UIC Law Review

Volume 23 | Issue 4 Article 2

Summer 1990

Life and Death Decisions: A Reply to Judge Peccarelli, 23 J. Marshall L. Rev. 569 (1990)

Irwin R. Kramer

LIFE AND DEATH DECISIONS: A REPLY TO JUDGE PECCARELLI

IRWIN R. KRAMER*

I. INTRODUCTION

Jane Doe is not dying . . . at least, not anytime soon. With the aid of a respirator, a feeding tube and an interwoven network of other life-support systems, her doctors believe that she could linger for many years. But, while these medical experts are confident that Jane has many years of "life" ahead of her, they express grave reservations about the quality of this life. According to their diagnosis, Jane is in a "persistent vegetative state" — a permanent coma from which she has virtually no chance of ever regaining consciousness or normal mental functioning. In all likelihood, Jane will live out the remainder of her years in a lonely, solemn hospital room where she will exist only by the grace of modern medical technology.

Though the complex network of tubes and machines succeed in maintaining her basic bodily functions, it will never restore the life that Jane enjoyed before the sudden accident which landed her in the hospital bed that has become her home. Gone are the friends, the career, the social gatherings and other amenities that, for many, make life worth living. All that remain are nurses and hospital orderlies taking periodic vital signs and changing I.V. bags, doctors making daily rounds, and a heartbroken family that faces a pathetic bedside vigil for many years to come.

After waiting two years for a miracle that has yet to occur, Jane's family now seeks an end to this seemingly interminable tragedy. Their prayers unanswered, Jane's parents have turned to more fallible, mortal authorities. As legal guardians for their daughter, they have asked the court for an order allowing nature to take its course: an order that, in their words, would allow Jane to "die with dignity." In short, Jane's parents have sought the court's permission to disconnect her life-support systems and feeding tubes—an action that would lead inevitably to Jane's death.

---

* Attorney, Baltimore, Maryland. 1990-91 Harry A. Bigelow Teaching Fellow and Lecturer in Law, The University of Chicago School of Law. B.A., 1984, Towson State University; J.D., 1987, University of Maryland; LL.M., 1989, Columbia University.

Despite hours of heart-rending testimony by close relatives, friends, clergymen and physicians, Jane's parents have only succeeded in winning the court's sympathy. Armed with a copy of Judge Anthony M. Peccarelli's latest law review article,[1] the court explains that Jane's parents have presented it with a "moral dilemma" that it is incapable of resolving. Borrowing Judge Peccarelli's words, the court states that, "[i]n the absence of a legislatively expressed public policy, . . . the courts lack a justiciable issue to consider and to decide the moral and social issues surrounding the withholding and withdrawal of [life-prolonging treatment]."[2]

Like Judge Peccarelli, the court rejects prior judicial decisions in this area and believes that following these misguided approaches would exceed the proper role of the judicial branch: "It is only when the legislative and executive branches of our government act that the judiciary can make a determination, and resolve the ambiguity of the competing interests."[3] Accordingly, while the court sympathizes with Jane and her parents, it holds that they must await action by the state legislature before their personal dilemma can be addressed.

This hypothetical decision, like the real law review article that inspired it, illustrates the reluctance of certain members of the judiciary to confront such difficult life and death decisions. Similar to Judge Peccarelli, these jurists seek to shift the burdens of this intractable dilemma to the legislature which, with the passage of a single statute, can presumably end all confusion and relieve them of their judicial discomfort. Yet, while this discomfort is understandable,[4] it does not warrant the wholesale abdication of judicial respon-

---

1. Peccarelli, *A Moral Dilemma: The Role of Judicial Intervention in Withholding or Withdrawing Nutrition and Hydration*, 23 J. MARSHALL L. REV. 537 (1990).

2. *Id.* While Judge Peccarelli appears to limit his discussion to the withdrawal of nutrition and hydration, "[a]rtificial feeding cannot readily be distinguished from other forms of medical treatment." Cruzan v. Director, Missouri Dep't of Health, 110 S. Ct. 2841, 2857 (1990) (O'Connor, J., concurring). Like Justice O'Connor, Justices Brennan, Marshall and Blackmun believe that "[n]o material distinction can be drawn between . . . artificial nutrition and hydration and any other medical treatment. The artificial delivery of nutrition and hydration is undoubtedly medical treatment." *Id.* at 2866 (Brennan, J., dissenting) (citation omitted). In fact, only one court in the nation has ever attempted to draw such a distinction. *See* Cruzan v. Harmon, 760 S.W.2d 408, 423 (Mo. 1988), *aff'd on other grounds sub nom.* Cruzan v. Director, Missouri Dep't of Health, 110 S. Ct. 2841 (1990); *see also* Delio v. Westchester County Medical Center, 129 A.D.2d 1, 19, 516 N.Y.S.2d 677, 689 (1987) (review of decisions in other jurisdictions did not reveal a single case distinguishing between procedures providing for nutrition and hydration and any other life-sustaining procedure). Since there does not appear to be any rational basis for such a distinction, this Reply will treat the withdrawal of nutrition and hydration like the termination of any other form of life-sustaining treatment.

3. Peccarelli, *supra* note 1, at 567.

4. As one commentator has aptly observed, "Courts are understandably uncom-

sibilities advocated by Judge Peccarelli.

Though Judge Peccarelli suggests otherwise, legislation is not the miracle cure for this judicial ailment, for this is an area in which there are no perfect answers, no perfect decisions and no perfect decisionmakers. "The question of whether a man should live or die is ultimately not susceptible to a 'right' or 'wrong' answer, but an answer must nonetheless be given."[5] Although judges are not perfect, they may be the best society has to answer this difficult question. As this Reply demonstrates, judges have for years done an outstanding job of decisionmaking in this difficult area[6] and have made these decisions through a process that is far superior to that used by politicians sitting in the legislature.[7] Thus, contrary to Judge Peccarelli's conclusions, this author concludes that judges can do more good for society and for incapacitated patients by confronting difficult life and death decisions than they can by shifting their responsibilities to another branch of government.[8]

II. The Quality of Judicial Decisionmaking in Right to Die Cases

Contrary to Judge Peccarelli's claims, his brethren have done an exemplary job of decisionmaking in this troublesome area. In fact, were it not for members of the judiciary, there would not be a "right to die" at all. As early as 1891, the United States Supreme Court laid the foundation for such a right when it observed that "no right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."[9] In 1914, Justice Cardozo elaborated on this right in an early medical malpractice case by reaffirming an individual's right to refuse surgery.[10] According to Justice Cardozo, "every human being of adult years and sound mind has a right to determine what shall be done with his own body, and a surgeon who performs an operation without his pa-

---

fortable with this process; they prefer, whenever possible, to avoid responsibility for such decisions." Ellman, Cruzan v. Harmon *and the Dangerous Claim that Others Can Exercise An Incapacitated Patient's Right to Die*, 29 Jurimetrics J. 389, 395 (1989) (footnote omitted).

5. Kindregan, *The Court as Forum for Life and Death Decisions: Reflections on Procedures for Substituted Consent*, 11 Suffolk U.L. Rev. 919, 920 (1977).

6. *See infra* notes 9-35 and accompanying text.

7. *See infra* notes 36-62 and accompanying text.

8. *See infra* notes 63-66 and accompanying text.

9. Union Pac. Ry. v. Botsford, 141 U.S. 250, 251 (1891).

10. Schloendorff v. Society of N.Y. Hospital, 211 N.Y. 125, 129-30, 105 N.E. 92, 93 (1914), *rev'd on other grounds*, Bing v. Thunig, 2 N.Y.2d 656, 143 N.E.2d 3, 163 N.Y.S.2d 3 (1957).

tient's consent commits an assault for which he is liable in damages."[11]

As medical technology grew, courts responded by expanding the common law to provide needed protection from the added intrusions accompanying newer methods of treatment.[12] With the invention of complex life-support systems capable of maintaining an individual's bodily functions for prolonged and indefinite periods of time, the right to refuse treatment became synonymous with the "right to die."[13]

Ultimately, the right to die gained such overwhelming support that many courts came to regard it as an aspect of the constitutionally protected right of privacy.[14] Although the United States Supreme Court has rejected this notion,[15] the Court recently "as-

---

11. *Id.*

12. *E.g., In re* Conroy, 98 N.J. 321, 486 A.2d 1209 (1985) (extending common law right of self-determination and informed consent to enable patient to refuse treatment).

13. *See* Cruzan v. Director, Missouri Dep't of Health, 110 S. Ct. 2841, 2851 (1990).

14. The concept of a constitutional right of privacy was first introduced by the Supreme Court in Griswold v. Connecticut, 381 U.S. 479 (1965). In finding a constitutional right to use contraceptives in the course of marital relations, the *Griswold* Court opened the door to broader constitutional protection for individual privacy. In particular, the Court explained that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy." *Id.* at 484 (citation omitted). Since *Griswold*, the Court has found many intimate activities, most notably the decision to abort a human fetus, to be protected within these constitutional "zones of privacy." *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973) (abortion); Eisenstadt v. Baird, 405 U.S. 438 (1972) (contraception in general); Katz v. United States, 389 U.S. 347 (1967) (communication); Loving v. Virginia, 388 U.S. 1 (1967) (marriage).

Before the Supreme Court's recent pronouncements in Cruzan v. Director, Missouri Dep't of Health, 110 S. Ct. 2841 (1990), several prominent courts found these zones to be "broad enough to encompass a patient's decision to decline medical treatment under certain circumstances, in much the same way as it is broad enough to encompass a woman's decision to terminate pregnancy under certain conditions." *In re* Quinlan, 70 N.J. 10, 40, 355 A.2d 647, 663, *cert. denied*, 429 U.S. 922 (1976); *accord* Gray v. Romeo, 697 F. Supp. 580, 585 (D.R.I. 1988); Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 370 N.E.2d 417 (1977). *But cf. In re* Conroy, 98 N.J. 321, 486 A.2d 1209 (1985) (resting decision entirely on common law grounds without addressing constitutional arguments). This extension of constitutional privacy rights also received scholarly approval. *See, e.g.*, Comment, *The Right to Die—A Current Look*, 30 LOY. L. REV. 139, 147 (1984) (footnote omitted) ("Extension to include a limited right to die does not appear to be unwarranted.").

15. Just last Term, the Court emphasized that "[a]lthough many state courts have held that a right to refuse treatment is encompassed by a generalized constitutional right of privacy, we have never so held." Cruzan v. Director, Missouri Dep't of Health, 110 S. Ct. 2841, 2851 n.7 (1990) (citing Bowers v. Hardwick, 478 U.S. 186, 194-95 (1986)). Without elaborating, the Court apparently adopted the constitutional analysis provided by the Missouri Supreme Court in Cruzan v. Harmon, 760 S.W.2d 408, 418 (Mo. 1988) (*en banc*), *aff'd sub nom.* Cruzan v. Director, Missouri Dep't of Health, 110 S. Ct. 2841 (1990). There, the Missouri court refused to stretch the penumbral zones of privacy first discussed in Griswold v. Connecticut, 381 U.S. 479 (1965), observing that the Supreme Court has strictly limited the constitutional right

sume[d] that the United States Constitution would grant a competent person a constitutionally protected [due process] right to refuse lifesaving hydration and nutrition."[16] In *Cruzan v. Director, Missouri Department of Health*,[17] the first Supreme Court case to address the "right to die," eight justices embraced "[t]he principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment."[18] Despite this overwhelming support, the five-justice majority refused to give incompetent patients the same protection and left states free to provide whatever protection they deem appropriate.[19]

Fortunately for these patients, most state courts have recognized a common law right to refuse or to discontinue artificial life-support.[20] Considering the need for such protection, many commentators have praised the application of longstanding common law principles to this new technology as an illustration of our judicial system at its best. According to Professor Charles Baron,

> [An] enormously important benefit [of our judicial system] is the opportunity which court decision making provides for the gradual development of a body of common law principles, based in societal values, that can be used for deciding fundamental questions with which a "new technology" is now challenging our society. The ability of Anglo-American court systems to develop principles for what appear to be radically new problems on the basis of established principles reflecting

---

of privacy to matters of marriage and procreation. *Cruzan*, 760 S.W.2d at 418 (citing Bowers, 478 U.S. 186 (1986) (constitutional privacy right does not extend to homosexual conduct)).

16. Cruzan v. Director, Missouri Dep't of Health, 110 S. Ct. 2841, 2851 (1990).

17. *Id.*

18. *Id.* In fact, in this five to four decision, which produced no less than five separate opinions, only Justice Scalia rejected this general principle. *See id.* at 2859 (Scalia, J., concurring).

19. *Id.* at 2852. The Court distinguished between competent and incompetent patients by observing that "an incompetent person is not able to make an informed and voluntary choice to exercise a hypothetical right to refuse treatment or any other right." *Id.* By declining to provide constitutional protection for incompetent patients, the Court refused to invalidate procedural restrictions on the withdrawal of life-prolonging treatment. Thus, the Court "conclude[d] that a State may apply a clear and convincing evidence standard in proceedings where a guardian seeks to discontinue nutrition and hydration of a person diagnosed to be in a persistent vegetative state." *Id.* at 2854. In *Cruzan*, this heightened evidentiary standard, imposed by the Missouri Supreme Court, prevented the parents of a permanently comatose accident victim from obtaining a court order to withdraw artificial nutrition and hydration for their daughter despite strong evidence that she would not want to live under such conditions. *Id.* at 2874 n.19 (Brennan, J., dissenting) ("She said 'several times' that 'she wouldn't want to live that way . . . .' ").

20. Cruzan v. Harmon, 760 S.W.2d 408, 413 (Mo. 1988) (en banc), *aff'd sub nom.* Cruzan v. Director, Missouri Dep't of Health, 110 S. Ct. 2841 (1990) ("Nearly unanimously, those courts have found a way to allow persons wishing to die . . . to meet the end sought."); *see, e.g.*, Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 370 N.E.2d 417 (1977); *In re* Conroy, 98 N.J. 321, 486 A.2d 1209 (1985); *In re* Quinlan, 70 N.J. 10, 355 A.2d 647, *cert. denied*, 429 U.S. 922 (1976).

court-developed societal responses to problems in analogous areas is an article of faith of Anglo-American jurisprudence.[21]

Not only do these principles represent an "article of faith" in our judicial system, they are often the only hope for incapacitated patients wishing to refuse or to discontinue treatment. Over the years, judicial decisions have developed a method of analysis designed to preserve the rights of those patients who lack the capacity to exercise them personally.[22] This method, known as "substituted judgment," enables courts to effectuate the desires of incapacitated patients in three different ways.[23] First, where the patient clearly expressed her desires when competent, courts will generally honor these wishes in the event of incompetency.[24] Second, if the patient had not explicitly indicated her wishes regarding the continuation or withdrawal of life-support, but close friends or relatives can testify to the patient's overall philosophy and likely decision, courts may render a decision in accordance with this evidence.[25] Third, where there is no substantial evidence of the patient's preferences, courts examine the patient's "best interests" in rendering a decision.[26]

Through these approaches, courts have helped to guarantee that the patient's right to refuse or to discontinue life-prolonging treat-

---

21. Baron, *Medical Paternalism and the Rule of Law: A Reply to Dr. Relman*, 4 AM. J.L. & MED. 337, 353 (1979) (footnote omitted); *see* Note, *Decisionmaking for the Incompetent Terminally Ill Patient: A Compromise in a Solution Eliminates a Compromise of Patients' Rights*, 57 IND. L.J. 325, 340 (1982).

22. Note, *supra* note 21, at 347.

23. Oberman, *Withdrawal of Life Support: Individual Autonomy Against Alleged State Interests in Preserving Life*, 20 LOY. U. CHI. L.J. 797, 811 (1989) (footnote omitted); *see* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1368-69 (2d ed. 1988).

24. *See In re* Conroy, 98 N.J. 321, 360, 486 A.2d 1209, 1229 (1985); *In re* Storar, 52 N.Y.2d 363; 376-80, 420 N.E.2d 64, 70-72, 438 N.Y.S.2d 266, 272-74 (1981).

25. *See In re* Colyer, 99 Wash. 2d 114, 131-32, 660 P.2d 738, 748 (1983).

26. *In re* Conroy, 98 N.J. 321; 363-68, 486 A.2d 1209, 1231-33 (1985); *see also In re* Barry, 445 So. 2d 365, 371 (Fla. Dist. Ct. App. 1984); *In re* Hamlin, 102 Wash. 2d 810, 820, 689 P.2d 1372, 1378 (1984). "The advantage of best interests analysis is that it does not require any evidence of the patient's desires, given a certain set of circumstances . . . . Factors to consider in a best interests analysis are the prognosis, the burdens upon the patient and the quality and duration of the sustained life." Note, *Withdrawal of Nutrition and Hydration from Incompetent Patients in Missouri*, 54 Mo. L. REV. 713, 725 (1989) (footnotes omitted) (citing Rasmussen v. Fleming, 154 Ariz. 207, 221-22, 741 P.2d 674, 688-89 (1987)).

While the second and third approaches discussed above may properly be called "substituted judgment," some commentators only use this term to describe the second approach and take pains to distinguish it from a "best interests" analysis. According to these commentators, "Substituted judgment decisionmaking has developed as an alternative proxy decisionmaking standard to the bests [*sic*] interests approach." *Student Forum: The Role of the Judiciary and the Legislature in Decisionmaking on Behalf of Incompetents*, 1982 WIS. L. REV. 1167, 1171 n.24. In contrast to the "best interests" approach, this "standard takes into account factors aside from the ward's best interests, such as the interests of third parties especially close relations." *Id.*

ment "not be discarded solely on the basis that her condition prevents her conscious exercise of the choice."[27] Stated differently, courts have applied the doctrine of substituted judgment to ensure that the disease which has destroyed the patient's decisionmaking capacity not also be permitted to destroy her rights.[28] By adopting a method of analysis which focuses on the interests, desires and preferences of the individual, courts have provided incompetent patients with the same rights as those held by competent patients.[29] "The need to preserve a person's rights has thus properly been viewed by the courts to be of paramount concern in the step-by-step decision of when to terminate treatment."[30]

Without proposing any substitute for substituted judgment, Judge Peccarelli complains that this "legal fiction" may not accurately assess the wishes of incompetent patients and he repeatedly cites it as an example of unwarranted judicial activism.[31] Yet, while substituted judgment is indeed a "legal fiction," it could hardly be described as a fairy tale. Little imagination is needed to conclude that patients would make decisions consistent with previously expressed desires, their own best interests, or the conduct and philosophy exhibited throughout their lifetimes. Furthermore, courts employing this standard prudently solicit the input of close friends and family members capable of providing concrete guidance on the patient's probable decision.[32] Thus, far from being a ludicrous legal fic-

---

27. *In re* Quinlan, 70 N.J. 10, 41, 355 A.2d 647, 664, *cert. denied*, 429 U.S. 922 (1976).

28. *See* Oberman, *supra* note 23, at 798 (footnote omitted) ("an individual should not lose the privacy or autonomy rights of a competent person upon becoming incompetent."); Note, *supra* note 21, at 334 (footnote omitted) (incompetency alone should not deprive an individual of rights).

29. "The trend in the law has been to give incompetent persons the same rights as other individuals." Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 747, 370 N.E.2d 417, 428 (1977). Unfortunately, the first Supreme Court case to address the right to die departed from this trend. In Cruzan v. Director, Missouri Dep't of Health, 110 S. Ct. 2841, 2856 n.12 (1990), the Court refused to provide incompetent patients with the same constitutional rights as those given to competent patients. Apparently, the Court believed it futile to provide the former with constitutional rights that they cannot exercise personally. *See id.* at 2852. However, because *Cruzan* only decided the extent of *constitutional* protection, it does not overrule a substituted judgment analysis that treats both classes of patients equally under *state* law.

30. Note, *supra* note 21, at 335.

31. Peccarelli, *supra* note 1, at 538, 547-48, 566.

32. Indeed, many scholars believe that family input is not only helpful, but indispensable in deciding whether to terminate life support. In Professor Ira Ellman's opinion,

> the family should make medical care decisions for an incapacitated patient because they are the decisionmakers most likely to render a decision faithful to the patient's probable desires . . . . As a matter of policy, letting the family decide in these cases usually makes sense; for one thing, we probably have few better alternatives.

Ellman, *supra* note 4, at 399 (footnote omitted). *See* Rhoden, *Litigating Life and*

tion, substituted judgment represents a deliberative, reasoned method of determining patients' wishes and of honoring these desires.

Although "there will always be some residual doubt that the decision made in fact expresses what the patient would have wanted done,"[33] there is no doubt that courts must develop objective, rational criteria for making such decisions. According to Professor Lawrence Tribe,

> Given that a decision must be made, and that continuing treatment for a patient who would have wanted treatment stopped may be as unfortunate as discontinuing treatment for a patient who would have wanted treatment continued, courts may have no choice but to formulate "objective" criteria for these treatment decisions.[34]

While this type of judicial decisionmaking is essential in preserving patients' rights, Judge Peccarelli's recommendations would subvert and destroy these rights. By vigorously opposing judicial intervention, and by refusing to decide these cases without statutory guidelines, Judge Peccarelli would condemn all incapacitated patients to a lifetime of feeding tubes and other life-support systems whether they would want it or not. In this way, Judge Peccarelli trades whatever residual doubt exists in the substituted judgment standard for the virtual certainty of error in all cases where incapacitated patients would exercise their right to die.[35] Thus, although substituted judgment may not be a perfect decisionmaking tool, it is far superior to the type of judicial inactivity advocated by Judge Peccarelli.

III. Judicial vs. Legislative Intervention

Ironically, despite his open distrust for judicial decisionmaking in this area, Judge Peccarelli would shift decisionmaking power to a body of politicians whose concerns lie more with political constituents than with incapacitated patients. Rather than improve the quality of such decisionmaking, removing life and death decisions from the judicial branch would deprive patients of vital protections that only courts can provide.

Though Judge Peccarelli suggests otherwise, the judicial process, with a substituted judgment standard designed to preserve pa-

---

Death, 102 Harv. L. Rev. 375, 438-45 (1988).

33. Tribe, *supra* note 23, at 1369 (footnote omitted).

34. *Id.* (footnotes omitted).

35. "An erroneous decision not to terminate life-support . . . robs a patient of the very qualities protected by the right to avoid unwanted medical treatment. His own degraded existence is perpetuated; his family's suffering is protracted; the memory he leaves behind becomes more and more distorted." Cruzan v. Director, Missouri Dep't of Health, 110 S. Ct. 2841, 2873 (1990) (Brennan, J., dissenting).

tients' rights, undoubtedly offers decisionmaking preferable to that which is not shrouded in the procedural protections and safeguards of the adversary system.[36] Unfortunately, Judge Peccarelli overlooks "the importance of guaranteeing to such decisions the special qualities of process which characterize decision making by courts."[37] As one jurist observed, "such questions of life and death . . . require the process of detached but passionate investigation and decision that forms the ideal on which the judicial branch of government was created."[38]

While the adversary system has its critics, the competition that it generates among lawyers is quite healthy where questions of life and death are concerned. After hearing two competing advocates argue vigorously both for and against the continuation of treatment, judges are in the best position to weigh all of the complex legal and factual considerations that must be evaluated in rendering a just decision.[39] Moreover, the battle among competing lawyers in adversarial proceedings helps to "ensure that all viewpoints and alternatives will be aggressively pursued and examined."[40] Indeed,

---

36. As one student commentator has observed, judicial intervention offers several important advantages in making these difficult life and death decisions:

> Judicialization . . . provides a forum for answering the difficult question involved in decisionmaking and offers a method to assert an incompetent patient's rights. The substitute judgment test used by the court is a means for weighing different considerations involved in each factual situation and for upholding a patient's rights in the best possible manner. The judicial system can also provide continuing guidelines over time.

Note, *supra* note 21, at 347.

37. Baron, *supra* note 21, at 337.

38. Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 759, 370 N.E.2d 417, 435 (1977).

39. As Professor Charles Baron has noted, excellent advocates are essential to excellent decisionmaking:

> It is certainly the two contending advocates who are in the best position to make sure that all critical aspects of their case are brought into the public eye. It is they who also have the major responsibility for supplying the judge with all of the favorable legal sources and arguments he can use to write his opinion, on the one hand, or with facing the judge with all of the contradicting legal sources and arguments that he must explain away, on the other. And it is they who are responsible for making sure that all and only relevant evidence comes before the trier of fact . . . . It is they who must in fact carry the burden of fully developing the evidence and arguments in the case, and it is they who are in the best position to make sure that any given judge stays true to the principles of the judicial process . . . .

Baron, *supra* note 21, at 349.

40. *Saikewicz*, 373 Mass. at 757, 370 N.E.2d at 433. A majority of the Supreme Court has expressed concern "that a judicial proceeding to make a determination regarding an incompetent's wishes may very well not be an adversarial one, with the added guarantee of accurate factfinding that the adversary process brings with it." Cruzan v. Director, Missouri Dep't of Health, 110 S. Ct. 2841, 2853 (1990) (footnote omitted). Yet, where proceedings lack a sufficiently adversarial quality, courts may alleviate this concern by appointing guardians ad litem:

> Indeed, any concern that those who come forward will present a one-sided view would be . . . addressed by appointing a guardian ad litem, who could use the

adversarial court proceedings provide an ideal focal point for collective decisionmaking which incorporates the views of family, friends, physicians, clergy and other interested members of society.[41] In this manner, courts may "provide a forum where different groups are able to coordinate their concerns and their input of information."[42]

Not only does the judicial process ensure that all relevant information is considered, it helps to eliminate irrelevant considerations. Through strict rules of evidence, courts exclude irrelevant or prejudicial information that may compromise patients' rights. In accordance with the substituted judgment standard used in most states, courts usually limit the evidence to patients' preferences and interests and "provide the ultimate safeguard against those who might not have the patient's best interests at heart."[43] Thus, courts can protect incapacitated patients from those who would pull the plug in order to spare the expense or inconvenience of treating them.[44]

Occasionally, courts must use this power to protect patients from their own families. Despite their good intentions, family members undergoing the ordeal of watching their loved ones die face a host of pressures that may conflict with patients' interests. Beyond the tremendous financial strain of mounting hospital bills, prolonging the patient's life increases the emotional price that relatives pay. The financial and emotional resources devoted to the patient also deplete their ability to meet other personal and family obligations. These burdens, and the continuous agony of confronting a loved one ravaged by disease, would end with the patient's death. For these reasons, family members may opt to discontinue treatment even if this would conflict with the patient's best interests or desires. Conversely, the emotional ties of family members may make them more reluctant than the incapacitated patient to accept death, and they may request heroic measures even where the patient herself would not. "In short, the family's intimate involvement is at once both a

---

State's powers of discovery to gather and present evidence regarding the patient's wishes. A guardian ad litem's task is to uncover any conflicts of interest and ensure that each party likely to have relevant evidence is consulted and brought forward—for example, other members of the family, friends, clergy, and doctors.

Id. at 2872 (Brennan, J., dissenting) (citation omitted).

41. Despite Judge Peccarelli's assertion that judicial intervention removes this decision from society, the adversary system actually "provide[s] the ideal focal point for society's participation in this most crucial decision." Comment, *The Problem of Prolonged Death: Who Should Decide?*, 27 BAYLOR L. REV. 169, 173 (1975). Through their testimony, individuals from all walks of life may shed light on the ultimate decision and contribute significantly to the court's resolution.

42. Note, *supra* note 21, at 341 (footnote omitted).

43. Comment, *supra* note 41, at 173.

44. *In re* Estate of Longeway, 133 Ill.2d 33, 65, 549 N.E.2d 292, 300 (1989) ("court intervention is necessary to guard against the remote, yet real possibility that greed may taint the judgment of the surrogate decisionmaker.").

powerful reason they are entitled to be heard and a powerful reason they may not be motivated solely by the patient's best interests."[45] Thus, even where families are involved, courts must intervene to exclude these improper motives and to preserve the integrity of the decisionmaking process.

In a very real sense, integrity is a central component of our judicial system and a compelling reason for keeping life and death decisions in the capable hands of judges. Perhaps the most important benefit provided by the judiciary is its "fundamental commitment to a public system of principled decision making."[46] It is not enough for judges merely to render decisions, they must support them with sound legal principles and a thorough analysis of the evidence. If judges fail to properly justify their decisions, they face reversal by appellate courts who may scrutinize every inch of their opinions for accuracy and persuasiveness.[47] More importantly, judges who render faulty decisions must endure the exacting scrutiny of the public at large. In addition to unfavorable press coverage, their written opinions are "always available for study and trenchant criticism in legal treatises, in law reviews, and, perhaps most important, in law school classrooms. Many a judicial reputation has been made or broken in 'case method' classes which employ judicial opinions as grist for their pedagogical mill."[48] Yet, while judges render their decisions with the knowledge that they may be publicly reviewed, members of the judiciary are largely insulated from political forces that may inhibit impartial, principled decisionmaking in controversial areas.[49]

Just the opposite is true of the legislators that Judge Peccarelli would defer to. Rather than exhibit a fundamental commitment to a system of principled decisionmaking, these politicians usually display a fundamental commitment to re-election. Unlike the judicial system, the legislative process does not involve a method of "detached but passionate investigation and decision."[50] Although many groups may testify before legislative committees, the legislature has

45. Ellman, *supra* note 4, at 400; *see* Cruzan v. Director, Missouri Dep't of Health, 110 S. Ct. 2841, 2856 (1990) ("[T]here is no automatic assurance that the view of close family members will necessarily be the same as the patient's would have been had she been confronted with the prospect of her situation while competent."); Comment, *supra* note 41, at 172 (safeguards in addition to family affection needed).

46. Baron, *supra* note 21, at 349.

47. "Backstopping the effort to work principle out of court decisions is a system of appellate courts which reviews the conclusions of law articulated by lower courts, to make sure that principles are developed consistently and in the proper direction." *Id.* at 348.

48. *Id.* at 347.

49. *See* Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1307 (1976) ("His professional tradition insulates him from narrow political pressures.").

50. *See supra* note 38 and accompanying text.

no mechanism for excluding irrelevant or prejudicial factors from consideration. Political deals and other considerations having nothing whatever to do with patients' welfare may shape and control legislative action. Quite often, legislators are more concerned with satisfying special interest groups than with addressing the interests of incapacitated patients.[51] Without any requirement that legislators articulate sound reasons for their actions, there are few procedures for ensuring the integrity of their decisionmaking.

While the legislature may nonetheless provide an effective political check on the errant decisions of judges, legislation designed to eliminate judicial intervention would destroy equally vital safeguards.[52] Though legislation has been proposed to place life and death decisions in the hands of such third parties as physicians and family members,[53] these statutes would leave incapacitated patients at the mercy of those whose interests may conflict with their own.[54] Only a court that has carefully weighed the evidence in the course of a principled, adversarial proceeding can adequately protect these patients from improper considerations which might otherwise affect these crucial decisions. Without any judicial review of these decisions, patients cannot be assured that their treatment, and, in reality, their lives, will only be terminated in accordance with their best interests or desires.[55]

---

51. "Although legislatures may be the repository of the collective will, historically, legislative action has been somewhat ineffective in creating and protecting mentally disabled persons' rights. Traditionally, the mentally incompetent have not displayed the political power necessary to advance their interests." *Student Forum*, *supra* note 26, at 1169.

52. Professor Abram Chayes has observed that the judicial process provides a more effective means of problem solving than does the legislature:

> Unlike an administrative bureaucracy or a legislature, the judiciary *must* respond to the complaints of the aggrieved. It is also rather well situated to perform the task of balancing the importance of competing policy interests in a specific situation. The legislature, perhaps, could balance, but it cannot address specific situations.

Chayes, *supra* note 49, at 1308 (emphasis in original).

53. *See, e.g.*, *Health Care Consent Act*, Ill. S.B. 1887, 86th General Assembly (Apr. 5, 1990); *Decisions to Forego Life-Sustaining Treatment Act*, Ill. S.B. 2213, 86th General Assembly(Apr. 6, 1990). The full text of both of these statutes is provided in Judge Peccarelli's article. *See* Peccarelli, *supra* note 1, at 549 n.52. The Illinois House Judiciary I Committee voted to reject the *Decisions to Forego Life-Sustaining Treatment Act*, Ill. S.B. 2213. *See* Wagner and Pearson, *House Panel Kills A Right-To-Die Bill*, Chicago Tribune, June 7, 1990, at 1, col. 1; Phone Interview with Bette Pree, Computer Analyst, Illinois Legislative Information Service (Oct. 4, 1990).

54. *See supra* notes 44-45 and accompanying text.

55. As Professor Charles Kindregan has stated, third parties cannot conduct the type of searching examination expected of the judiciary:

> A searching examination by an impartial arbiter seems to be required in order to determine whether essential medical treatment should be withheld from an incompetent patient. The lack of such an examination is the fundamental defect of proposals to allow the family, a guardian, physicians, or a medical institution to make the decision to withhold life-supporting treatment for incompe-

Not only would these statutes deprive patients of important judicial safeguards, they would also deprive surrogate decisionmakers of the type of civil and criminal immunity that only courts can provide.[56] While these statutes purport to immunize those who withhold treatment according to their provisions, they offer inadequate protection for those who apply these provisions incorrectly.[57] Even the remote chance of being held liable for a patient's death would undoubtedly deter many persons from interpreting these statutes themselves. To avoid this risk, these laymen will likely turn to the courts for more reliable statutory interpretations and the immunity that comes with them.[58] Thus, no matter whom the decisionmaking baton is passed to, they will probably pass it right back into the steady hands of judges.[59]

Although Judge Peccarelli complains that "[j]udicial intervention results in the overlaying of the moral principles of an individual judge . . . upon the right of individuals to make their own decisions,"[60] he is more than willing to accept the moral views of a body of politicians.[61] Yet, in urging legislators to codify the moral views of

---

tent persons.
Kindregan, *supra* note 5, at 931.

56. "The court is not chosen as the forum because judges are wiser than other men. Rather, the court is the forum because only the judge can provide civil and criminal immunity to the person who withholds treatment." *Id.* at 919-20.

57. For example, the *Decisions to Forego Life-Sustaining Treatment Act*, Ill. S.B. 2213, 86th General Assembly (Apr. 6, 1990) would provide, *inter alia*, that "[n]o person shall be subject to any criminal prosecution for making a decision to forego or not to forego life-sustaining treatment in good faith on behalf of a patient who lacks decisional capacity *in accordance with this Act*." *Id.* at § 8(b) (emphasis added). Similarly, the *Health Care Consent Act*, Ill. S.B. 1887, 86th General Assembly (Apr. 5, 1990), would provide, *inter alia*, that "[n]o physician . . . shall be subject to any criminal prosecution or be deemed to have engaged in unprofessional conduct for carrying out in good faith and *in accordance with this Act* and reasonable medical standards a decision to forego or not to forego life-sustaining treatment." *Id.* at § 8(a) (emphasis added). By conditioning immunity on compliance with these acts, these provisions leave open the possibility of litigation on the propriety of surrogate decisionmakers' or physicians' actions. Hence, while these immunity provisions may create strong defenses, they do not eliminate the danger of personal liability as effectively as a decision approved by the court.

58. To confirm their authority to terminate life-support, these individuals may use the declaratory judgment procedure available in virtually all state and federal courts. *See, e.g.*, FED. R. CIV. P. 57; Federal Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202 (1988).

59. Rather than pass statutes eliminating judicial intervention, legislators can help to improve the quality of decisionmaking by encouraging individuals to make their wishes known. "To assist the courts, all competent persons must be encouraged to make known their wishes regarding life-support and other medical treatment in the event of future incompetency. This would require a far greater legislative effort than that seen in this area to date." Oberman, *supra* note 23, at 817 (footnote omitted). In particular, legislators must approve laws which promote the execution of living wills and which give patients the opportunity to make other written declarations regarding life-support in advance of disability. *Id.*

60. Peccarelli, *supra* note 1, at 547.

61. *Id.* at 561-66.

society, Judge Peccarelli fails to explain adequately how these views pertain to the plight of an incapacitated patient. In truth, legislators should not be permitted to legislate morality any more than judges should. Neither group, nor anyone else in society, has the right to impose its own moral views upon incapacitated patients. To the extent that moral views may be considered at all, the views of the patient alone must be examined. Indeed, the risk that legislators will impose their own views on such patients is a strong argument *against* legislative action and a potent reason for using the principled decisionmaking process of the judiciary to keep the inquiry where it belongs—on the views and interests of patients themselves.[62]

IV. CONCLUSION

While Judge Peccarelli repeatedly denies it, his brethren have made excellent contributions to the quality of life and death decisions. Not only did the judiciary create the right to die by applying established common law principles to the perplexing questions raised by new medical technology, it has answered these questions through a method of analysis designed to preserve patients' rights and to honor their wishes. To further ensure the integrity and accuracy of this process, judges have rendered these decisions in the course of principled, adversarial proceedings which examine all relevant factors and which exclude improper considerations.

Despite the benefits of judicial intervention, Judge Peccarelli would deprive incapacitated patients of these fundamental safeguards. Indeed, by refusing to intervene in advance of legislative action, Judge Peccarelli would leave these patients in a legal state as irreversible as their comas. "While it is understandable that judges are uncomfortable determining if life under certain conditions is actually worse than death, a great injustice is done to the incompetent patient by avoiding the question."[63] Rather than improve the decisionmaking process, shifting this question to the legislature may cast patients' lives into an uncertain political arena in which the moral views of politicians and their constituents take precedence over the interests and desires of patients themselves.

Beyond the harm to patients, judges who refuse to face these problems do a great disservice to society. Having accepted positions

---

62. "[T]he job of deciding such life and death questions is the responsibility of the court system 'and is not to be entrusted to any other group purporting to represent the "morality and conscience of our society," no matter how highly motivated or impressively constituted.' " Baron, *supra* note 21, at 337-38 (quoting Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 732, 370 N.E.2d 417, 438 (1977).

63. Oberman, *supra* note 23, at 818.

that often require them to make the most difficult decisions known to man, Judge Peccarelli and his brethren have assumed an obligation to confront these awesome tasks.[64] Society has always relied on members of the judiciary to make the toughest decisions *in* life and, in this case, *about* life.[65] Shifting this responsibility to the legislature would thus neglect one of the most important societal functions of the judicial branch. Yet, as Judge Peccarelli himself admits, "Frequently the persons or entities who have the responsibility for making the decision abdicate their responsibility."[66] This is precisely what Judge Peccarelli has done in his article.

64. Peccarelli, *supra* note 1, at 567 ("it is the judiciary to whom an appeal is made to resolve issues which others are unwilling or unable to resolve.").

65. *See* Comment, *supra* note 41, at 172 ("Society already looks to the courts as arbitrators of questions of fact, even those with great moral ramifications.").

66. Peccarelli, *supra* note 1, at 567.