her trachea for the purpose of removing mucus.” Id. On Febru-
Marcia was transferred to Rhode Island Medical Center, General Hospital ("Medical Center"). She never regained consciousness and was in a persistent vegetative state at the time of litigation. It was unclear whether Marcia experienced pain.

Every four hours medical staff fed Marcia a liquid formula and intermittently administered water through the G-tube. In May, 1987, Marcia's family asked that her doctor order the feeding stopped "and that Marcia Gray be permitted to die." At the time, doctors agreed on the prognosis—"no reasonable likelihood of returning to a conscious state and that there is 'no chance' of Marcia Gray's recovery."

Her neurosurgeon said he did not believe she would experience hunger, thirst or pain should the feeding be discontinued. But, the parties stipulated that she reacted to some pain. Marcia's family, consisting of her husband, two children, her mother, and sister-in-law, were "convinced that it would be [Marcia's] desire not to be sustained with

ary 6, 1986, doctors surgically inserted a shunt to drain excessive cerebrospinal fluids from the brain and have performed four other procedures between February and June of 1986, to repair shunt malfunctions. Doctors also removed her infected cranial bone plate. Id.

The court-appointed Guardian Ad Litem described Mrs. Gray's condition at the time of the litigation. The Gray opinion quoted the Guardian Ad Litem's opinion:

Marcia Gray has been diagnosed as being in "persistent vegetative state" (PVS). PVS is a type of comatose state in which the cerebral functioning has ceased but in which the brain stem functioning is fully or partially intact. The brain stem controls primitive reflexes, including heart activity, breathing, the sleep/wake cycle, reflexive activity in upper and lower extremities, some swallowing motions and eye movements. Marcia shows signs of each of these activities. The cerebrum, on the other hand, controls sensation and voluntary and conscious activities. Marcia's cerebrum has been damaged severely, and as a result she displays no voluntary or conscious movements, nor does she display any awareness or sensation. This combination of reflexive activity in the absence of sensation or conscious activity is characteristic of PVS. PVS is generally a permanent condition. Id. (emphasis added).

However, the parties stipulated that Marcia Gray had some reaction to pain. The Joint Stipulation of Facts described her condition at the time of litigation:

Postoperatively she never regained consciousness and has remained in a "persistent vegetative state." (hereinafter referred to as "PVS.") PVS is a term that defines a long-term condition, at least one year, where the patient is not aware of her surroundings, where there is no communication with others, and where there is no hope of recovery. There are no consistent recognizable cognitive functions. Some reflexes are still present, and Mrs. Gray has some motion, which is probably involuntary, such as the occasional movement of the head. Some reaction to pain has been noted. The pupils will constrict if light is shined on them.

Joint Stipulation of Facts, supra note 22, at 3 (emphasis added).

27 697 F. Supp. at 583. Compare with Cruzan v. Harmon, 760 S.W.2d 408, 412 (Mo. 1988) (en banc) cert. granted, 109 S. Ct. 3240 (1989). In Cruzan, Nancy Cruzan was also in a persistent vegetative state and was not terminally ill or dying. The family also requested medical personnel to discontinue all nutrition and hydration. The Supreme Court of Missouri stated that Cruzan was:

[A] case in which euphemisms readily find their way to the fore, perhaps to soften the reality of what is really at stake. But 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. Id.

28 697 F. Supp. at 583. Family members mentioned various conversations they had with Nancy regarding Karen Quinlan's situation. Mr. Gray said his wife made him promise not to keep her alive by artificial means if she were ever in a similar condition. Id. Note, however, that Karen Quinlan's family was not asking the hospital to remove Karen's feeding tube. See infra note 32.


30 See supra note 26.
artificial measures if her life were otherwise hopeless.” They reported conversations Marcia previously had with various family members in which she criticized keeping Karen Ann Quinlan alive by artificial means.

The Medical Center denied the family’s request. “The staff and administration refused to honor this request because they felt to do so would be a violation of their ethical and professional duties and responsibilities.” While the Medical Center gave permission to transfer Marcia elsewhere, the family did not transfer her prior to the litigation because they feared criminal prosecution. Moreover, they had not found a nearby facility that would agree to accept Marcia and terminate her nutrition and hydration without some assurance that the facility’s staff and administration would not face criminal prosecution.

Marcia could not receive food or liquids orally. Her G-tube produced little, if any, discomfort. While no one could accurately predict how long she would survive without food and water, the litigants stipulated that it would be improbable for her to survive longer than twenty days. They also stipulated that medical experts would testify either that, in their opinion, Marcia would not suffer or that it would be impossible to tell if she would experience pain or suffering. No known medical experts would testify that, in their opinion, she would experience pain or suffering. However, the parties did stipulate that she had reacted to pain.

2. Objections to Removing Hydration and Nutrition

In their stipulation of facts, the parties outlined four reasons why the medical facility objected to terminating Marcia’s hydration and nutrition. The first reason was that the Medical Center and the Director of the Department of Mental Health, Retardation and Hospitals, ethically oppose “any procedure which will actively cause death, including cessation of treatment.” The facility’s philosophy and documented missions are to “heal illness and maintain life.” Since Marcia had a long life expectancy and was not dying, the institution, staff and defendants believed

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31 697 F. Supp. at 583. See supra note 26 and infra notes 49 and 130.
33 Joint Stipulation of Facts, supra note 22, at 5.
34 Id. at 6. See also Gould, Right to Die Legislation: The Effect on Physicians’ Liability, 39 Mercer L. Rev. 517 (1988) for a discussion of physicians’ criminal and civil liabilities and protections from liability.
36 See supra note 26.
38 Id. at 9. The Medical Center and its director “object to any procedure which will actively cause death, including cessation of treatment.” Id. With continued nutrition, Marcia Gray could live a long life; without nutrition, she would not die directly from her illness, but she would starve to death or dehydrate.
that Marcia's family was asking them to perform euthanasia by requesting that they remove the tube.\textsuperscript{39}

Second, the Medical Center argued that, if the Center voluntarily complied with the Gray family's request, it would perpetuate the fear of the Center's predominantly geriatric population and their families that the facility would begin carrying out these requests routinely.\textsuperscript{40} Third, the Medical Center was concerned that without court review, staff might lose their licenses and the facility or its staff might be civilly or criminally prosecuted for taking Marcia's life.\textsuperscript{41} The Medical Center found no legal standards or guidance for issues such as how to decide to stop various treatments, who may decide to stop such treatments, and whether an institution can be compelled to stop such treatments.\textsuperscript{42}

Lastly, the Medical Center was concerned that Marcia's rights may not be fully protected. She had left no clear, written instructions as to her wishes. The Medical Center found no guidance on how to fully and fairly protect a patient's right to life in these situations. Neither the courts nor the Rhode Island legislature provide any assistance in these cases. Therefore, the Medical Center decided that it would be improper to grant the family's request until a court properly decided the related issues.\textsuperscript{43}

The court stated that the Medical Center would not terminate Marcia's nutrition and hydration because to do so constitutes euthanasia, is "inconsistent with the physician's role as safekeeper of his or her patient's well being,"\textsuperscript{44} could pose civil or criminal liability, and would damage the hospital's reputation as an institution devoted to long-term care.\textsuperscript{45} Moreover, defendants argued that continuing hydration and nutrition violated no constitutional rights. In fact, they argued that it is illegal to withhold food and water from a persistently vegetative patient. The Medical Center also posited a right to protect its patient's interests as well as its health care personnel's interests. The Medical Center contended that the court cannot direct it and its personnel to perform the procedure since its personnel object to it.\textsuperscript{46} The medical professionals were "unanimous in their adamant opposition to the proposal to remove nutrition and hydration."\textsuperscript{47}

3. Reasons the Family Wanted to Remove Hydration and Nutrition

The Gray family believed that Marcia would not want to remain alive under the present circumstances and would want her hydration and nu-

\textsuperscript{39} Id. See also supra note 16 regarding euthanasia.
\textsuperscript{40} Joint Stipulation of Facts, supra note 22, at 9.
\textsuperscript{41} Id. at 10. Medical Center officials noted that in at least one state, California, two doctors were charged with murder for participating in a procedure similar to that in the Gray case. Charges were eventually dropped. The Stipulation of Facts does not provide any citation for this fact. See also, Gould, supra note 34.
\textsuperscript{42} Joint Stipulation of Facts, supra note 22, at 10.
\textsuperscript{43} Id. at 10-11.
\textsuperscript{44} 697 F. Supp. at 583.
\textsuperscript{45} Id.
\textsuperscript{46} Id. at 583-84.
\textsuperscript{47} Id. at 583.
The family, through Mr. Gray, argued that under 42 U.S.C. § 1983, the Civil Rights Act of 1871, Mr. Romeo, in his capacity as Director of the Department of Mental Health, Retardation and Hospitals, and the State of Rhode Island denied Marcia her constitutional rights. The family sought a declaratory judgment authorizing the guardian, Mr. Gray, to "require the withdrawal of the life support apparatus." Further, Mr. Gray complained that his wife's first, ninth, and fourteenth amendment rights would be denied if he were not authorized to "order" medical personnel to remove the G-tube. Various family members commented that Marcia made statements conveying her wishes not to be kept alive by artificial means.

4. The Court's Analysis

The court objected to categorizing this as a right to die case. Instead, the court said the case was more about "life and circumstances."

48 Section 1983 provides:
Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

49 697 F. Supp. at 583 (emphasis added). It is not clear whether a feeding tube should be treated differently from other types of "life support apparatus." In the law of living wills, for example, provision of hydration and nutrition is distinguished from other forms of "life support apparatus" and many state statutes do not allow living wills to address removing hydration and nutrition. See Mooney, Indiana's Living Wills and Life-Prolonging Procedures Act: A Reform Proposal, 20 Ind. L. Rev. 539, 544. But cf., AMA's Statement on Withdrawing Treatment, USA Today, Apr. 2, 1986, at 9A, construed in Note, Comparison of the Living Will Statutes of the Fifty States, 14 J. CONTEMP. L. 105, 121 (1988). The American Medical Association's Council on Ethical and Judicial Affairs issued a March 17, 1986 statement that: "Life-prolonging medical treatment includes medication and artificially or technologically supplied respiration, nutrition or hydration." Id. The Note reports that in 19 states life-support does not include nourishment. Id. app. at 123-29.


51 697 F. Supp. at 583. See supra note 49 for a discussion of the definition of artificial means of life support. See also supra note 28 referencing Marcia's conversations with family members about Karen Quinlan's circumstances.

52 697 F. Supp. at 584. "Although it has been customary to cast actions such as this in the light of raising the issue of a right to die this shorthand expression does not in any sense communicate effectively the nature of this controversy." Id.

53 Id. The court adopted a typical utilitarian approach to legal issues with a pleasure vs. pain analysis—a quality of life argument.
It framed the issue as "whether or not the State can insist that a person in a vegetative state incapable of intelligent sensation, whose condition is irreversible, may be required to submit to medical care under circumstances in which the patient prefers not to do so." Restated, "the question is who has the right to determine [Maria's] course of care."

To answer this question the court broke down its analysis into five issues. The first was whether Marcia had a constitutional right to refuse life-sustaining medical treatment; the second was whether feeding and hydrating through a G-tube is medical treatment. After answering these affirmatively, the court next looked at evidence to help determine

Due to advances in medical care, it is possible in some circumstances to sustain the body's biological functions for extended periods of time while the patient has no sense of pain or pleasure, fear or joy, love or hate, understanding or appreciation, taste or touch or smell or any other aspect of life's experience, with no realistic possibility of sentient life.

The court stated that "the right of self-determination and individual autonomy has its roots deep in our history," and quoting John Stuart Mill:

"The only purpose for which power can be rightfully exercised over any member of a civilised [sic] community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinion of others, to do so would be wise, or even right.

The court acknowledged a right to personal autonomy, but then found that compelling medical staff to act against their moral and ethical principles was wholly inappropriate. The court did not cite Mill in this part of its opinion, however, so we do not know what jurisprudence led to its conclusion.

St. Thomas Aquinas would have also refrained from compelling medical staff to act against their ethical principles, but he would not have used the utilitarian principles for any part of his analysis. Aquinas had stated that laws are either just or unjust. If just, they can bind a person's conscience. Laws can be unjust in two ways: "by being contrary to human good" or "being opposed to the Divine good." Unjust laws do not bind one's conscience and those opposing the Divine Good "must no wise be observed, because . . . we ought to obey God rather than man." Id. at 97.

One could argue that a court order compelling a nurse to withdraw a patient's feeding tube, for example, might be unjust on both counts. It arguably contradicts human good because it exceeds the lawgiver's (the court's) power. Generally, a court cannot force someone to act against his moral or ethical fiber without a compelling state interest. To do so may directly violate the fourteenth and first amendments. Obeying the court order may prohibit some nurses from exercising their religion, if the medical procedure goes against one's religiously-based convictions. Id. See infra notes 148-189 and accompanying text.

Arguably, the court would also violate Divine law by compelling someone to contravene Divine law, assuming withholding food and water would violate someone's religiously-based convictions. A person ought to obey God over man. T. Aquinas, supra, at 97. See also infra notes 150 & 173-178 and accompanying text for a discussion of what is necessary for a free exercise violation.

54  697 F. Supp. at 584.
55 Id.
56 Id.
57 Id. at 586.
what Marcia’s wishes would be.\textsuperscript{58} This third analytical step led the court to find that Marcia would refuse this treatment if competent.\textsuperscript{59} The court’s fourth issue was whether any governmental interests outweighed Marcia’s interest.\textsuperscript{60} Finding none overriding, the court looked at its fifth and final issue, whether the court should and could require the Rhode Island Medical Center and its personnel to remove the G-tube.\textsuperscript{61}

This Note focuses on the final issue alone. Nonetheless, reviewing the court’s analysis will provide a framework for considering the health care provider’s dilemma.

\textbf{a. Is there “a federal constitutional right to refuse life-sustaining medical treatment?”}\textsuperscript{62}

The court concluded that even though the United States Supreme Court had never addressed this issue, its decisions under the fourteenth amendment’s due process clause or other constitutional penumbras could be applied here.\textsuperscript{63} The court cited \textit{Roe v. Wade},\textsuperscript{64} which found a “right of privacy, whether it be founded in the Fourteenth Amendment’s concept of personal liberty and restrictions upon state action . . . or . . . in the Ninth Amendment’s reservation of rights to the people . . . broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.”\textsuperscript{65} The court applied \textit{Roe} and its progeny, asserting the general personal autonomy principle.\textsuperscript{66} The court also referred to \textit{Griswold v. Connecticut},\textsuperscript{67} where the Supreme Court originally established a right to privacy based on the penumbras of the Constitution.\textsuperscript{68}

\begin{itemize}
\item \textsuperscript{58} \textit{Id.} at 587.
\item \textsuperscript{59} \textit{Id.} at 588.
\item \textsuperscript{60} \textit{Id.}
\item \textsuperscript{61} \textit{Id.} at 590.
\item \textsuperscript{62} \textit{Id.} at 584. It would be possible for the Supreme Court to decide, in \textit{Cruzan}, that there is a right to die but it is based in a common law right of personal autonomy and not in a constitutional right to privacy. \textit{See infra} note 121.
\item \textsuperscript{63} 697 F. Supp. at 584.
\item \textsuperscript{64} 410 U.S. 113 (1973). \textit{See also} \textit{Webster} v. Reproductive Health Servs., 109 S.Ct. 3040 (1989).
\item \textsuperscript{65} 410 U.S. at 153. Note that the Court held that the fetus did not have constitutional rights, denying it personhood status under the Constitution. \textit{Id.} at 157.
\item Note also that the woman’s “rights” were not absolute, but subject to limitation by a compelling state interest. While the Court found protecting potential life to be a state interest, it held that this interest does not become “compelling” enough for a state to proscribe abortion till viability, when a fetus could live outside the womb. \textit{Id.} at 155.
\item \textsuperscript{66} 697 F. Supp. at 585. The court referred to \textit{Roe’s} progeny up to the time of the case, thus excluding \textit{Webster}, but including Akron Center for Reproductive Health, Inc. v. City of Akron, 462 U.S. 416 (1983), and Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986).
\item In 1973, in \textit{Roe v. Wade}, the Court affirmed the principle that a person has the right, grounded in the Fourteenth Amendment’s due process clause, to control fundamental decisions involving his or her own body. The Court noted, of course, that this right of privacy is not absolute, but must be balanced against certain state interests.

697 F. Supp. at 585.
\item \textsuperscript{67} 381 U.S. 479 (1965). This case established a right to privacy in the marital bedroom regarding contraceptives. \textit{Id.} The Court has expanded this “right to privacy” beyond the marital bedroom. In \textit{Eisenstadt} v. \textit{Baird}, 405 U.S. 438 (1972), the Court found it unconstitutional for states to proscribe selling contraceptives to single persons. The Court broadened the right to include abortion cases beginning with \textit{Roe}, but refused to apply it to consensual homosexual activity in \textit{Bowers} v. \textit{Hardwick}, 478 U.S. 186 (1986).
\item \textsuperscript{68} 381 U.S. 479 (1965).
The Gray court acknowledged that the Supreme Court recently refused to expand the privacy right in Bowers v. Hardwick,69 a case involving consensual homosexual activity. Nonetheless, the Gray court expanded the privacy right to include refusing medical treatment even if it results in the individual’s death. The court found the Gray family’s facts more closely akin to Roe and Griswold than to Bowers.70

The court also found support for its finding in the Bowers opinion itself. In Bowers, the Supreme Court stated the right to privacy included personal decisions “implicit in the concept of ordered liberty”71 or “deeply rooted in this Nation’s history and tradition.”72 Finally, the Gray court relied on Tune v. Walter Reed Army Medical Hospital,73 to conclude that a person “has a paramount right to control the disposition to be made of his or her body, absent a compelling countervailing governmental interest,” even if the decision results in that person’s death.”74

b. Is nutrition and hydration provided through a G-tube medical treatment?

The court acknowledged an “emotional symbolism” attributed to nutrition, but found no legal distinction between providing respiration or nutrition through a tube. Since other cases defined artificial respiration as medical treatment, the court concluded that Marcia’s right to refuse medical treatment included removing a G-tube.75

c. Would Marcia Gray have refused the G-tube if she were competent?

The Gray court stated that “the right to refuse medical treatment ‘must extend to the case of an incompetent, as well as a competent, patient because the value of human dignity extends to both.’”76 The court briefly discussed the substituted judgment doctrine, under which a court decides what an incompetent person may have wanted if he were competent to make his own decision.77 For the court, the evidence clearly revealed that if competent, Marcia would refuse this medical treatment.78 Thus, it found no need to decide how a substituted judgment would be made since the court said all involved were in agreement including the court. In this part of its opinion, the court disregarded the fact that the

70 697 F. Supp. at 585-86.
71 478 U.S. at 191 (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).
72 Id. at 192 (quoting Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977)).
77 Id. See supra note 10 for discussion of substituted judgment. See also infra note 130 for cases in which physicians were wrong regarding a patient’s diagnosis.
78 697 F. Supp. at 587. Note, however, that the hospital continued objecting to withdrawing the G-tube.
Medical Center and its personnel continuously opposed withdrawing the tube.

d. Does Marcia Gray’s self-determination interest outweigh state interests?

Roe v. Wade\textsuperscript{79} and Webster v. Reproductive Health Services\textsuperscript{80} emphasized that individual rights are not absolute. The Gray court balanced Marcia’s rights against the state interests of preserving life, preventing suicide, protecting innocent third parties and maintaining the integrity of medical ethics.\textsuperscript{81} It concluded that none of the government’s interests outweighed Marcia’s interest. The Gray court referred to Brophy v. New England Sinai Hospital\textsuperscript{82} in analyzing this issue. The Brophy court found that the state’s duty “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.”\textsuperscript{83} Brophy also held that a state should not decide questions regarding a person’s quality of life; the person should make those decisions.\textsuperscript{84} Applying Brophy, the Gray court decided that Marcia would find the G-tube demeaning.\textsuperscript{85}

Gray also disregarded the ordinary/extraordinary treatment distinction sometimes used to balance state and individual interests.\textsuperscript{86} Under this distinction, treatment categorized as ordinary could not be withheld while extraordinary treatment could ethically be withheld.\textsuperscript{87} Moreover, the court concluded that Marcia did not need state protection since her family was there “working for her interest.”\textsuperscript{88} Other incapacitated patients need state protection because they are unable to protect their own interests and have no one to do so.

Preventing suicide, the second state interest, also failed to outweigh Marcia’s rights. The court distinguished suicide or self-infliction from self-determination, finding that suicide is “deliberately ending a life by artificial means” while self-determination is “allowing nature to take its course.”\textsuperscript{89} The court acknowledged, nonetheless, that upon withdrawing nutrition and hydration, Marcia would die directly of starvation and de-

\begin{thebibliography}{89}
\bibitem{79} 410 U.S. 113 (1973).
\bibitem{80} 109 S. Ct. 3040 (1989).
\bibitem{81} 697 F. Supp. at 588 (relying upon Tune v. Walter Reed Army Medical Hosp., 602 F. Supp. 1452, 1455 (D.D.C. 1985)).
\bibitem{82} 398 Mass. 417, 497 N.E.2d 626 (1986).
\bibitem{83} 697 F. Supp. at 588.
\bibitem{84} Id.
\bibitem{85} Id.
\bibitem{86} Id. at 588-89. \textit{See infra} note 87.
\bibitem{87} In Brophy v. New England Sinai Hosp., 398 Mass. 417, 497 N.E.2d 626 (1986), the court noted that in \textit{In re Quinlan}, 70 N.J. 10, 355 A.2d 647 (1976), the Quinlan court found the distinction between ordinary and extraordinary care to be significant. 497 N.E.2d at 637. More recent cases have stopped using the distinction. \textit{See President's Commission Report}, supra note 1, at 82-83. The distinction is “both difficult and controversial and [it] can lead to inconsistent results, which makes the terms of questionable value in the formulation of public policy in this area.” \textit{Id.} at 83. The distinction originally marked the difference between ordinary treatment that the patient was morally obligated to accept and others to provide, and extraordinary treatment that was optional by moral standards. \textit{Id.} at 82.
\bibitem{88} 697 F. Supp. at 589.
\bibitem{89} Id.
\end{thebibliography}
hydration. The court still found a difference between “self-infliction” or suicide and self-determination in cases like Gray.

The court also dismissed the state’s argument that starvation and dehydration are painful. The court relied on medical testimony indicating that Marcia could not feel the pain, despite the parties’ stipulation that she reacted to some pain.

The court addressed a third governmental interest, protecting innocent third parties. The court again cited Tune, this time proposing that its analysis is generally limited to protecting a patient’s dependents. The court did not consider this state interest compelling, since the Gray family would not be adversely affected.

The final state interest considered was preserving the integrity of medical ethics. The court concluded that this too was not a compelling interest, because the patient, not the medical professional, should make the health care choice and can even refuse medical treatment.

e. Should the court require Rhode Island Medical Center to carry out Marcia Gray’s wishes or may the Medical Center and its personnel refuse to participate?

The Gray court recognized that terminating nutrition and hydration obviously burdens those medical professionals who see providing food and water as primary responsibilities. While it applauded this concern, the court said that these “professionals must acknowledge Marcia Gray’s right of self-determination. Accordingly, if Marcia Gray cannot be promptly transferred to a health care facility that will respect her wishes, the Rhode Island Medical Center must accede to her requests.”

In making this determination, the court first noted that “the Constitution rarely commands an affirmative obligation on the government’s part; instead, individual rights are stated in the negative, instructing the government on what it cannot do.” It further stated that autonomy amounts to the right to make decisions without unwarranted governmental interference. Further, relying on Harris v. McRae, the court stated, “the government is under no constitutional obligation to provide re-

90 Id.
91 Id. See also Note, supra note 49, at 120. Without the distinction and immunity for health care professionals, they could be liable for murder, manslaughter, assisting a suicide, wrongful death and other illegal acts. Id.
92 697 F. Supp. at 589.
93 See supra note 26 and accompanying text.
94 697 F. Supp. at 589.
96 697 F. Supp. at 591.
97 Id. (emphasis added).
98 Id. at 590.
99 448 U.S. 297 (1980). In this case, the Supreme Court held that freedom from governmental interference in an abortion decision before viability does not entitle a person to governmental funds to procure an abortion. Id. at 317-18.
sources to enable an individual to take full advantage of his or her rights.”

With this in mind, the court reviewed Rhode Island legislation and case law guaranteeing a patient’s right to refuse medical treatment. The court found that the law guarantees a patient an implicit right “not to be penalized for exercising his or her judgment.” The court then noted that once medical personnel discontinue giving food and water to a patient, they can still provide other care such as “supportive care—pain control, skin care, and personal hygiene.” Seemingly, the court was arguing that by providing such needed services, the medical staff maintains its integrity. Medical professionals would not merely abandon the patient once they removed the feeding tube.

The court also considered the defendants’ argument that legislation allowing persons to refuse participation in abortion or sterilization procedures should apply to the instant case. The court dismissed this argument, finding that the state legislation clearly applies only to abortion and sterilization cases. The court said that the federal legislation only applies to particular federal health programs. The court inferred, however, that it may be used for procedures other than abortions and sterilizations.

The court finally emphasized that Marcia’s family had no idea that by choosing the Medical Center it would be giving up her right to determine what care she would receive. The Medical Center never articulated its policy not to terminate feeding and hydrating through G-tubes until Glenn Gray requested that medical personnel remove the G-tube. The court concluded that “Marcia Gray and her family ‘were entitled to rely

100 697 F. Supp. at 590 (emphasis in original).

102 697 F. Supp. at 590.
103 Id. (quoting Steinbrook & Lo, Artificial Feeding—Solid Ground, Not a Slippery Slope, 318 New Eng. J. Med. 286, 288 (1988)).
104 Id. The Rhode Island legislation, R.I. Gen. Laws § 23-17-11 (1985), allows someone associated with a health care facility to refuse participation in abortion or sterilization procedures because of religious or moral reasons. The court dismissed this argument here because the Rhode Island language limits its application to abortion or sterilization procedures.

The defendants also argued that federal law, 42 U.S.C. § 300a-7(d) (1982), should apply. That law states:

No individual shall be required to perform or assist in the performance of any part of a health service program... funded in whole or in part under a program administered by the Secretary of Health and Human Services if his performance or assistance in the performance of such part of such program would be contrary to his religious beliefs or moral convictions.

697 F. Supp. at 590 n.6 (citing 42 U.S.C. § 300a-7(d) (1982)). In a footnote, the court stated that the federal law did not apply because it relates only to specific federally funded health service programs or research activities. Marcia Gray was not receiving such services. 697 F. Supp. at 590 n.6. It seems as though the court might have applied the provision if she had been receiving these specific federal services.

105 Id. See infra note 183 & 184 and accompanying text. See also infra note 180.
II. Death By Starvation and Dehydration

This Note does not discuss whether termination of nutrition and hydration for a persistently vegetative patient is appropriate. Nonetheless, learning how a person starves or dehydrates once a G-tube is removed illustrates the dilemma medical personnel confront when a family member requests that a G-tube be removed and the patient be allowed to die from starvation and dehydration.

Testimony in *Brophy v. New England Sinai Hospital*, 109 depicted this dying process. In *Brophy*, the Supreme Judicial Court of Massachusetts addressed the sole issue of “whether the substituted judgment of an incompetent patient-ward in a persistent vegetative state to refuse the continuance of artificial means of nutrition and hydration should be honored.” 110 Like Marcia Gray, Paul Brophy suffered an aneurysm, 111 was in a persistent vegetative state, 112 and medical personnel adamantly refused to withdraw a G-tube. 113 He, too, was not terminally ill but would likely die from starvation and dehydration if medical staff removed the G-tube. 114

The Massachusetts probate court initially decided the evidence clearly indicated that, if competent, Brophy would want the G-tube removed. Nonetheless, the probate court enjoined the attending hospital and Mrs. Brophy, the guardian, from removing or clamping the tube. 115


107 N.Y. Times, Oct. 23, 1988, at 16, col. 3. A week after the court order, Rhode Island Governor Edward DiPrete told Thomas Romeo, defendant and head of the State's Department of Mental Health, Retardation and Hospitals, not to appeal. Romeo and the hospital administrator stated that medical staff continued to object adamantly to removing the G-tube. Romeo reported that he felt that it was a moral dilemma for him since he believes removing a feeding tube is the "moral equivalent of murder" and he may be forcing employees to unwillingly become accomplices by obeying the order if she cannot be transferred quickly. Although the Medical Center is state-run, Romeo says that removing the tubes is inconsistent with his department's mission and policies. American Medical News, Nov. 18, 1988, at 9.


109 See supra notes 1 & 2 for possible sources for that discussion.


111 Id. at 633.

112 Id. at 628-29.

113 Id. at 628.

114 Id. at 632.

115 Id. at 635.

116 Id. at 628-29 & n.5.
The Supreme Court of Massachusetts, after conducting a substituted judgment analysis,117 sustained the portion of the judgment respecting the hospital and medical professionals' right to refuse to withdraw the tube. The court, however, allowed Mrs. Brophy to transfer her husband and authorize another facility to remove the G-tube.118

In analyzing the state's interest in maintaining the medical profession's integrity, the court concluded that it could not require the hospital to withdraw or clamp the tube. The court stated that "so long as we decline to force the hospital to participate in removing or clamping Brophy's G-tube, there is no violation of the integrity of the medical profession."119 The court agreed with the probate court's finding that "the hospital and its medical staff 'should not be compelled to withhold food and water to a patient, contrary to its moral and ethical principles, when such principles are recognized and accepted within a significant segment of the medical profession and the hospital community.'"120 The court found that neither the Massachusetts law, "the doctrine of informed consent, nor any other provision of law requires the hospital to cease hydration and nutrition upon request of the guardian."121 The court found it "particularly inappropriate to force the hospital, which [was] willing to assist in a transfer of the patient, to take affirmative steps to end the provision of nutrition and hydration to him. A patient's right to refuse medical treatment does not warrant such an unnecessary intrusion upon the hospital's ethical integrity in this case."122

When Mrs. Brophy originally made her request, Brophy's attending physician, Dr. Lajos Koncz, refused to comply because he believed that "he would wilfully be causing Brophy's death."123 The medical and nursing staff essentially agreed. Dr. Richard Field, the hospital's physician-in-chief, stated that he could not comply, "personally or officially," because "it would constitute a harmful act which would deliberately produce death."124 The medical executive committee and the hospital's board of directors concurred. The latter, however, would not oppose transferring the patient if the court ordered that someone remove the tube.125

Dr. Koncz, the attending physician, testified that Brophy might experience some pain and suffering if the tube were removed. Justice Lynch, in dissent, believed that the G-tube should not be removed, and explained in a footnote the process of death by starvation and dehydration. The footnote provides a greater sense of what is at issue:

117 See supra note 10.
119 Id. at 638.
120 Id. at 639.
121 Id. Earlier in its opinion, the court acknowledged a right of self-determination and individual autonomy. It is from these common law rights that the court recognized the right to refuse medical treatment, not from any constitutional right. Id. at 633-34. See infra note 133.
122 497 N.E.2d at 639 (1986).
123 Id. at 632.
124 Id.
125 Id.
Removal of the G tube would likely create various effects from the lack of hydration and nutrition, leading ultimately to death. Brophy’s mouth would dry out and become caked or coated with thick material. His lips would become parched and cracked. His tongue would swell, and might crack. His eyes would recede back into their orbits and his cheeks would become hollow. The lining of his nose might crack and cause his nose to bleed. His skin would hang loose on his body and become dry and scaly. His urine would become highly concentrated, leading to burning of the bladder. The lining of his stomach would dry out and he would experience dry heaves and vomiting. His body temperature would become very high. His brain cells would dry out, causing convulsions. His respiratory tract would dry out, and the thick secretions that would result could plug his lungs and cause death. At some point within five days to three weeks his major organs, including his lungs, heart, and brain, would give out and he would die. The judge found that death by dehydration is extremely painful and uncomfortable for a human being. The judge could not rule out the possibility that Paul Brophy could experience pain in such a scenario. Paul Brophy’s attending physician described death by dehydration as cruel and violent.\textsuperscript{126}

The Gray court was concerned whether Marcia would feel hunger, thirst, or pain if medical staff removed her feeding tube.\textsuperscript{127} While the Gray opinion stated that her neurosurgeon did not believe she would experience these sensations, that opinion should not have been considered definitive. The parties even stipulated prior to trial that “some reaction to pain has been noted.”\textsuperscript{128}

In response to reporters, the Medical Center’s general counsel articulated misconceptions people had regarding Marcia’s condition and the possible pain and suffering associated with dying by starvation and dehydration. Referring to court records, he said they would “show that if you walked into the room, Marcia Gray would turn her eyes toward you .... If you gave pain, she’d withdraw her feet. If you made loud noises, she had a startle reflex. She had sleep cycles. You could tell when she was asleep, you could tell when she was awake.”\textsuperscript{129} Though rare, there have been instances when physicians were mistaken regarding a person’s “persistent vegetative state.”\textsuperscript{130}

\textsuperscript{126} Id. at 641 n.2 (Lynch, dissenting).
\textsuperscript{128} Joint Stipulation of Facts, supra note 22, at 3. See also supra note 26.
\textsuperscript{130} Nat’l. Right to Life News, Feb. 1, 1989, at 4, col. 1 (quoting Schwaneberg, Newark Star-Ledger, Nov. 27, 1988). A family member proposed removing a feeding tube from a relative in a persistent vegetative state. Complying with New Jersey Suprême Court holdings, two neurologists were called to confirm the physician’s diagnosis that the patient was in a persistent vegetative state. The first confirmed the diagnosis; the second neurologist said hello to the patient and the patient responded hello. See also N.Y. Times, April 13, 1989, at B3, col. 5. New York’s highest court authorized removing incompetent patients’ feeding tubes when a patient’s wishes can be determined from “clear proof”. In early April, 1989, the first right-to-die petition allowing this was granted, but the judge had to vacate it when the patient began recovering. The 86 year old patient, Carrie Coons, was in a persistent vegetative state for over four months. The court granted a right-to-die petition but ordered the family to wait two weeks and transfer her to another hospital. The newspaper account did not report the court’s reasons for this stipulation.

During the two weeks, Mrs. Coons became alert enough to speak briefly about the “legal quandary” surrounding her care. New York case law only allows a court to grant right-to-die petitions...
Proponents of removing the tube said Marcia would die within five days. In fact, she died over two weeks later. Before her death, she reportedly lost fifty pounds and was given Valium to reduce seizures.\textsuperscript{131}

III Conscience Clauses Are Needed To Protect Medical Personnel

A. The Supreme Court Is Not Likely to Resolve the Issue

It is unlikely that the Supreme Court’s decision in \textit{Cruzan v. Harmon}\textsuperscript{132} will resolve the conflict illustrated by \textit{Gray} and \textit{Brophy} as to whether a court may order a medical facility, and its staff, to remove a feeding tube, when doing so contravenes the institution’s ethos or the staff’s ethical convictions.\textsuperscript{133} The conflict involves preserving medical integrity and protecting the rights of individuals and institutions that refuse to withhold food and water from their patients.\textsuperscript{134} The \textit{Gray} court when there is “clear proof that an incompetent patient would have wished that to be done.” When asked what she would have wished, Mrs. Coons said she was not sure. She said, “These are difficult decisions,” and that she would “like to wait” on any decision regarding the feeding tube. \textit{Id.}

Dr. Ronald E. Cranford, a Minneapolis neurologist, past president of the American Society of Law and Medicine, and a White House commission consultant on right to die issues, stated that this dramatic case “shows you that you’re basically never dealing with certainties here.” \textit{Id.} It seems there are two uncertainties in this case. First, the diagnosis and prognosis are uncertain. Second, the validity of the surrogate decision is uncertain.

Another uncertainty to be considered is the potential for medical advancements that might bring a patient out of a persistent vegetative state. \textit{See} South Bend Tribune, March 28, 1990, at 1, col. 1. On March 12, 1990, a Wisconsin man who had been in a persistent vegetative state for eight years awoke after receiving a painkiller, Valium, while having dental work done. He “fell asleep about five minutes . . . . Then he woke up and started talking. He was able to answer questions, say his name, to feed himself and walk.” \textit{Id.} at col. 3.

After lapsing back into the vegetative state, a second dose awoke him again for 90 minutes. His neurologist at the University of Wisconsin Hospital, Dr. Andres Kanner, witnessed the second incident. Kanner commented, “I have to tell you he was a different man. He knew his name, the name of his family, where he used to work. He could add, subtract and perform complicated calculations.” \textit{Id.} While doctors do not know why the drugs help him, they theorize that the benzodiazepines, the family of drugs including Valium, which “inhibit certain functions of the nervous system, are blocking the effects of the vegetative state.” \textit{Id.} at col. 4. The drugs have given him lucid intervals of 10 to 12 hours. Prior to this, doctors knew little about how to treat him and had little hope for any recovery. \textit{Id.}

\textsuperscript{132} 760 S.W.2d 408 (Mo. 1988) (en banc), \textit{cert. granted}, 109 S. Ct. 3240 (1989).
\textsuperscript{133} Roe v. Wade, 410 U.S. 113 (1973), its progeny, and Webster v. Reproductive Health Servs., 109 S. Ct. 3040 (1989), found a right to an abortion during various stages of pregnancy overriding any state interests until viability. Those Supreme Court decisions did not adequately address medical personnel’s role in performing those “constitutionally-protected” abortions. Congress addressed the issue in the Church Amendment, 42 U.S.C. § 300a-7 (1974). Congress enacted a conscience clause clearly setting out a right in some instances to refuse participation in performing abortions and sterilizations. This statute only pertains to procedures performed in a federally funded health service program or research activity. In the future, one of its provisions may be applied to cases like \textit{Gray}. \textit{See supra} note 105 and accompanying text.

\textit{Cruzan} asks the Supreme Court whether the privacy right extends to include a constitutionally protected right to die. In the alternative, the Court may conclude that there is a right to make these care decisions based on the common law that has been used for years for the general proposition that patients can refuse medical treatment. \textit{See supra} note 121. \textit{Cruzan} is also asking who should make the surrogate decisions for incompetent patients. The Court is not likely to address whether courts or others may compel medical personnel to participate, since that issue is not directly present in \textit{Cruzan}. It is likely the next issue to be resolved, however, if the Court finds some right, whether constitutionally-based or not, to refuse nutrition and hydration. It is conceivable that the Court will leave this issue to the legislature as it did in the abortion context.

\textsuperscript{134} Courts have balanced a patient’s right to refuse medical treatment against four state interests. Included in these is the integrity of the medical profession. It was in evaluating this interest that the
cited *Brophy* numerous times throughout its analysis but neglected to do so when considering two questions: whether the state’s interest in maintaining the medical profession’s integrity would override a person’s right to refuse treatment, and whether a court could force an institution and its staff to remove a patient’s G-tube, and consequently his food and water.\(^{135}\)

The *Brophy* court clearly opposed forcing institutions and medical staff to remove feeding tubes; it feared this might violate the medical profession’s integrity.\(^{136}\) In contrast, the *Gray* court recognized that removing the feeding tube would be “unsettling” and “a great burden on health care professionals,” but declared that they “must acknowledge Marcia Gray’s right of self-determination.”\(^{137}\) The *Gray* court then ordered the hospital to transfer Marcia to a facility that would “respect her wishes” or the hospital would have to “accede to her requests” itself.\(^{138}\) The court knew that the staff unanimously and adamantly opposed removing the tube.\(^{139}\) What if the Medical Center had not been able to transfer Marcia and the professionals on her case continued to oppose removing the tube on religious or ethical grounds? The court’s mandate did not provide for any exception for religiously-based objections.

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*Brophy* court concluded that “so long as we decline to force the hospital to participate in removing or clamping Brophy’s G-tube, there is no violation of the integrity of the medical profession.” *Brophy* v. New England Sinai Hosp., 398 Mass. 417, 497 N.E. 2d 626, 638 (1986). Other courts have not been finding a compelling state interest which would supersede the rights of the individual patient on the grounds that the medical profession’s integrity would be unduly harmed. See e.g. *In re Jobes*, 108 N.J. 394, 529 A.2d 434, 450 stay denied sub nom. Lincoln Park Nursing and Convalescent Home v. Kahn, 483 U.S. 1036 (1987).

\(^{135}\) 497 N.E.2d at 638. See supra note 134.

\(^{136}\) Id. at 583.

\(^{137}\) Id. at 587.

\(^{138}\) See also Seidel, *The Hospital and Abortion, Case and Comment* 24 July-Aug. 1974, at 24 for the proposition that *Roe* failed to address the issue of protecting health care professionals who refuse to participate in abortions for ethical reasons; Greco v. Orange Memorial Hosp., 513 F.2d 875 (5th Cir. 1975) cert. denied 423 U.S. 1000 (1975), coupled with Webster v. Reproductive Health Svs., 109 S. Ct. 3040 (1989), for the proposition that the Supreme Court found it unnecessary to clarify it in its abortion opinions.

\(^{139}\) Id. at 589-906. Instead the court referred to Wilkinson v. Vesey, 110 R.I. 606, 295 A.2d 676 (1972) and *In re Jobes*, 108 N.J. 394, 529 A.2d 434 stay denied sub nom. Lincoln Park Nursing and Convalescent Home v. Kahn, 483 U.S. 1036 (1987). In *Jobes*, the Supreme Court of New Jersey reversed the trial court’s holding that the nursing home was entitled to refuse to withdraw Mrs. Jobes’ jejunostomy tube (hereinafter j-tube), providing her food and water, and transfer her to another facility. 529 A.2d at 437. The court reversed the lower court because the facility had never informed the Jobes family of its policies, giving the family “no reason to believe that they were surrendering the right to choose among medical alternatives when they placed her in the nursing home.” Id. at 450. The court emphasized, however, that it did “not decide the case in which a nursing home gave notice of its policy not to participate in the withdrawal or withholding of artificial feeding at the time of a patient’s admission. Thus, [it did] not hold that such a policy is never enforceable.” Id.

See also Seidel, *The Hospital and Abortion, Case and Comment* 24 July-Aug. 1974, at 24 for the proposition that *Roe* failed to address the issue of protecting health care professionals who refuse to participate in abortions for ethical reasons; Greco v. Orange Memorial Hosp., 513 F.2d 875 (5th Cir. 1975) cert. denied 423 U.S. 1000 (1975), coupled with Webster v. Reproductive Health Svs., 109 S. Ct. 3040 (1989), for the proposition that the Supreme Court found it unnecessary to clarify it in its abortion opinions.

\(^{136}\) 497 N.E.2d at 638. See supra note 134.


\(^{138}\) Id.

\(^{139}\) Id. at 583.

The Guardian *Ad Litem* has reported to the (c)ourt that the hospital as an institution is opposed to denying Mrs. Gray nutrition and hydration because it is tantamount to euthanasia, inconsistent with the physician’s role as safekeeper of his or her patient’s well being, the fear that the hospital has of civil or criminal responsibility and the reputation which the hospital has (as) an institution for long-term care and the treatment of chronic care patients. Those professional health care personnel who administer to Mrs. Gray’s needs presently are unanimous in their adamant opposition to the proposal to remove nutrition and hydration.

*Id.*
The *Gray* court relied on *In re Jobes* when it ordered the Medical Center to either transfer Marcia Gray or remove the tube. Both *Jobes* and *Gray* involved a facility which did not clearly announce its policy against withholding or withdrawing nutrition and hydration. It seems less likely that a court would force an institution to participate if the institution had clearly expressed its policies. This notice would conceivably prohibit a patient from reasonably relying on the hospital’s deference to patients in this particular decision.

Private medical care facilities could begin publicizing these policies to incoming patients as a way to possibly shield themselves from judicial orders inconsistent with their moral or ethical policies. However, there must be some more substantially certain protection for medical personnel who could not in good conscience participate in withdrawing nutrition and hydration. More than the patient’s individual rights are at stake in these cases. The individual rights of medical personnel are also at issue.

B. Whose Civil Rights are Affected in these Cases?

Mr. Gray based his claim on 42 U.S.C. § 1983, the Civil Rights Act of 1871. The statute clearly sets out that a plaintiff must assert two primary allegations for a section 1983 claim. The plaintiff must allege first that a person was acting under color of state law. Secondly, while acting under state law, that person deprived the plaintiff of a federal right.

Gray and similar plaintiffs claim that an individual has a federal right “to control fundamental medical decisions that affect his or her own body . . . properly grounded in the liberties protected by the Fourteenth Amendment’s due process clause.” The *Gray* court noted that while the Supreme Court has never directly addressed whether a person has a federal constitutional right to refuse life-sustaining medical treatment, the Court’s decisions have repeatedly affirmed the common law principle of individual self-determination.

Mr. Gray first argued that the hospital was acting under state law, as a state actor, because it was a state facility. He then alleged that the hospital would deprive his incompetent wife of her federal right if it did not

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141 See supra note 135 and accompanying text. See also Miles, Singer & Siegler, supra note 1 for a discussion of mission statements and institutional missions.
142 See supra notes 48-51 and accompanying text.
144 By the plain terms of § 1983, two—and only two—allegations are required in order to state a cause of action under that statute. First, the plaintiff must allege that some person has deprived him of a federal right. Second, he must allege that the person who has deprived him of that right has acted under color of state or territorial law.
145 Id. Mahoney suggests addressing other elements for a prima facie case, but these two are fundamental and clearly required by statute.
146 697 F. Supp. at 585.
147 Id. Thus, the Supreme Court, in *Cruzan*, may determine that there is a right to refuse a feeding tube and that a surrogate may exercise an incompetent patient’s right for him. The Court could find this right based in the common law or based in the Constitution. If it finds the latter basis, the Court will most likely be extending the privacy right used to justify abortion.
follow his request, made under substituted judgment, and withdraw her feeding tube.

When a court orders a hospital to remove a feeding tube, as it did in Gray, it is also acting as a state actor. Leaving aside the hospital's rights for a moment, the court may be depriving individual medical professionals or staff of their individual federal rights. As individuals, medical personnel have first amendment rights. One obvious first amendment right is the freedom to exercise one's own religion. A court ordering a hospital to "promptly" transfer the patient or "accede to her requests" is at least indirectly forcing individuals to take actions that may be contrary to their religious convictions. In Gray, these actions were contrary to the convictions of doctors, staff and administrators, aside from even considering the institution's ethos.

146 See supra note 10.
147 In Shelley v. Kraemer, 334 U.S. 1 (1948), the Supreme Court held that a state was responsible for discrimination, when its court enforced racially discriminatory restrictive covenants. This court action amounted to state action in the discrimination and violated the fourteenth amendment's equal protection clause.
148 See supra note 50 for text of the first and fourteenth amendments.
149 See supra note 1, at 48. Relying on George Annas, a noted medical ethicist, the physicians who authored this article conclude that "health care facilities have no institutional responsibility for the morality of medical decisions made inside their walls. Yet in many ways society articulates expectations of the moral obligation of such facilities." Id. Examples include establishing ethics committees and requiring facilities to adopt policies governing decisions regarding withholding resuscitation. Referring to Annas again, the three physicians state that:

[C]ourts should hesitate to force health care facilities to carry out morally controversial treatment requests. Some nurses and physicians have profound moral objections to participating in certain treatment plans, such as those that require caring for a patient who has refused feeding. The right of individual providers of health care to refuse to participate in treatment plans that they find morally objectionable has been well established. As the President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, Making Health Care Decisions: A Report on the Ethical and Legal Implications of Informed Consent in the Patient-Practitioner Relationship noted, a health professional is not "obligated to accede to the patient in a way that violates ... the provider's own deeply held moral beliefs." If the courts cannot compel people to violate their own conscience-based moral standards, then it follows that on occasion institutions may be unable to comply with court-ordered directives to carry out certain actions, because no one in the institution is willing to do so.

Id. at 48-49 (footnotes omitted)
150 697 F. Supp. at 583. The Gray court did not state whether the staff's convictions were religiously-based. The court failed to address the freedom of religion issue altogether. The Supreme Court has provided guidance as to what convictions the first amendment protects. In Wisconsin v. Yoder, 406 U.S. 205 (1972), the Court stated that "to have the protection of the Religion Clauses, the claims must be rooted in religious belief." Id. at 215. They cannot be "merely a matter of personal preference." Id. at 216 (emphasis added). In United States v. Seeger, 380 U.S. 163 (1965), the Supreme Court interpreted federal statutory law as exempting conscientious objectors from combatant service when their opposition was based on "religious training and belief" as opposed to a "merely personal moral code." Id. at 173. A merely personal moral code is a "moral code which is not only personal but which is the sole basis for the [individual's] belief and is in no way related to a Supreme Being." Id. at 186. "The validity of what he believes cannot be questioned ... [The] task is to decide whether the beliefs professed by an [individual] are sincerely held and whether they are, in his own scheme of things, religious." Id. at 184-85 (emphasis added). The Supreme Court has also held that it is not necessary for all members of a sect to hold the same conviction. Thomas v. Review Bd. 450 U.S. 707 (1981).

Of course, once a religious belief is found and a state action is interfering with one's exercise of that belief, the next inquiry is whether there is a compelling state interest overriding the first amendment right. Wisconsin v. Yoder, 406 U.S. 205 (1972). Since the issue presented in this Note is analogous to protecting health care providers' consciences in the abortion context, such a compelling state interest is unlikely. Congress, in fact, enacted a conscience clause to protect medical per-
A Catholic priest of the Providence Diocese, Rev. Robert J. McManus, wrote a theological opinion on the Grays’ behalf. With respect to the court order, he told media that his “only concern would be that it is never right to ask people to violate their consciences . . . . Ideally there should not be a conflict [between a government’s law and moral law], but sometimes, in point of fact there is. And one is obligated to follow the moral law.”151

The President’s Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research (the “Commission”) noted in its report that medical staff is not “obligated to accede to the patient in a way that violates . . . the provider’s own deeply held moral beliefs.”152 The Commission concluded that: “As in medical decision-making generally, some constraints on patients’ decisions are justified. Health care professionals or institutions may decline to provide a particular option because that choice would violate their conscience or professional judgment, though in doing so they may not abandon a patient. “153

The Gray court is the first federal court to order a hospital to transfer its patient or remove the feeding tube over the moral objections of the institution and individual health care providers. Therefore, it is understandable that medical personnel have not previously brought section 1983 actions to challenge such an order. If other courts follow the Gray result, medical personnel choosing to resist such court orders may face the penalty of contempt of court. In the abortion context, statutes have protected medical personnel from this dilemma to some degree. They appropriately allow objections on religious or moral foundation.154

C. An Analogy to the Abortion Conscience Clause

In Doe v. Bolton,155 Roe v. Wade’s156 companion case, the Supreme Court invalidated numerous provisions of a Georgia statute. The Court held that these provisions unconstitutionally interfered with a right to an abortion. However, the Court did not find Georgia’s conscience clause protecting medical personnel objectionable. The court stated that, under Georgia law, the hospital was “free not to admit a patient for an abortion . . . . [A] physician or any other employee has the right to re-

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151 Gianelli, R.I. Governor Bars Appeal on Life-Support Decision, Am. Medical News, Nov. 18, 1988, at 11, col. 2. See also supra note 53 discussing St. Thomas Aquinas and unjust laws. Aquinas states that all law derives from eternal law. Unjust laws are therefore not laws at all and do not bind one’s conscience. According to Aquinas, one should never obey those unjust laws that are inconsistent with the eternal law. Id.


153 President’s Commission Report, supra note 1, at 3.

154 See infra notes 159-189 and accompanying text.


frain, for moral or religious reasons, from participating in the abortion procedure."157 The Court continued: "These provisions obviously are in the statute in order to afford appropriate protection to the individual and to the denominational hospital."158

Not all states have conscience clauses for such "appropriate protection." There is now a federal conscience clause protecting medical personnel in federally assisted facilities with respect to abortion and sterilization procedures. On June 18, 1973, six months after Roe and Bolton, President Nixon signed into law the Health Programs Extension Act.159 Provisions of that act, known as the Church Amendment,160 "prohibit a court or a public official . . . from requiring an individual or institution to perform or assist in the performance of sterilization procedures or abortions, if such action would be contrary to religious or moral convictions."161

157 Bolton, 410 U.S. at 197-98. The Georgia conscience clause stated, in part:

Nothing in this section shall require a hospital to admit any patient under the provisions hereof for the purpose of performing an abortion . . . . A physician, or any other person who is a member of or associated with the staff of a hospital, or any employee of a hospital in which an abortion has been authorized, who shall state in writing an objection to such abortion on moral or religious grounds shall not be required to participate in the medical procedures which will result in the abortion, and the refusal of any such person to participate therein shall not form the basis of any claim for damages on account of such refusal or for any disciplinary or recriminatory action against such person.


158 Id. at 198 (emphasis added).


160 Senator Church of Idaho proposed the provisions in an amendment.

161 Pub. L. No. 93-45, 87 Stat. 91 (codified as amended at 42 U.S.C. § 300a-7 (1982)). Senator Church's original amendment read as follows:

It is hereby declared to be the policy of the Federal Government, in the administration of all Federal programs, that religious beliefs which proscribe the performance of abortions or sterilization procedures (or limit the circumstances under which abortions or sterilizations may be performed) shall be respected.

Any provision of law, regulation, contract, or other agreement to the contrary notwithstanding, on and after the enactment of the Act, there shall not be imposed, applied, or enforced, in or in connection with the administration of any program established or financed totally or in part by the Federal Government which provides or assists in paying for health care services for individuals or assists hospitals or other health care institutions, any requirement, condition, or limitation, which would result in causing or attempting to cause, or obligate, any physician, other health care personnel, or any hospital or other health care institution, to perform, assist in the performance of, or make facilities or personnel available for or to assist in the performance of, any abortion or sterilization procedure on any individual, if the performance of such abortion or sterilization procedure on such individual would be contrary to the religious beliefs of such physician or other health care personnel, or of the person or group sponsoring or administering such hospital or other institution.

119 CONG. REC. 9595 (1973) (emphasis added).

On the Senate floor, Illinois Senator Stevenson recommended that the clause extend protection to those objecting for moral reasons. Senator Church agreed to modify the language accordingly. Id. at 9595-96 (statements of Sen. Stevenson and Sen. Church).

The provisions were also amended to include New York Senator Javits' anti-discrimination provision. He voiced concern that constitutional questions may arise if a denominational hospital could fire its staff for performing abortions in other facilities even though they refrained while in the denominational hospital. Javits raised other constitutional questions. Id. at 9598-99 (statement by Sen. Javits). Because of those, the Conference Committee adopted different language.

The provisions have been amended over the years, namely § 300a-7(d) and (e) were added. Today the statute reads:

§ 300a-7. Sterilization or abortion
(a) Omitted
In November, 1972, a court enjoined a private, Catholic hospital to allow a woman’s doctor to perform a sterilization operation during a Caesarian section delivery. That preliminary injunction prompted this

(b) Prohibition of public officials and public authorities from imposition of certain requirements contrary to religious beliefs or moral convictions
The receipt of any grant, contract, loan, or loan guarantee under the Public Health Service Act [42 U.S.C.A. § 201 et seq.], the Community Mental Health Centers Act [42 U.S.C.A. § 2689 et seq.], or the Developmental Disabilities Services and Facilities Construction Act [42 U.S.C.A. § 6000 et seq.] by any individual or entity does not authorize any court or any public official or other public authority to require—
(1) such individual to perform or assist in the performance of any sterilization procedure or abortion if his performance or assistance in the performance of such procedure or abortion would be contrary to his religious beliefs or moral convictions; or
(2) such entity to—
(A) make its facilities available for the performance of any sterilization procedure or abortion if the performance of such procedure or abortion in such facilities is prohibited by the entity on the basis of religious beliefs or moral convictions, or
(B) provide any personnel for the performance or assistance in the performance of any sterilization procedure or abortion if the performance or assistance in the performance of such procedures or abortion by such personnel would be contrary to the religious beliefs or moral convictions of such personnel.

(c) Discrimination prohibition
(1) No entity which receives a grant, contract, loan or loan guarantee under the [aforementioned acts] after June 18, 1973 may—
(A) discriminate in the employment, promotion, or termination of employment of any physician or other health care personnel, or
(B) discriminate in the extension of staff or other privileges to any physician or other health care personnel,
because he performed or assisted in the performance of a lawful sterilization procedure or abortion, because he refused to perform or assist in the performance of such procedure or abortion on the grounds that his performance or assistance in the performance of the procedure or abortion would be contrary to his religious beliefs or moral convictions, or because of his religious beliefs or moral convictions respecting sterilization procedures or abortions.
(2) No entity which receives after July 12, 1974, a grant or contract for biomedical or behavioral research under any program administered by the Secretary of Health and Human Services may—
(A) discriminate in the employment, promotion, or termination of employment of any physician or other health care personnel, or
(B) discriminate in the extension of staff or other privileges to any physician or other health care personnel,
because he performed or assisted in the performance of any lawful health service or research activity, because he refused to perform or assist in the performance of any such service or activity on the grounds that his performance or assistance in the performance of such service or activity would be contrary to his religious beliefs or moral convictions, or because of his religious beliefs or moral convictions respecting any such service or activity.

(d) Individual rights respecting certain requirements contrary to religious beliefs or moral convictions
No individual shall be required to perform or assist in the performance of any part of a health service program or research activity funded in whole or in part under a program administered by the Secretary of Health and Human Services if his performance or assistance in the performance of such part of such program or activity would be contrary to his religious beliefs or moral convictions.

(e) Prohibition on entities receiving Federal grants, etc., from discriminating against applicants for training or study because of refusal of applicant to participate on religious or moral grounds
No entity which receives, after September 29, 1979, any grant, contract, loan, loan guarantee, or interest subsidy under [the aforementioned acts] may deny admission or otherwise discriminate against any applicant (including applicants for internships and residencies) for training or study because of the applicant’s reluctance, or willingness, to counsel, suggest, recommend, assist, or in any way participate in the performance of abortions or sterilizations contrary to or consistent with the applicant’s religious beliefs or moral convictions.
The district court, granting the preliminary injunction, found that the Catholic hospital acted "under color of law" because it received favorable tax treatment and it received federal Hill-Burton funds to defray some hospital remodeling and construction costs over the years 1956 to 1963. As a state actor, it could not interfere with a woman's right to an abortion. After Congress enacted the Church Amendment, the court dissolved its injunction, finding that "by its plain language, the Act prohibits any court from finding that a hospital which receives Hill-Burton funds is acting under color of state law." The Ninth Circuit affirmed this and further held that the fact that St. Vincent's hospital had the only maternity ward in the area was insufficient to

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It appears as though Senator Church's original language, coupled with the modification including moral objections and the subsequent amendments in 1974 and 1979, may have established a more far-reaching conscience clause. By looking solely at the language, one could conclude that Senator Church did not want to limit the protection only to medical treatment provided under the three bills reauthorized by the Heath Programs Extension Act.

This conscience clause did not apply in Gray. The defendants in Gray argued that they were protected from a court order by 42 U.S.C. § 300a-7 (d). In a footnote, the court responded that since Marcia Gray did not receive treatment under a health service program (one of the types of programs reauthorized by the original Health Programs Extension Act), this provision did not apply. 697 F. Supp. at 590 n.6. See infra note 180.

162 Taylor v. St. Vincent's Hosp., 369 F. Supp. 948, 950 & n.1 (D. Mont. 1973) (citing 1973 U.S. CODE CONG. & ADMIN. NEWS 1553 (sic) (The correct page number is 1473)). The court cited this legislative history since Congress enacted the Church Amendment as a direct reaction to the preliminary injunction. After Congress enacted the Church Amendment the court dissolved the injunction. Senator Church, in proposing the amendment on the Senate floor, stated:

Even though the Supreme Court's decision (Roe) does not impose the obligation upon a hospital there is nothing in existing law to prevent zealous administrators from requiring the performance of abortions, within the limits of the Court's decision, as a part of their regulations pertaining to federally funded programs . . . . Already a case has arisen which should furnish us with ample grounds for legislative action. A Federal district court in Montana, in the case of Mike and Gloria Taylor against St. Vincent Hospital, has issued a temporary injunction, compelling a Catholic hospital, contrary to Catholic beliefs, to allow its facilities to be used for a sterilization operation. The district court based its jurisdiction upon the fact that the hospital had received Hill-Burton funds.

Given the injunction . . . together with the possible administrative ramifications of the recent Supreme Court decision on abortions, it should be evident that a provision needs to be written into the law to fortify freedom of religion as it relates to the implementation of any and all Federal programs affecting medicine and medical care.

119 CONG. REC. 9595 (1973).

163 The Church Amendment covers Hill-Burton Act funds since the Hill-Burton Act is a subchapter of the Public Health Services Act. Hill-Burton funds are granted:

(a) to assist the several States in the carrying out of their programs for the construction and modernization of such public or other non-profit community hospitals and other medical facilities as may be necessary, in conjunction with existing facilities, to furnish adequate hospital, clinic, or similar services to all their people;
(b) to stimulate the development of new or improved types of physical facilities for medical, diagnostic, preventive, treatment, or rehabilitative services; and
(c) to promote research, experiments, and demonstrations relating to the effective development and utilization of hospital, clinic or similar services, facilities, and resources, and to promote the coordination of such research, experiments, and demonstrations and the useful application of their results.


164 369 F. Supp. at 950 & n.1 (D. Mont. 1973) (citing 1973 U.S. CODE CONG. & ADMIN. NEWS 1553 [sic] (The correct page number is 1473)).

165 Taylor v. St. Vincent's Hosp., 523 F.2d 75, 76 (9th Cir. 1975). This was the later Taylor case brought on appeal. This court affirmed the district court when it dissolved its original injunction.
constitute "state action" under the theory that it monopolized maternity services. 166 Therefore, a section 1983 claim could not be made.

Senator Church from Idaho intended to statutorily declare that "no federal funding of hospitals, medical research, or medical care may be conditioned upon the violation of religious precepts." 167 During Senate floor debate he stated: "Nothing is more fundamental to our national birthright than freedom of religion. Religious belief must remain above the reach of secular authority." 168 The Senate expanded the original amendment to protect health care providers objecting on moral, but not necessarily religious, grounds. 169

Throughout the Senate floor debate over the Church Amendment, it became clear that senators were addressing two distinct concerns. Protecting the individual health personnel was the first and uncontroverted concern. 170 Senator Javits of New York, in the midst of raising possible constitutional objections and various amendments, stated, "[I]f this were confined to the moral and religious convictions of the individual—that is, the physician or the individual health personnel, I do not see how anybody can object." 171 However, protecting the institutional ethos presented more problems. These included whether Congress would violate the Constitution's establishment clause by allowing an institution to have religious scruples. 172

During the Senate floor debate, Senator Kennedy of Massachusetts and chairman of the Health subcommittee stated that "Congress has the authority under the Constitution to exempt individuals from any requirement that they perform medical procedures that are objectionable to their religious convictions. Indeed, in many cases, the Constitution itself is sufficient to grant an exemption to protect persons from official acts that infringe on their free exercise of religion." 173

Senator Kennedy noted that Congress exempted conscientious objectors from the Selective Service. 174 To qualify, conscientious objectors must oppose war because of a truly held belief that is somewhat related

166 Id. at 77-78. See also DeShaney v. Winnebago County DSS, 109 S.Ct. 998, 1009 (1989) (Brennan, dissenting); Youngberg v. Romeo, 457 U.S. 307 (1982); Estelle v. Gamble 492 U.S. 97 (1976); Boddie v. Connecticut, 401 U.S. 371 (1971) for the proposition that monopolizing particular services may constitute "state action," invoking the fourteenth amendment.


Senator Church stated that thousands of hospitals had been "built, remodeled, enlarged, modernized or equipped" with Hill-Burton funds. The federal funds were granted on the condition that hospitals would comply with certain Federal regulations which the Government could stipulate after hospitals had received the grants. Nothing in Roe, or its companion case, prohibits tying an obligation to perform abortions to these funds, even regarding denominational facilities. Id. This would create major problems for a hospital founded on religious convictions that do not tolerate abortion.

168 Id.

169 Id. See supra note 161.


171 Id.

172 Id. Senator Javits raised questions with other possible constitutional underpinnings including whether giving money to institutions that prohibit legal medical procedures would violate the equal protection clause.

173 Id. at 9602 (statement of Sen. Kennedy).

174 Id.
to a Supreme Being. He then specifically cited two Supreme Court cases, Sherbert v. Verner and Wisconsin v. Yoder, in which the Court protected individuals’ religious exercise rights without violating the establishment clause.

In United States v. Seeger, 380 U.S. 163 (1965), the Supreme Court interpreted a federal statute and exempted certain individuals from combatant service because they were conscientiously opposed to all war (not only unjust wars) and their opposition was based in “religious training and belief,” not in “political, sociological or philosophical” views. The court clarified what one needs to show to be a conscientious objector. First, the truth of the belief is insignificant in these cases; one need only show that he truly holds the belief. The Court held that:

While the “truth” of a belief is not open to question, there remains the significant question of whether it is “truly held.” This is the threshold question of sincerity which must be resolved in every case. It is, of course, a question of fact — a prime consideration to the validity of every claim for exemption as a conscientious objector.

Second, the objection must be based on “religious training and belief” and not on a “merely personal moral code”. The Court explained that the statutory definition of conscientious objector excepts those whose beliefs are based on a merely personal moral code and that:

The use by Congress of the words “merely personal” seems to us to restrict the exception to a moral code which is not only personal but which is the sole basis for the registrant’s belief and is in no way related to a Supreme Being. It follows, therefore, that if the claimed religious beliefs of the respective registrants in these cases meet the test that we lay down then their objections cannot be based on a “merely personal” moral code.

That “test” the Court laid down is: “A sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption (from Selective Service) comes within the statutory definition.” Id. at 176.

The landmark case, Sherbert v. Verner, exempted Seventh Day Adventists from a state requirement that they be willing to work Saturdays to receive unemployment benefits. The Court used the strict scrutiny standard in this case and has since reaffirmed this standard in Hobbie v. Unemployment Appeals Comm’n, 480 U.S. 136 (1987).

In Yoder, the Court unanimously held that Amish children were not required to comply with Wisconsin’s compulsory school law. Compelling the parents to send their children to public high school would interfere with the exercise of their religion since their religion requires one to live in a community separate from the modern world. Moreover, the state interest in educating its youth was not compelling. The Amish proved to be productive without this further schooling. Even if the Amish children ever left their community they had skills that would be marketable in the modern world.

Since 1973, the Supreme Court has clarified its opinions. In Thomas v. Review Bd., 450 U.S. 707 (1981), the Court relied on Sherbert v. Verner. It held that Indiana could not deny unemployment benefits to a Jehovah’s Witness who quit his job when his employer transferred him to the department producing turrets for military tanks. He successfully claimed that his religion forbade participation in producing armaments even though other Jehovah’s Witnesses did not feel their religion prohibited such employment. In reversing the Indiana court, the Supreme Court stated:

The Indiana Court also appears to have given significant weight to the fact that another Jehovah’s Witness had no scruples about working on tank turrets; for that other Witness, at least, such work was “scripturally” acceptable. Intrafaith differences of that kind are not uncommon among followers of a particular creed, and the judicial process is singularly ill equipped to resolve such differences in relation to the Religion Clauses. One can, of course, imagine an asserted claim so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause; but that is not the case here, and the guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect . . . . Courts are not arbiters of scriptural interpretation. The narrow function of a reviewing court in this context is to determine whether there was an appropriate finding that petitioner terminated his work because of an honest conviction that such work was forbidden by his religion.

More recently in Frazee v. Illinois Employment Sec., 109 S. Ct. 1514 (1989), the Supreme Court reiterated this point:
Senator Kennedy also addressed the more difficult issue, whether Congress can protect a medical institution itself. In searching for precedent, Senator Kennedy sought cases in which courts granted institutions other first amendment protection. He noted that the "Pentagon papers case," for example, extended the freedom of speech protection to individual members of the press and to the Washington Post and New York Times. Moreover, he commented that the Court would most likely honor Congress' judgment if it found it "necessary and proper" to grant institutions this protection to more fully protect the first amendment rights of individual medical personnel.\(^{179}\)

In the end, the Church Amendment protected both individuals and institutions from being compelled to act against moral or religious convictions. This legislation is limited, however, because it is tied to particular federal funding or programs and not all medical facilities and personnel. The \textit{Gray} opinion highlighted this limitation. The Rhode Island Medical Center and Romeo, the Director of the Department of Mental Health, Retardation and Hospitals, argued that the court should apply this provision to protect them in \textit{Gray}. The court answered in a footnote that the legislation did not apply because Marcia was not receiving treatment through a "health service program."\(^{180}\)

\begin{quote}
Our judgment in those cases (\textit{Sherbert} and \textit{Thomas}, as well as \textit{Hobbie v. Unemployment Appeals Comm'n}, 480 U.S. 136 (1987)) rested on the fact that each of the claimants had a sincere belief that religion required him or her to refrain from the work in question. Never did we suggest that unless a claimant belongs to a sect that forbids what his job requires, his belief, however sincere, must be deemed a purely personal preference rather than a religious belief.
\end{quote}


\(^{180}\) See supra note 161. Defendants argued that 42 U.S.C. § 300a-7(d) was the applicable section protecting them from a court order to go against their consciences and institutional mission. It reads:

\begin{quote}
No individual shall be required to perform or assist in the performance of any part of a health service program or research activity funded in whole or in part under a program administered by the Secretary of Health and Human Services if his performance or assistance in the performance of such part of such program or activity would be contrary to his religious beliefs or moral convictions.
\end{quote}

697 F. Supp. at 590 n.6 (citing 42 U.S.C. § 300a-7(d)(1982)).

There is, however, nothing in this statutory language or the legislative history to preclude a court from using this provision in a withdrawal of treatment situation. The 1974 amendment adding provision (d) did not specifically refer to abortions and sterilization. During Senate debate on this new conscience provision senators referred to protecting the medical profession as "increasing technology . . . raises grave ethical and moral issues—issues affecting the future of all mankind." 120 CONG. REC. 21,539 (1974) (statement of Sen. Mondale). The 1974 amendment to this statute addressed biomedical research and advances. The language of the statute does not limit its application. If this provision were intended to apply only in abortion and sterilization cases one would think the provision's language would mirror that of the earlier provisions in 42 U.S.C. § 300a-7. See supra note 161. Moreover, one would think that the \textit{Gray} court would have dismissed the assertions that the state and federal conscience clauses applied with one retort, namely, that both statutes only applied to abortions and sterilizations. Instead, the court addressed each separately. It found the state clause inapplicable because it clearly was limited to abortions and sterilizations. The court did not apply the federal clause because Marcia Gray was not receiving care under a health service program. 697 F. Supp. at 590 & n.6.
Although there are some state conscience clauses, not all include procedures to remove hydration and nutrition.\textsuperscript{181} Moreover, comments made on the Senate floor in the Church Amendment debate emphasize how important such a conscience clause can be. First amendment rights, such as the freedom to exercise one's religion, are at stake here.\textsuperscript{182}

The \textit{Gray} court hinted that a conscience clause worded similarly to the current federal conscience clause, arguably, could have protected the defendants.\textsuperscript{183} The court might have applied this specific legislation if the Medical Center were receiving the stipulated federal funds. The only reason the court articulated for not applying this legislation to \textit{Gray} was that Marcia was not receiving the applicable service. It did not say it would only apply this language to abortion or sterilization cases.\textsuperscript{184}

Some medical professionals opine that health care providers' moral and ethical opinions deserve consideration but should remain secondary to a patient's or his family's right to refuse life-sustaining treatment.\textsuperscript{185} Others believe their rights cannot be so easily overlooked and are calling for legislation in the aftermath of \textit{Gray}. The Center for the Rights of the Terminally Ill (CRTI) is one group calling for legislation. It adopted a resolution that it hopes will prompt legislation.\textsuperscript{186}

This Note proposes draft legislation based on the CRTI's resolution and the current federal abortion conscience clause cited above.\textsuperscript{187} With the caveat that congressional staff would have to change the language to

\begin{footnotes}
\item[181] See supra note 49. \textit{See also Davis, Defining the Employment Rights of Medical Personnel within the Parameters of Personal Conscience,} 1986 DET. C.L. REV. 847, 859-66 (1986). This article also discusses various alternatives available to an employee if an employer discriminates against him for his beliefs.
\item[182] \textit{See supra} notes 148-154, 167-178 and accompanying text.
\item[183] \textit{See supra} note 104 & 180.
\item[184] \textit{Id. See supra} note 180.
\item[185] Grimstad, \textit{Protecting the Rights of Conscience of Health Care Personnel,} ALL ABOUT ISSUES, Jan. 1990, at 14-15. The American Academy of Neurology issued a position paper in April of 1988 to this effect. \textit{Id. at} 15. Grimstad, on the other hand, is calling for legislation to protect health care personnel, especially since the \textit{Gray} decision.
\item[186] \textit{Id.} In January 1989, the Center for the Rights of the Terminally Ill (CRTI) adopted "A Resolution to Protect the Rights of Conscience of Health Care Personnel". Several hundred individuals and institutions have signed it. \textit{Id. It reads:}

\begin{quote}
Whereas, the rights of health care personnel are to be respected; 
Therefore, no professional health care provider, nor any employee or member of the staff of any health care facility, nor any home health caregiver shall be required to perform or participate in the performance of any act of omission or commission intended to hasten the death of a patient, if such health care provider, employee, staff member or caregiver objects to such an act on personal, ethical, moral or religious grounds; 
Therefore, any person making such a claim of conscience, or who states an intention to make such a claim of conscience, shall not be denied employment, disciplined or discriminated against in any manner on account of his or her refusal to perform or participate in any act of omission or commission for the purpose of causing or hastening the death of a patient; 
Further, no person shall, as a condition of training, employment, pay, promotion or privileges, be required to agree to perform or participate in the performance of any act of omission or commission for the purpose of causing or hastening the death of a patient.
\end{quote}

\textbf{3 The CENTER FOR THE RIGHTS OF THE TERMINALLY ILL (CRTI) REPORT, No. 2 (Mar/Apr 1989).}
\item[187] This author assisted Charles Rice, Professor of Law at the University of Notre Dame, in drafting some language for a federal conscience clause and acknowledges his generosity and guidance. If this language were to be enacted, statutory definitions might need to be included. It is interesting to note that there seems to be no universal or general definition for "hospital" or "medical facility" or
clarify definitions and make adjustments to add it to other legislation, the proposed language reads:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That:

(a) No court, nor public official, nor other public authority shall be authorized to require:

(A) any individual to perform or assist in the performance of any act of commission or omission which may cause or hasten the death of a patient if his or her performance or assistance would be contrary to his or her religious beliefs or moral convictions; or

(B) any health care facility to:

(1) make its facilities available for the performance of any act of commission or omission which may cause or hasten the death of a patient if such an act is prohibited by the entity on the basis of religious beliefs or moral convictions, or

(2) provide any personnel for the performance or assistance in the performance of an act of commission or omission which may cause or hasten the death of a patient if the act or assistance would be contrary to the religious beliefs or moral convictions of such personnel.

(b) Discrimination prohibition

No entity may:

(A) discriminate in the employment, promotion, or termination of employment of any physician or other health care personnel, or

(B) discriminate in the extension of staff or other privileges to any physician or other health care personnel, because he or she refused to perform or assist in the performance of a lawful act of commission or omission which may cause or hasten the death of a patient on the grounds that his or her performance or assistance would be contrary to his or her religious beliefs or moral convictions.

(c) Individual rights respecting certain requirements contrary to religious beliefs or moral convictions.

No individual shall be required by any person to perform or assist in the performance of any act of commission or omission which may cause or hasten the death of a patient if his or her performance or assistance would be contrary to his or her religious beliefs or moral convictions.

There are at least two onerous problems with drafting legislation aimed at protecting all medical personnel and at least private facilities.

"medical personnel". Each and every statute can and usually does have its own definition, making a federal, government conscience clause difficult to enact.

Because of this problem, the language would need to be attached to appropriations or reauthorization legislation. The first problem with that is that the legislation would only apply to personnel and institutions falling under the particular program or funding apparatus, resulting in disparate treatment. Why should different medical personnel be treated differently with regard to their own constitutionally protected free exercise rights depending on whether the care they give is somehow tied to federal funds? The second and related problem would be that the protection would vary since piecemeal legislation is not likely to be uniform by the time it passes Congress.

Whether this language would protect state-run facilities depends partly on the Supreme Court's decision in *Cruzan*. If it finds a constitutionally protected right to authorize withdrawing nutrition, it may be that only private institutions would be protected by the provision regarding institutions. However, in protecting these institutions, the aim is really to protect the individual. Protecting the institutions where these individuals work is a way to fortify the individuals' protection.
First, there are no uniform definitions for terms like "hospital" or "medical facility" that would help in drafting one conscience clause to cover all private facilities and individual health care personnel. It appears then that only piecemeal legislation can be enacted.\(^8\) That presents the second problem: some personnel go unprotected. This is inadequate since this protection has constitutional underpinnings. Forcing someone to remove a feeding tube could interfere with their exercise of religion. Even if a person’s objection is based on moral instead of religious convictions, the Church Amendment debate illustrates how important it is to protect moral convictions.\(^8\)

IV. Conclusion: Legislators Must Act to Protect the Rights of Medical Personnel

In *Gray*, a federal court for the first time ordered a state-run hospital to promptly transfer an incompetent patient in a persistent vegetative state or remove her nutrition and hydration. Medical staff and the hospital’s policies and mission opposed removing the tube. In the end, they were able to transfer the patient, escaping the decision whether to disobey a court order or their moral convictions.

Regardless of whether the Supreme Court finds a patient’s constitutional or common law right to authorize terminating nutrition and hydration, a court should have no authority to compel a person to either disobey a court order to withdraw a feeding tube or act in direct conflict with religious or moral convictions against these procedures. Such an order violates a person’s individual rights, most notably one’s freedom of religion.

During Senate floor debate on the abortion conscience clause, senators agreed that medical personnel needed legislative protection from courts and other public authority ordering them to perform abortions. Senator Kennedy stated that the Constitution empowered Congress to “exempt individuals from any requirement that they perform medical procedures that are objectionable to their religious convictions.”\(^1\) He then cited Supreme Court cases supporting his argument that “in many cases, the Constitution itself is sufficient to grant an exemption to protect persons from official acts that infringe on their full exercise.”\(^1\) The Senate debate also emphasized the importance of protecting convictions based on moral, not necessarily religious principles. This Note contends that medical personnel who might disobey such a court order for religious reasons could defend their actions by using the first amendment exercise clause.

\(^{188}\) Telephone interviews with William Howard, United States Civil Rights Commission, Washington, D.C. (June and July, 1989); Joseph Pidgeoni, United States Department of Health and Human Services, Washington, D.C. (June, 1989); and David Shaneyfelt, United States Department of Justice, Washington, D.C. (June and July, 1989). The author acknowledges their assistance regarding legislation drafting and notes that the views herein are of this author.

\(^{189}\) See supra notes 155-180 and accompanying text.


\(^{191}\) Id.
This Note likens the situation at hand with that left by Roe and Bolton in 1973. The Supreme Court failed to fully address the moral and religious dilemma for health care providers opposing abortion or sterilization; Congress acted to protect them. While a conscience clause is in place for medical personnel regarding the abortion and sterilization issues, further action is necessary to afford similar protection in the euthanasia area. If 42 U.S.C. 300 a-7(d) could be applied to euthanasia cases (and it may be after the Gray court's footnote), the appropriate course of action might be to enact that same language onto every applicable legislation possible to expand its coverage to more facilities and individual health care providers. If not, Congress must act as it did in 1973 and coordinate efforts to “fortify freedom of religion as it relates to the implementation of any and all Federal programs affecting medicine and medical care.”

States must follow suit. State law also determines who is acting under color of law. The federal conscience clause would not protect a facility or its employees, if the facility were not receiving the stipulated federal funds. Medical staff should never be considered, in a Gray situation, as capable of violating a person's civil rights while only trying to exercise their own constitutionally-based rights.

Irene Prior Loftus

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