

life. There is no possibility for experience of any sort. The majority also acknowledges that the circumstances of Ms. Cruzan's condition constitute a grave burden upon her family. They write, "Only the coldest heart could fail to feel the anguish of these parents who have suffered terribly these many years. They have exhausted any well-spring of hope which might have earlier accompanied their now interminable bedside vigil. And we understand, for these loving parents have seen only defeat through the memories they hold of a vibrant woman for whom the future held but promise."<sup>18</sup>

But in the face of their compassion the majority maintains that the interest in preserving Ms. Cruzan's life outweighs the interests of some third parties, including her family or those who might possibly benefit from the use of funds presently used to maintain Ms. Cruzan. Yet at the same time the majority bases its argument that interests in preserving life are always overriding, on the claim that certain others besides the patient may be adversely affected. They write, "The State's interest is in the preservation of life, not only Nancy's life, but also the lives of persons similarly situated yet without the support of a loving family. This interest outweighs any rights invoked on Nancy's behalf to terminate treatment in the face of the uncertainty of Nancy's wishes and her own right to life."<sup>19</sup> And in their summary statement they write, "we choose to err on the side of life, respecting the rights of incompetent persons who may wish to live despite a severely diminished quality of life."<sup>20</sup>

Leaving aside the question of what it would have taken for the majority to regard the evidence of Ms. Cruzan's preferences as clear and convincing, there remains an interesting inconsistency in how we ought to regard the interests of other parties. It seems ironic that the interests of those most intimately associated with Ms. Cruzan are counted less than the interests of a population of unknown others who might be at risk from inadequate substitute decisions. As Judge Higgins writes in his dissenting opinion, "the majority elects to ignore the facts and law of this case and 'choose(s) to err' on the side of life of incompetent persons who may wish to live, a case not before the Court at this time."<sup>21</sup>

As outlined in this essay, the appropriate role of the family as substitute decision-maker can be justified on the basis of a moral framework of

shared decision-making that seeks to respect patients and to promote their well-being. The majority opinion effectively removes families from this important responsibility in its effort to protect family-less patients from bad substitute decisions. A far more appropriate approach would be to acknowledge the framework of shared decision-making and the necessary role of the family, plus other parties in case of conflict of interest or disagreement, and seek other means like guardianship reform to safeguard the interests of others. The unjustified interference of the state between families and their loved ones seems a very high price to pay for the protection of other parties who might be more effectively protected by other means.

<sup>1</sup> *Cruzan*, by *Cruzan v. Harmon*, 760 S.W. 2d 408, at 410.

<sup>2</sup> *Cruzan*, at 425.

<sup>3</sup> The state's interest in preserving life, as well as preventing suicide, protecting innocent third parties, and safeguarding the integrity of the medical profession, appears in at least fourteen recent court cases and is cited in *Superintendent of Belchertown State School v. Saikewicz*, 373 Mass. 728, 370 N.E.2d 417 (1977).

<sup>4</sup> Immanuel Kant, *Grounding for the Metaphysics of Morals* (1785), trans. James W. Ellington (Indianapolis: Hackett Publishing Co., 1981), p. 36.

<sup>5</sup> *In re Conroy*, 98 N.J. 321, 486 A.2d 1209 (1985).

<sup>6</sup> *Cruzan*, at 416.

<sup>7</sup> President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, *Deciding to Forego Life-Sustaining Treatment*. (Washington, D.C.: U.S. Government Printing Office, 1983), p. 133.

<sup>8</sup> *Cruzan*, at 423.

<sup>9</sup> *Cruzan*, at 412.

<sup>10</sup> *Cruzan*, at 423.

<sup>11</sup> Phyllis Schmitz and Merry O'Brien, "Observations on Nutrition and Hydration in Dying Cancer Patients," in Joanne Lynn (ed.), *By No Extraordinary Means* (Bloomington, Indiana: Indiana University Press, 1986), pp. 29-38.

<sup>12</sup> *Cruzan*, at 419.

<sup>13</sup> *Cruzan*, at 424.

<sup>14</sup> See President's Commission, note 8 supra; Current Opinions of the Council on Ethical and Judicial Affairs of the American Medical Association, 1986; and Child Abuse and Neglect Prevention and Treatment Program: Final Rule, *Federal Register* 50: 14878-14901 (1985).

<sup>15</sup> Id.

<sup>16</sup> *Cruzan*, at 423.

<sup>17</sup> See President's Commission, note 8 supra, pp. 181-186.

<sup>18</sup> *Cruzan*, at 412.

<sup>19</sup> *Cruzan*, at 426.

<sup>20</sup> *Cruzan*, at 427.

<sup>21</sup> *Cruzan*, at 441.

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## The Cruzan Decision: A Confusion of Confusions

by John M. Swomley

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The *Cruzan* case is the story of a young woman, Nancy Beth Cruzan, who was apparently killed in an auto accident January 22, 1983. She was resuscitated after about 15 minutes of respiratory and cardiac arrest. The absence of oxygen (anoxia) during this period led to permanent brain damage. She never regained consciousness. After six weeks of rehabilitative measures at a medical center in Joplin, Missouri, she was discharged as "essentially unimproved and unre-

sponsive to rehabilitation." All the physicians who have participated in her case, including three neurologists and a neurosurgeon, agree there is no hope of recovery.

Nancy's parents, who serve as co-guardians, sought permission in the Circuit Court of Jasper County to discontinue further use of a gastrostomy

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tube which had been inserted surgically in her stomach. The trial judge, Charles E. Teel, Jr., authorized Mr. and Mrs. Cruzan to act on behalf of Nancy and directed the employees of the State of Missouri to carry out their request. Judge Teel said: "There is a fundamental natural right expressed in our constitution as the 'right to liberty' which permits an individual to refuse or direct the withholding or withdrawal of artificial death-prolonging procedures when the person has no more cognitive brain function than our ward."

The Supreme Court of Missouri, in overruling the lower court decision, based its opinion on sectarian "right to life" dogma. In fact, a senior court judge, Warren Welliver, began his dissent with the cutting remark: "This case is not before us to establish groundwork for future right-to-life litigation."

In another dissent, Judge Andrew J. Higgins noted that "Although the majority cites more than 50 cases from 16 states that support the (trial court's) judgment in this case, it rejects all and fails to point to a single case in support of its analysis and ultimate conclusion to reverse the judgment." Judge Higgins later asked: "Is it because of its 'public policy' bootstrapped from a statute that all parties in this case, the trial judge, and the majority agree has no application in this case...?" That statute is an abortion law written by Samuel Lee, state legislative chairman of Missouri Citizens for Life, and Louis DeFeo, executive director of the Missouri Catholic Conference, neither of whom is a legislator. (*Kansas City Times*, January 23, 1989)

The Missouri Supreme Court's majority opinion, written by Edward Robertson, Jr., refers to that abortion law as follows: "At the beginning of life, Missouri adopts a strong predisposition in favor of preserving life. Section 188.010, R.S.Mo.1986 announces the 'intention of the General Assembly of Missouri to grant the right to life to all humans, born and unborn...'"

Throughout the majority opinion there are numerous references that indicate this was a decision largely based on anti-abortion assumptions. In asserting the "state's interest" in "the sanctity of life itself," the Court grounds this sanctity "on the principle that life is precious and worthy of preservation without regard to its quality." Moreover, "the state's interest is not in quality of life... Instead, the state's interest is in life; that interest is unqualified."

The opinion continued that "...we

do not believe [Nancy's] 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."

Theological reflection necessarily begins with the Court's assumptions about the sanctity of life, the presumption that it has nothing to do with quality of life but only prolongation of life, and its assumptions about abortion.

Theological reflection begins with the Court's assumptions about the sanctity of life. The phrase 'sanctity of life' is an unfortunate myth that has little basis in reality. Although the state speaks about sacredness of life, it always holds some lives more sacred than others.

The phrase "sanctity of life" is an unfortunate myth that has little basis in reality. Although the state speaks about sacredness of life, it always holds some lives more sacred than others. Charles Blackmar, another dissenting judge, wrote: "The very existence of capital punishment [in Missouri] demonstrates a relativity of values by establishing the proposition that some lives are not worth preserving." He also noted that Missouri's "Living Will" statute "which the majority finds to be 'an expression of the policy of this state with regard to sanctity of life,' in fact allows and encourages the pre-planned termination of life."

The state of Missouri, which has Nancy Cruzan physically in its control in a state hospital, is paying about \$10,000 a month to keep her body from dying. This is more than \$100,000 a year that the state is not spending to preserve the lives and health of poor citizens who cannot afford medical care and whose lives are not sacred enough to have state-provided health care.

When applied to all unborn human life, the phrase "sanctity of life" is a device for opposing some forms of birth control, as well as abortion. Those forms of birth control (including "the pill") prevent implantation of the fertilized egg. Technically, of course, there is human life in the sperm and ovum. The intent to protect all unborn human life is also an assertion that fetal life is more sacred than the life of the

woman whose health is threatened by pregnancy. If current charges by "prolifers" that abortion is murder were to prevail, women and physicians who cooperate in the abortion process would be punishable by death in death penalty states in order to uphold the "sanctity of life."

What is the basis for the idea that life is sacred? It is not rooted in the nation-state, which pays men to kill other men in war and spends the largest percentage of its budget on weapons of destruction. Sacredness cannot be based on secular pronouncements or coercive laws of Missouri or any other secular branch of government.

The words "sacredness" or "sanctity" or "reverence" for life are not in the Bible. Respected Biblical figures preferred death to dishonor or infidelity. Jeremiah at one point wished that he had never been born and regretted that he had not been killed in his mother's womb. (20:14-17) Some preferred life after death to obedience to Caesar. There is no reference in the Bible to protecting unborn human life or to equating it with breathing human beings, and no prohibition against abortion. In the New Testament there is no emphasis on laws to safeguard life but there is great emphasis on respect for personality, love of neighbors and enemies, and liberation from legalism.

The phrase "sanctity of life" is not credibly rooted in any church which sanctions nuclear or conventional weapons, establishes military vicariates or silently tolerates the murder of its clergy and laity.

We cannot speak of God as endorsing the sanctity of life from conception on, as some sectarian groups proclaim. About fifty percent of fertilized eggs do not implant. Of those that do, between twenty and fifty percent miscarry. There are also deaths *in utero* and stillbirths. Those who claim abortion is murder should recognize that Nature or God is the greatest killer because there are more spontaneous abortions or terminations of pregnancy than those performed medically.

If there is no evidence from natural law or from the process of gestation, is "sanctity of life" attributable to God only by believers? Is the non-believer free to accept or to reject such doctrine? Since believers do not by their actions treat life as more sacred than do non-believers, is it possible that we think of it as sacred only when our own life or the life of a member of our family or circle of friends is endangered? Relatively few people think of the lives

of people in other nations as sacred, and many in our own nation do not place the lives of pregnant women on the same level with fetal life, just as many heterosexuals do not think of the lives of homosexuals with AIDS as sacred.

Probably the phrase "sanctity of life" is a way of saying that ideally everyone ought to regard other persons as inviolable. Certainly the Golden Rule—that we should do unto others as we would have them do to us—may be the source of the idea that life is sacred. Or it may reside in the fact that love is the cement of community, whereas hostility and indifference to the well-being of others destroys human relationships. This, however, does not conclusively answer the question whether existence is always better than non-existence, whether the prolongation of life is always good.

How can judges indicate they are not concerned about quality of life but only length of life? The quality of life in terms of adequate food, clothing, and shelter in zero degree weather has a lot to do with the length of life.

Abstract concern for the existence of life apart from its quality is biological idolatry.

This necessarily raises a question about quality of life. How can judges indicate they are not concerned about quality of life but only length of life? The quality of life in terms of adequate food, clothing, and shelter in zero degree weather has a lot to do with the length of life. Likewise, a life without quality may lead to a death wish, endangering one's own life and the lives of others.

Abstract concern for the existence of life apart from the quality of life is biological idolatry. Such idolatry can sanction slavery, torture, physical and mental abuse so long as life itself is maintained. Judge Blackmar wrote: "There is evidence that Nancy may react to pain stimuli. If she has any awareness of her surroundings, her life must be a living hell. She is unable to express herself or to do anything at all to alter her situation."

Powerlessness, the fact that one's body is totally or even largely in the control of others, destroys human dig-

nity and reduces a person to a possession. It is not surprising that the "right to life" movement, which wants legislation to deprive women of the right to control their own bodies when pregnant, should seek to deprive persons of the right to die. The Missouri Citizens for Life presented an *amicus* brief to the Court arguing against the right of the Cruzan family to discontinue the forced feeding of Nancy.

Even the Vatican, which has firm rules against euthanasia, permits the withdrawal of "medical techniques" or "means": "It is also permitted, with the patient's consent, to interrupt these means, where the results fall short of expectations. But for such a decision to be made, account will have to be taken of the reasonable wishes of the patient and the patient's family, as also of the advice of the doctors who are specially competent in the matter.... They may also judge that the techniques applied impose on the patient strain or suffering out of proportion with the benefits which he or she may gain from such techniques."

The Missouri Supreme Court said, "the evidence is clear and convincing that Nancy will never interact meaningfully with her environment again. She will remain in a persistent vegetative state until her death. She is totally dependent on others for her care." The Court's decision to continue feeding through a tube in Nancy's stomach is not concerned with the needs of the patient, but with the pressures of organized groups that persuaded the legislature to adopt a "pro-life" policy from conception on. The Court's resistance to death by denying its reality is evil.

The Court's decision to continue feeding Nancy is not concerned with her needs, but reflects the pressure by organized groups that lobbied the state legislature to adopt a "pro-life" policy from conception on.

In Nancy's case there is no relationship to what is normally associated with life. She cannot enjoy eating or drinking, she cannot interact with other people, she cannot reason or transcend the immediate moment either by memory or by projecting thought into the future. She cannot make moral choices or communicate any reaction to others. Therefore, she is no longer a moral agent. In short, she

is unable to express personhood as other humans do. Likewise she is unable to reflect even in a modest way what the Bible calls the "image of God," which, at the least, includes the ability to love, to reason, to transcend the present and to participate in the life of the universe.

We must respect the life of others enough to let them die a natural death rather than mechanically to extend life year after year. Love of neighbor requires us to ask whether providing nutrition and hydration to Nancy is a benefit or a harm to her.

The mere presence of breathing or other signs of life does not require the permanent maintenance of life support. Although there is no biblical guidance available because the Bible was written in a pre-scientific and pre-technological era, there are important clues for our consideration. One is respect for others. We must respect the life of others enough to let them die a natural death rather than mechanically to extend life year after year. The trial judge wrote: "To decide...that medical treatment once undertaken must be continued irrespective of its lack of success or benefit to the patient in effect gives one's body to medical science without his consent."

We must also respect the wishes of the person involved. The Jasper County Court in a three-day trial heard the testimony of several different witnesses, including one of Nancy's close friends and her own sister, to the effect that Nancy would not want to continue the kind of treatment now being forced on her. The trial judge based his conclusion not only on their statements but on "other statements to family and friends" that Nancy would choose to forego the ongoing intrusion caused by the gastrostomy tube.

A second biblical clue to determining whether an incompetent patient should be required indefinitely to receive nourishment through a stomach tube is the concept of "love of neighbor." Such love requires us to ask whether providing nutrition and hydration in this manner is of benefit or harm to the patient. When a patient has been in irreversible coma for more than five years with severe brain damage, tubal feeding does not appear to be beneficial. Rather it seems harmful. This is even more true if there should be a

break or leakage and another surgical invasion of the stomach were required. In any event Nancy is the recipient of an unwanted surgical procedure and burdensome treatment. She is also a source of unceasing worry to her family. This is not a normal way of expressing love.

A third biblical clue is in the word "redemption." The concept of redemption in biblical thought is identical in meaning to our modern term "liberation." What are the redeeming or liberating features of five years of forced feeding? The Supreme Court's majority thought Nancy's life expectancy might be thirty more years of life maintenance through a stomach tube, with no hope of any improvement in condition. This is scarcely a redeeming procedure for Nancy or her family. It is more akin to life imprisonment without hope of parole.

The biblical ideals of respect, love, and redemption require that whatever is done for Nancy be done with a benevolent motive and caring procedure. The trial judge has already indicated that no one would benefit economically from Nancy's death. She has no resources other than Social Security. Her parents have indicated again and again that they want to relieve her from further deterioration and anguish. Allowing her to die would fulfill her own expressed wishes prior to the

accident. The attending physician should be able to determine if the patient is dying comfortably or needs sedation. However, no evidence was produced to indicate that ending the enforced feeding would produce pain since Nancy has permanently lost consciousness.

My reflection with respect to the Nancy Cruzan case ends with an understanding of what this case is not. It is not a case that requires a general judgment or absolute decision that artificial or extraordinary medical procedures should be suspended for everyone who is comatose. The trial judge, on the basis of evidence with respect to a specific individual in a specific situation, made a decision to authorize the co-guardians to exercise their legal authority to act in the best interests of their ward.

It is not a case where the principle of euthanasia will be vindicated. The issue is whether the state has a right to use bodily invasive surgical procedures, that once may have seemed necessary, to keep a patient alive indefinitely when that patient wants to stop such extraordinary methods.

It is not a case where either guardians or physicians will administer a lethal dose of any substance to cause death, but one of permitting a young woman to die naturally without state-

compelled medical intervention. It is comparable to a case where a person who will never be able to breathe again is kept alive indefinitely by mechanical respiratory assistance. The need or hunger for air is comparable to the need or hunger for food and liquid.

This is not a case where physicians or guardians are seeking to harvest organs for transplantation into other persons, although there is great value in anyone's donating organs to save the lives of otherwise hopelessly ill people who might benefit. In Nancy's situation, there is not the slightest suggestion that her body has been kept alive five years for the purpose of using it as a mere tool to assist medical science.

Nancy Cruzan and her family should not be used by the Missouri Supreme Court or the Right to Life movement as a means to achieve a political or "public policy" end any more than a physician should use someone as a means for a medical end. The key religious concern is one of compassion—the recognition that mercy is a great value, a product of the spirit. Freedom is also a great value. A person who is not free to live or to die, or to exercise control of her own body and talents, has been deprived of the very core of her moral status as a person.

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## A Conversation with Mr. & Mrs. Cruzan

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**MME:** First of all, we want to say how appreciative we are for taking the time to share your reflections about Nancy and what you are trying to do on her behalf.

Let's begin with your visits with Nancy. What do you talk about, what do you hope your visits will accomplish?

**Mrs. Cruzan:** Well, they don't accomplish anything for Nancy. We talk to her about everyday things, what everybody's been doing, what we had for Thanksgiving dinner and all those kinds of things. We also talk to her about what's going on legally, although we think she doesn't understand. I don't know really how to explain it. It's like talking to a baby who can't understand you. It just seems like the thing to do. Our visits really don't accomplish anything for Nancy, but I suppose they accomplish something for us.

**MME:** Have you been discussing the movement of her case through the legal system?

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**Mrs. Cruzan:** Yes, we tell her these things, although she doesn't understand. Nancy can hear but she doesn't comprehend. We still go through the motions and tell her everything that's going on and what we hope the end result will be.

**Mr. Cruzan:** Like Joyce said, we don't think Nancy understands, but there's a remote possibility she may. I try to keep her current on what's going on, tell her not to be afraid, that we know it's frightening, that if it were me I would be scared. But, we'll be with her.

**Mrs. Cruzan:** We never get any reaction from her, you know, it's just as if we were telling her what day it was.

**Mr. Cruzan:** In reality, our trips to see her, the visiting and talking, are as much for us as for Nancy. You know, part of our daughter is still there. You just don't turn your back on her and walk away.

**MME:** How do you see your responsibilities to Nancy now? When you make decisions on