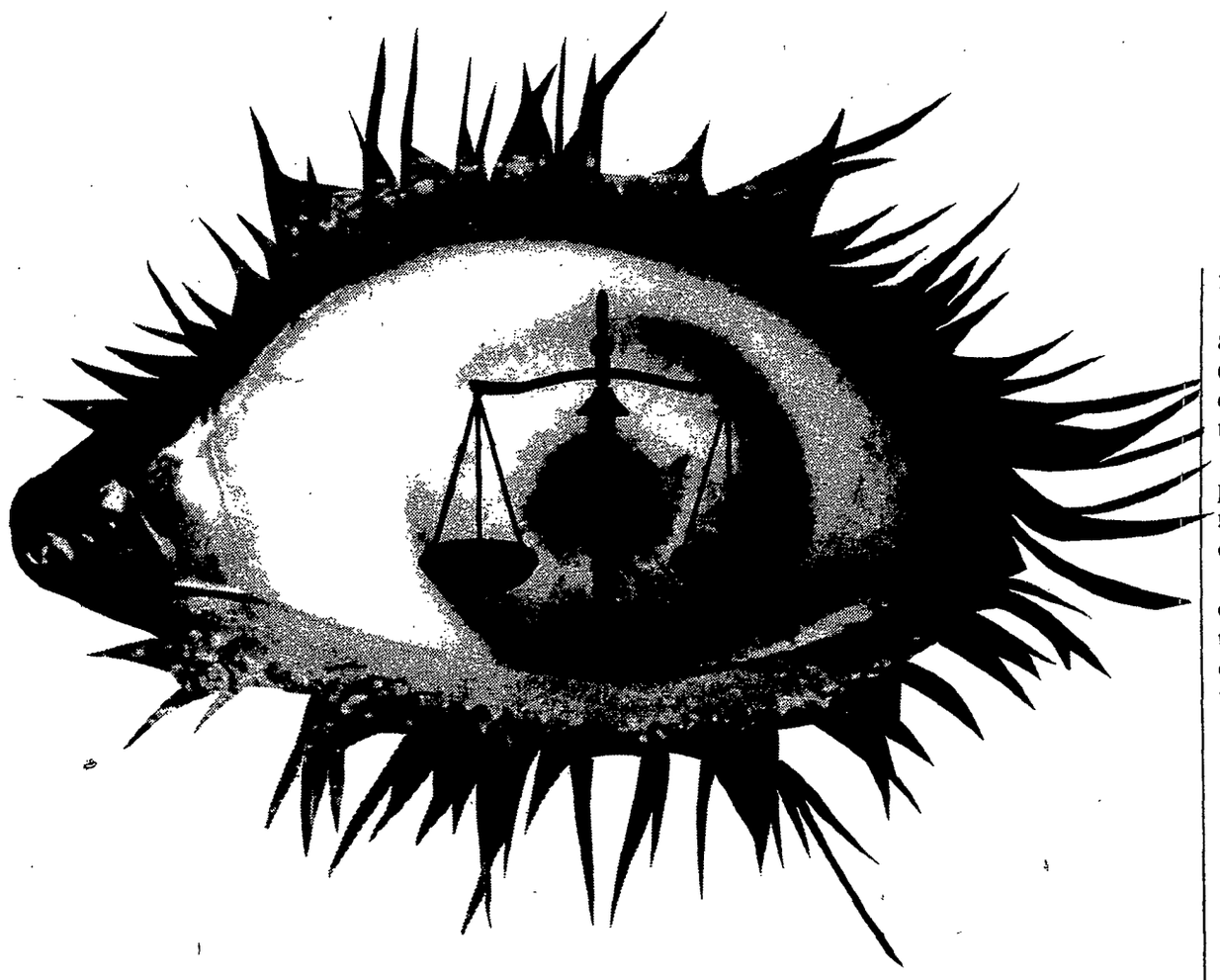
cisions



nents, the seriousness with which were made and the inferences, if drawn from the surrounding cir- mong the facts which should be

recognized certain inherent prob- g the standard, the majority ex- amental dissatisfaction with the ent doctrine, because "it is incon- ndamental commitment to the no- on or court should substitute its at would be an acceptable quality ..."

gue that New York's "clear and ence standard is too difficult to standard is required to protect in- st undue involuntary civil com- ser standard be justified to protect os erroneously inflicted certain

force rigorously the rules govern- airs and the execution and expres- s, dead men's evidentiary preclu-

ke lumbering Cyclops trying to serve the often seeing only out of our single eye. I ople and ourselves better when the two at may be in many instances, to effect n and spirit towards the solutions and ser- ch.

. How anomalous it would be to do to the state's overriding interest y in protecting lives of people, es- capable of protecting, aiding or n present interests.

are dealing in these decisions with ich is different. It is a transforma- there is no return should there be a nge of mind, or change of cir- mistaken exercise of that last right ndard would be oxymoronic.

e criticized high, tough standard, it themselves. New York state was on after the first application of the g by a trial judge directing removal tube.

n 86-year-old Albany, New York l a massive stroke. When first ad- spital, she was cognitive and com- eventually lost her ability to eat and onomy tube was inserted to provide ration.

tion deteriorated, her older sister urt for ... authority to remove the e. The hospital and the patient's n opposed the application. Medical ished that while not comatose, she ersible persistent vegetative state." the medical testimony, the sister the patient were able, "she would y life, a good life, and I want to be this and go home to my Maker."

and other testimony, the court ... ent transferred to a hospital which e tube and, if none could be found, was in would have to remove the

ree could be carried out, the patient d communicative, and was asked nted the tube removed. It was ex- y a nurse that if the feeding tube re- ld probably live a few more years; would die in less than two weeks — most likely, very painfully. According to local newspaper accounts, she at first drew back from the question, eventually responding: "That's a very difficult decision to make." When asked again, she said, "I never really thought of it in quite that way."

The judge recalled his decree, and the medical expert who had given the critically relied upon testimony spoke of the uncertainty of it all. The patient was later transferred to a nursing home, where she still resides.

I know of no court which has directed, at the request of someone other that the affected person, cessation of food and water — the most elemental human needs along with oxygen — for a *conscious, sensate, nonterminally ill* human being.

It may be legally and even morally supportable to propose that cessation of artificially provided food and water is, under some exceptional circumstances, an acceptable non-treatment in cases of vegetative, comatose or neocortically dead, *and* terminally ill and dying persons who had clearly expressed their views in such exceptional circumstances by provable clear and convincing evidence.

We must note that even that great institution, the United States Supreme Court, is not immune from the infallibility of the human condition. It is a human institution, and as its own great Justice Jackson observed: "We are not final because we are infallible, but we are infallible only because we are final."

Tragic historical decisions reflecting fundamental misunderstandings and mistakes about the true nature and scope of the judicial process affecting real people are all too numerous. Recall for example *Plessy v Ferguson*, upholding that black slaves were property, not persons. Such decisions prove that preserving the most cherished rights and values of free individuals requires vigilance almost every waking moment and a willingness to confess and correct error, too. ...

But if we review and approve, then passing incident becomes the doctrine of the Constitution. There it has a generative power of its own, and all that it creates will be in its own image. The instruction here concerning fallibility and ... adherence to precedent provides a very valuable lesson in jurisprudence. ...

But even then, it seems to me, that relief should be framed in the alternative, allowing the family the freedom to carry out the person's wishes and allowing the state and the medical professionals to refrain from becoming active participants in an active ritual of death. ...

... Amid such uncertainty, how should we, the lawyers and judges, maintain our jurisprudential and you, the doctors and psychiatrists, your medical equilibrium?

In my judicial decision-making function, I must remain open to the facts and evidence of the particular case; to a respectful consideration of competing viewpoints in our pluralistic society and government; to fresh and improved understandings of the operative principles; and especially to subtle calibration and interplay of the jural roots of all we have been talking about, that is, the U.S. and various state constitutions; to public-policy choices expressed in broad-based legislative enactments; and to the common-law decisional *stare decisis* faithfulness to precedent...

... It is a daunting task, requiring hard thinking and, yes, even hard praying, since it is the ultimate decision of life or death we are putting to the risk of our feeble and sometimes fumbling human understanding in these cases...

... I have personally espoused a particular philosophy of the importance of every case, no matter how momentous or mundane: Behind each case are individuals — real people, in turmoil, conflict, pain and need — who over small or minor disputes or over the most significant dispute of all — their lives — have turned to or been summoned or even dragged into the courts for respite and resolution — for better or worse. Every one of these persons is entitled to respectful, careful deliberation — what I call the dignity of the case and of the person...

... We should start with openness, tolerance and mutual respect for the other's problems and maintain a daily regimen of ego deflation because of the reality of the fallibility of the human condition and, therefore, of all its human institutions...

... I also propose that we respectively approach these matters, decisions and cases with a set of hierarchical, rebuttable presumptions — alone and often in appropriate combination — remembering we are operating solely within our competence in the secular sphere:

ONE: Respect for the personal self-determination choices of the individual;

TWO: Respect for those of the closest family or equivalent unit or person on behalf of that individual;

THREE: Respect for the contributing views and values of the treating medical professionals and associated care providers;

FOUR: Respect for the state's interest and purpose in representing the individual in the context of society's universal values and commonly held principles.

Finally, may I say that our respective disciplines grope like lumbering Cyclops trying to serve the very same societal members but often seeing only out of our single eye. I maintain we will serve those people and ourselves better when the two Cyclops join eyes, bumpy as that may be in many instances, to effect synergistically a cooperative vision and spirit towards the solutions and service we owe every person we touch. Together we make energy and light and avoid the debris.

My hope and goal is that my Cyclopean legal-judicial eye and your Cyclopian psychiatric-medical eye have acquired some peripheral perspective ... For better peripheral vision, even in one eye, is progress. ...

Judge sees 'constructive development' in New York's health-care proxy statute

ALBANY — "Insight" author Judge Joseph W. Bellacosa sees New York State's recently passed health-care proxy law as a positive sign in the ongoing debate regarding so-called "right-to-die" cases.

"I think that (the health-care proxy law) is a very constructive development in the legislative process," the state appeals court justice told the *Catholic Courier* in a telephone interview from his office.

The law allows a citizen to appoint someone as a proxy who will be responsible for the citizen's health care decisions in the event that he or she becomes incompetent to make such decisions.

The law stipulates, however, that to designate a proxy a citizen must stipulate — in writing — specifically what the proxy is allowed and not allowed to do on the citizen's behalf. In addition, the law states that hospitals morally and/or religiously opposed to a proxy's decision are free to ignore it.

Bellacosa, appointed to his seat four years ago by Gov. Mario Cuomo, commented that the new law is an example of the kind of role legislatures can play in the debate over withdrawal of medical treatment from patients.

"I think it's very appropriate that (the legislature) provide the means and the guidance to health providers," he said, adding that such legislation "seems to me the proper way to go about it."

As he emphasized in the lecture from which this week's *Insight* article was taken, however, he finds it improper to use the term "right to die" in the ongoing debate over withdrawing of medical treatment.

"I think that kind of labeling avoids the hard, individualized, concentrated ... approach to these matters," he said.

—Rob Cullivan