

down with Nancy's care-givers. Number one was, anyone who did not feel comfortable or who opposed our decision, we didn't want them to have to be a party to it. We would have had a big question and answer session and let them air all their feelings and we'd try our best to help them understand. I think this is a real concern you've got to watch for, particularly in long-term cases like Nancy's.

Mrs. Cruzan: Some of them claim they've seen things we've never seen. I'm not saying they didn't, I'm just saying we never did. For instance, Nancy crying or smiling—we just never did see it, and I would have thought that if she were to show any emotion, she would have done it at least sometime when we were around. But we never did.

Mr. Cruzan: We're fighting the state of Missouri to end Nancy's life because we honest to God feel like that's what Nancy would tell us to do if she could come back for a few minutes. She would say, "You know what I want." Two floors above her is a rehabilitation unit that lacks adequate funding. The state is spending \$130,000 a year to take care of Nancy, and we believe the money could be more wisely used. I'm not saying we ought to start killing people when they reach 75. But I think society is going to have to think

about how much money we are willing to spend just to keep people alive, or not even alive but merely in existence. I think this issue must be addressed.

Mrs. Cruzan: You know, there are people who need organ transplants but don't have the money and don't receive them; so the state is already putting a value on human life. Why did the majority of the Supreme Court claim that the state of Missouri has an unqualified interest in protecting life?

Mr. Cruzan: The majority's decision places high value on the sanctity of life, so much in fact that it ignores concerns about the quality of life. The majority says the state's interest in life is unqualified, yet that's a damn lie. Because the state doesn't believe it. If Missouri thinks life is sacred why does it turn around and execute people? The state is making a qualitative judgment as to the value of a person's life because of something he or she did. This is a judgment on whether someone deserves to live or not, and to me that's contradictory. The Court says that the state places such a high value on life that we can't take any chances. Since people make mistakes, the Court says, we're going to err on the side of life. What about mistakes in executing people? The Court's reasoning doesn't jell very well.

Jewish Legal Perspectives on *Cruzan*

by Michael R. Zedek

To suggest "the" or even "a" Jewish perspective in the Nancy Cruzan case is by no means a simple matter. That is so not only because of the complex legal and ethical challenges of the controversy, but also because the available Jewish medical/ethical material derives from sources that could never have anticipated the facts before us.

For instance, the very thought of a "persistent vegetative state" is a condition unknown to the sages responsible for the vast body of commentary which Jewish tradition examines in order to determine how best to proceed in the present matter. Those who undertake such an exploration do so principally by searching for hints and analogies. And such is a tricky business.

For with regard to the *Cruzan* case, true parallels simply do not exist. Rather the effort must be to examine the sources for their underlying values, to discover, if possible, an essential

spirit whose special themes lead this tradition in a consistent direction.

One further preliminary. Obviously, I am not qualified sufficiently to comment in the context of the American judicial process on the legal issues of *Cruzan*. Rather my task is to offer information based on Jewish "theo-legal"¹ sources. Before turning full attention to that exploration, however, I must emphasize that there are divergent points of view in the Jewish community as to the status and authority of such material. Some view the decisions of proper² rabbinic authorities as precisely that, authoritative and binding. Others perceive the *Halacha*,³ as this vast body of material is most commonly designated, as providing at most only guidance and suggestion. Such persons insist on personal autonomy in decision making. No doubt there is at least one more grouping, namely those who view these materials as little more

than historical curiosities.

The present author, as a Reform Rabbi, finds his place in the second category. For me the tradition always has a vote, but it may not exercise veto power. It does not make the only claim. One may even consider, especially in exceptionally painful circumstances, the necessity of moving in opposition to the general tendency of the tradition, but one does so (at least I do) with a hesitant step, with "fear and trembling."

Enough of introductions. As to the matter at hand, there can be no doubt that the clear instruction of Jewish law is that one may not withdraw nutrition and hydration. Such action is considered murder. The citations are

Michael R. Zedek is Senior Rabbi at The Temple Congregation B'nai Jehudah, in Kansas City, Missouri.

numerous and, with one possible exception,⁴ seem unequivocal. The notions implicit in the relatively modern and relativistic phrase "quality of life" just aren't a consideration. Judaism's focus is with what might well be described as a single-minded obsession with the "sanctity of life." This view insists that life is of inestimable, even infinite value. The quality of life thereby to be preserved is of no consideration. For the value of even the most minute portion of infinity remains infinity.

The Mishnah⁵ states:

One who is in a dying condition is regarded as a living person in all respects. One may not bind his jaws, nor stop up his openings, nor place a metallic vessel or any cooling object on his navel until such time that he dies... (matters historically done in preparing the body for burial).

One may not move him nor may one place him on sand nor on salt until he dies (preventatives of putrefaction).

One may not close the eyes of the dying person. He who touches them or moves them is shedding blood as Rabbi Meir used to say: "This can be compared to a flickering flame. As soon as a person touches it, it becomes extinguished." So too, whosoever closes the eyes of the dying is considered to have taken his soul. (Semahot 1:1-4).

The Babylonian Talmud (Shabat 151B) indicates:

One who closes the eyes of a dying person while the soul is departing is a murderer (literally, he sheds blood). This may be compared to a lamp that is going out. If a man places his finger upon it, it is immediately extinguished.

Later redactors of Jewish law, most notably the 16th century code of Joseph Caro, elaborate on the Talmudic strictures. Caro specifically devotes an entire chapter (Yoreh De'ah 339) to the laws regarding a dying patient. Caro's code begins with the phrase:

"A *goses*⁶ is considered as a living person in all respects." And then Caro enumerates various acts that are prohibited. All the commentaries explain these prohibitions lest they hasten the patient's death?

Caro also knew a 13th century text called *Sefer Hasidim (Book of the Pious)* which tells us:

If a person is dying and someone near his house is chopping wood

so that the soul cannot depart then one should remove the (wood) chopper from there...⁸

So Caro elaborates:

If there is anything which causes a hindrance to the departure of the soul such as the presence near the patient's house of a knocking noise ...if there is salt on the patient's tongue; and these hinder the soul's departure, then it is permissible to remove them from there because there is no act involved in this at all but only the removal of the impediment.⁹

The other strand of rabbinic material which may reflect on the *Cruzan* case is found in legends and stories. So, for instance, this tale from the Talmud (Avodah Zarah 18A). The passage discusses the terrible martyrdom of Rabbi Hanina ben Teradyon. We are told:

In the case of Rabbi Hanina ben Teradyon, the Romans placed him in the fire for execution but covered his chest with woolen sponges drenched in water. This was to keep him alive longer while the fires burned and thus to prolong his agony. His disciples pleaded with him to overcome this evil device by opening his mouth wide so that he might be asphyxiated by the smoke, die more quickly and be spared the pain. He refused, says the Talmud, on the grounds that that would constitute suicide.

"Only He Who gave life can take it away; I may not do it myself," he replied to his disciples in this incredible conversation. "Well, then," the executioner himself, who took pity on him, offered, "let me remove these moistened sponges from around your heart." That, he answered, is permissible. In the first case, the suggestion was one of hastening death by one's own action. That he could not allow. In the second, it was a case of removing an impediment, artificially supplied, that delayed the expected process of dying. Removing a hindrance to natural death is permitted. The executioner did so, and Rabbi Hanina's agony ended. When the executioner himself died, the Talmud reports, he "went straight to heaven" for this act of exquisite mercy, implying, of course, that the act was not only permissible but meritorious.¹⁰

The Talmud also reports (Ketubot 140A) that Rabbi Judah ha-Nasi, the great leader of his generation, was

"afflicted by what appeared to be an incurable and debilitating intestinal disorder. He had a female servant who is depicted in rabbinic writings as a woman of exemplary piety and moral character. This woman is reported to have prayed for his death."¹¹

With that story in mind, a 13th century authority writes that "it is permissible, and even praiseworthy, to pray for the death of a patient who is gravely ill and in extreme pain."¹²

Such appears to move the tradition away from an absolutist position; nonetheless, such a determination also must consider that not only is "human life in general of infinite and inestimable value, but that every moment of life is of infinite value as well." Accordingly, obligations with regard to treatment and cure are one and the same, whether the person's life is likely to be prolonged for a matter of years or merely for a few seconds.¹³

Even so, Jewish law does perceive a distinction between the deliberate termination of life and the removal of means that artificially prolong the process of death. The *Shulchan Aruch*¹⁴ makes the teaching explicit: "To remove hindrances to the soul's departure is permitted, even mandated."¹⁵

"While physicians, then, may not disconnect life-support systems where they shorten life thereby, they may do so to shorten the death process."¹⁶

But this is a difficult, even a dangerous idea. When, if ever, is allowing death to come not shortening life? With that in mind, the tradition insists that the only moment when this option applies is in the case of a *goses*. Further, all traditional authorities define the *goses* as a moribund patient for whom death must be reasonably certain in no more than three days.¹⁷

Using Jewish law alone, then, the only basis upon which to support Nancy's parents' request is to argue that new medical technologies have extended the horizon of when dying begins. Perhaps, indeed, we have before us the necessity to establish a new category of time in determining the moment a patient becomes *goses*.

On this basis only, one might allow the decision which many would wish to permit in these tragic circumstances. But that course represents a new direction, one which Jewish tradition would be reluctant to trod. For such could be a very slippery and dangerous slope indeed.

¹ I use the term to indicate that some within the Jewish world see these source materials as not only appro-

appropriate and applicable but also divinely inspired, totally correct in their prescriptions for conduct.

- ² Elements within the Orthodox movement of Judaism insist that only Rabbis who follow its strictures may be considered appropriate deciders of the tradition.
- ³ This Hebrew word means "the way," the path on which one must walk. It refers to the entire body of tradition and decisions on behavior derived therefrom.
- ⁴ The tradition discusses a category of health called *goses*. Almost impossible to translate, the term refers to a person at the very end point of life.
- ⁵ The Mishnah refers to the oral laws which were collected by Rabbi Judah ha-Nasi sometime in the second century. The Mishnah is the first building block of the Talmud which is the essential compendium of Jewish law.
- ⁶ See footnote #4.
- ⁷ Fred Rosner, M.D., "The Jewish Attitude Toward Euthanasia," in *Jewish Bioethics* (eds.) Fred Rosner and J. David Bleich (New York: Hebrew Publishing Company, 1979), p. 262.
- ⁸ *Ibid.*
- ⁹ *Ibid.*, p. 263.
- ¹⁰ David M. Feldman, *Health and Medicine in the Jewish Tradition* (New York: Crossroad Publishing Company, 1986), pp. 94-95.
- ¹¹ J. David Bleich, *Judaism and Healing: Halakhic Perspectives* (New York: KTAV Publishing House, 1981), p. 142.
- ¹² *Ibid.*, p. 143.
- ¹³ *Ibid.*, p. 135.
- ¹⁴ Principal collection of Jewish practice compiled by Joseph Caro and added to by Moses Isserles, 16th century.
- ¹⁵ David M. Feldman, *Health and Medicine in the Jewish Tradition*, p. 95.
- ¹⁶ *Ibid.*
- ¹⁷ 'At the same time, Jewish law sanctions the withdrawal of any factor—whether extraneous to the patient himself or not—which may artificially delay his demise in the final phase.' Jakobovits is quick to point out, however, that all the Jewish sources refer to an individual in whom death is expected to be imminent, three days or less in rabbinic references. The citation is found in Rosner (see footnote #7).

The Right of Privacy and The Right to Die

by Joan Mahoney

The United States Constitution does not incorporate a specific provision protecting the right of privacy or the right of bodily integrity. Decisions by the United States Supreme Court have, however, recognized that there are certain decisions regarding one's body with which the government may not interfere. For example, the equal protection clause has been held to prohibit the sterilization of certain criminals by a state, where other criminals were not sterilized.¹ The fourth amendment has been interpreted to prevent forcible surgical removal from a criminal defendant of evidence in the form of a bullet.² Finally, the due process clause of the fourteenth amendment has been used to strike down state laws restricting the use of birth control devices³ and criminalizing abortion,⁴ and has been held to prevent the coercive use of a stomach pump.⁵

While the Supreme Court has not been faced with determining the boundaries of a patient's right to refuse life-preserving medical care, or the right of a guardian to refuse it on the patient's behalf, many lower courts, both state and federal, have dealt with this issue. In most jurisdictions, the courts have allowed the guardians to terminate the medical care, thus allowing the patient to die. Recently, the Missouri Supreme Court rejected the attempt made by the guardians of Nancy Cruzan to remove the gastrostomy feeding tube that provides nutrition and hydration to Nancy, who is in a persistent vegetative state. The question with which this article is concerned is whether the Court was correct in its interpretation of the right to privacy and whether it properly weighed the apparently conflicting interests of the state and Nancy Cruzan.

In July, 1988, the Probate Division of the Jasper County Circuit Court held that there is a constitutionally guaranteed right of liberty that permits the withdrawal of "artificial death prolonging procedures" when the patient has essentially no cognitive functions

and there is no hope for recovery.

On appeal, the Missouri Supreme Court conceded that there is a common law right of individual autonomy concerning decisions regarding health and welfare,⁶ and that there is, in addition, a constitutional right to privacy that extends to treatment decisions.⁷ After determining, however, that the right of privacy is not absolute, but must be balanced against the interests of the state, the court held that the state interest in the preservation of life outweighs the patient's interest in the right to refuse treatment, at least where the medical treatment is the provision of food and hydration. In summary, the court stated,

Given the fact that Nancy is alive and that the burdens of her treatment are not excessive for her, we do not believe her right to refuse treatment, whether that right proceeds from a constitutional right of privacy or a common law right to refuse treatment, outweighs the immense, clear fact of life in which the state maintains a vital interest.⁸

The Court went on to limit the holding to cases involving guardianship, implying that the decision might be different if the patient were competent and able to make the decision on her own. If there is a right to privacy in these cases, apparently it belongs only to the patient and cannot be exercised on her behalf, although the guardians have the right to make other medical decisions not relating to issues of life and death.

There were three dissenting opinions each of which suggested upholding the decision of the trial court. Judge Higgins provided a comprehensive survey of cases from other jurisdictions in support of the constitutional principle involved in the right to refuse med-

Joan Mahoney, J.D., is Associate Professor of Law in the University of Missouri-Kansas City, School of Law.