benefit; there is no meaningful life of any kind—it is a mere body only, not an embodied person."[4]

John Paris, S.J., agrees. "Those who argue that quality of life cannot be a consideration in the treatment decisions for such (persistent vegetative) patients are placing the maintenance of mere biological existence above all other considerations."[5] Dennis Brodeur is of the same view. Artificial nutrition-hydration that "simply puts off death by maintaining physical existence with no hope of recovery...is useless and therefore not ethically obligatory."[6] Similarly the American Academy of Neurology stated: "Once this PVS diagnosis has been clearly established, medical treatment in general, including artificial feeding, provides no benefit to those patients."[7]

> The Catholic tradition never counted mere vegetative life a patient-benefit. The *Cruzan* court does.

I agree with the Callahan-Paris-Brodeur approach. When the American Medical Association adopted a similar position, the then archbishop of New Orleans (Philip Hannan) stated: "The Church strongly condemns this position."[8] With all due respect, I believe that is just plain wrong. In my view, those who take such a position have departed from the substance of the Catholic tradition on this matter. That tradition never counted mere vegetative life a patient-benefit. The *Cruzan* Court does.

6. The Major Concern of the *Cruzan* Court. In any number of places the Court leads us to believe that withdrawing artificial nutrition-hydration from Nancy will expose others with a reduced quality of life to similar withdrawals. In other words, allowing any quality of life consideration here would open the door to abuses of the weak.

This is certainly a legitimate concern and I do not wish to minimize it. But the proper response is not the safeside victimization of Nancy Cruzan and her family. It lies rather in hard and fast exception-stoppers. Concretely, third party decisions to withdraw nutrition-hydration should be rigidly controlled by two conditions: irreversible PVS and the dying condition. (It is here that the notion of "the dying patient" becomes urgently relevant—and possibly divisive.)

The Philosophical Roots of the *Cruzan* Court

At the outset I stated that I believe the Court to be "muddled, confused and/or downright wrong on virtually every key issue." I have tried to list some of these issues. But perhaps more important is the underlying philosophy that has guided the Court's deliberations.

That philosophy is what I call "legal positivism." The Court has decided the *Cruzan* case only on the narrow basis of constitutional or legal precedent. Finding analytical soft spots in the **dicta** of previous courts, it has ignored the wisdom and plain common sense struggling for expression in those decisions.

I can put this another way by saying that the *Cruzan* Court gave no weight to moral tradition. It faced profound human problems with only legal tools and categories. Equivalently this means that it was attempting to decide **human** problems without benefit of the values that inform the human. This is like facing medical dilemmas with only medical tools and expertise, as if medical good is simply identified with personal good. The case of Nancy Cruzan goes far deeper than the reach of constitutional and legal precedent. If we deny that, we freeze the ability of courts to face new and profoundly human problems. We paralyze their ability to be wise.

[1] William May, *et. al.*, "Feeding and Hydrating the Permanently Unconscious and Other Vulnerable Persons," *Issues in Law and Medicine* 3 (Winter, 1987), pp. 203–217, at 209.

[2] Robert Barry, O.P., "The Ethics of Providing Life-Sustaining Nutrition and Fluids to Incompetent Patients," *Journal of Family and Culture* 1 (n. 2, 1985), pp. 23–37, at 32.

[3] *Loc. cit.*, pp. 32–33.

[4] Daniel Callahan, "Feeding the Dying Elderly," *Generations* (Winter, 1985), p. 17.

[5] John J. Paris, S.J., "Critical Life Issues," *Health Progress* 66 (December, 1985), p. 23.

[6] Dennis Brodeur, "Feeding Policy Protects Patients' Rights, Decisions," *Health Progress* 66 (June, 1985), pp. 38–43.

[7] Summarized in the *Newsletter of the Society for the Right to Die* (Summer, 1988).

[8] Cited in *National Catholic Register*, April 6, 1986.

The *Cruzan* Decision: A Moral Commentary

by Gilbert Meilaender

In this commentary I focus on issues important for **moral** analysis. I attempt no discussion of the merits or demerits of the Missouri Supreme Court's decision as a piece of **legal** reasoning, a matter on which I have little competence. It should be clearly said, however, that the *Cruzan* decision is an excellent example of moral analysis. It directs attention to crucial issues, turns away from flaws in decisions of courts in some other jurisdictions, and renders a verdict that should be applauded and (one hopes) imitated.

In arguing for this point of view, I may come under the indictment of Judge Blackmar who, in his dissenting opinion, writes that he is not "impressed with the crypto-philosophers cited in the principal opinion, who declaim about the sanctity of any life without regard to its quality. They dwell in ivory towers." It is difficult, however, to take seriously as moral analysis the separate dissenting opinions of Judges Blackmar and Welliver. (The dissenting opinion of Judge Higgins is more carefully crafted.) In any case, to consider how we ought to think about sanctity or quality of life is precisely **not** to dwell in an ivory tower; it is to ponder the difficult problems of how to care for the many different human beings for whom we have some responsibility and with whom we are united in a bond of citizenship.

Gilbert Meilaender, Ph.D., is Professor of Religion at Oberlin College.

The Missouri Court directs our attention to considerations which are crucial and often confused in discussions of cases like that of Nancy Cruzan. Much of the moral argument surrounding cases like this one imports language that was being used several decades ago to wage a different battle. Twenty years ago the central struggle was this: to stop useless and/or burdensome treatments for irretrievably dying patients. That is, to let them die. Some opposed such "letting die," thinking it equivalent to killing. They failed, I believe, to distinguish adequately between the aim of an act and its foreseen result. To aim at caring for a dying patient by withdrawing death-prolonging treatments may result in a somewhat earlier death, but the aim is not to kill. The aim is to let die. Others opposed such "letting die" on different grounds, arguing that if we were (on humanitarian grounds) prepared to let such patients die, we should be willing to end their suffering still sooner by deliberately aiming to hasten their death. They failed, I think, to distinguish adequately between the aim and the motive of an act—supposing that aiming to kill a fellow human being became permissible if our motives were praiseworthy.

> The Cruzan decision is an excellent example of moral analysis. It directs attention to crucial issues, turns away from flaws in decisions by other courts, and renders a verdict that should be applauded and imitated.

Paul Ramsey characterized these two viewpoints as "opposite extremes" that turned out to be strangely alike. The one never found reason to acknowledge inevitable death and permit it to come. The other never found reason to permit death to come without taking the next step and hastening its arrival. Neither could just "let die" the irretrievably dying patient.[1]

In that context the language of "letting die" was very important and powerfully applicable. We were arguing about patients who really were dying patients—about whether we should let them die, should fight against that death as long as we were able, or should hasten the coming of that inevitable death. In that context to argue for "letting die" staked out an important position in the dispute: one which sought to continue to care for dying patients while giving up futile attempts to cure, but one which refused ever to abandon care for still-living human beings. Chapter three of Ramsey's *Patient as Person* remains the classic expression of such a viewpoint and will continue to repay careful study. I return to it below.

The context has now changed, and it is to the great credit of the Missouri Court to have recognized this. We are no longer arguing about irretrievably dying patients, yet the language of the argument often sounds as if we were. The Court is very clear and to the point: "[T]his is not a case in which we are asked to let someone die. Nancy is not dead. Nor is she terminally ill." She isn't dying and, hence, no treatment can be said to be prolonging her **dying**. If there were such a **death**-prolonging treatment, we could simply withdraw it and let death take her. But no such treatment is ready at hand for us to withdraw. We cannot simply let her die, because she is not a dying patient. If we want her to go away, we will have to aim at her death (not just let it come as the result of an action aimed at caring for her). This too the Court sees and says. We can add the next sentence to those quoted above. "[T]his is not a case in which we are asked to let someone die. Nancy is not dead. Nor is she terminally ill. This is a case in which we are asked to allow the medical profession to make Nancy die by starvation and dehydration."

What reason could there be to make this our aim? The answer is fairly obvious. Although Nancy Cruzan is neither dead nor dying, her life is the sort no one would choose if given more normal possibilities. Although not dying, she is severely disabled. To see this, however, is to see the true nature of a choice to withdraw nutrition. In doing so we aim at no death-prolonging treatment; rather, we aim at a life thought to be of little or no worth. We judge that life not from the perspective of the one actually living it (a perspective about which we must confess radical ignorance), nor, certainly, from God's perspective, but from our own. We compare it to the sort of life we live (and Nancy Cruzan once lived) and judge it by that standard as a *lebensunwerten Leben*, a life not worth living. Understandably. But it should be clear that in so doing we are not simply rejecting a treatment as useless or inadequate—but a life as unworthy. That judgment of comparative worth the Court clearly discerns and rejects. We can add one more sentence to those quoted above. "[T]his is not a case in which we are asked to let someone die. Nancy is not dead. Nor is she terminally ill. This is a case in which we are asked to allow the medical profession to make Nancy die by starvation and dehydration. The debate here is thus not between life and death; it is between quality of life and death." In these sentences the Court recognizes how drastically the terms of debate have shifted within our country in the last two decades and how inadequate is the language of "letting die" for a case like that of Nancy Cruzan. On these matters crucial for moral analysis this opinion is more clear-headed than many of the decisions from "courts of some...sister states" which the Missouri Court recognizes but does not follow.

The Court makes one further distinction of importance at this point in the argument. Having stated that a decision to withdraw nutrition from Ms. Cruzan cannot be described as "letting die" but must be described as intentional killing, the Court makes clear that it speaks here the language of aim, not of motive. "To be sure, no one carries a malevolent motive to this litigation. Only the coldest heart could fail to feel the anguish of these parents who have suffered terribly these many years." The moral life would be far more straightforward than it is if well-motivated people never did what was wrong and those with evil motives never did right. But such is not the case. And the Court quite rightly distinguishes between the motives that led the Cruzans to court and a proper description of the deed they sought permission to enact.

If I am correct in suggesting that the terms of debate have shifted greatly and that the language of "letting die" no longer really fits the circumstances of a patient like Nancy Cruzan, why is this language still used? On this point also the Court's opinion is clarifying and helpful. It notes a "change of focus"—away from language that focused on treatments (as ordinary or extraordinary) and toward language that focuses on "the patient's medical prognosis and the individual patient's assessment of the quality of her life in the face of that prognosis." The ordinary/extraordinary language, though often confusing to some people, at least directed our attention to certain objective reasons for refusing treatment. An "extraordinary" treatment was either useless or excessively burdensome and could **therefore** rightly be refused. In refusing treatment on such grounds, a patient might, in

effect, be choosing a shorter life, but still choosing life. From among the available life-choices that patient would be choosing a certain life—shorter, but free of certain burdensome or useless treatments.

But the "change of focus" discerned by the Court directs our attention away from such relatively objective grounds for choice. Instead, courts begin to focus simply on the right of individual choice. From that perspective, any treatment, even one that is clearly life-saving and is not experienced as burdensome, may be refused. Once treatment refusal is grounded simply in autonomous patient choice, there is little ground left for denying patients the right to choose, not just among alternative life-choices, but death itself. Thus the Court says: "Once prognosis becomes irrelevant, and the patient's choice always more important than the state's interest [in preserving life], this standard leads to the judicial approval of suicide." If the only thing that counts is autonomous choice, patients may do more than choose one sort of life by choosing against certain treatments. They may turn against more than a particular treatment: they may turn against life.

In the case of competent patients this may, of course, be difficult to determine legally. There **is** a clear conceptual distinction between choosing not to live and choosing to live in a certain way (free of the burdens of particular treatments). But even were we to agree that it is morally wrong to choose against life, it would be very difficult for any court of law to determine that in my choices I was rejecting not just the burdens of continued treatment but continued life. (And it would certainly be difficult had I been well instructed by a good lawyer sensitive to the distinction.) Thus, in the case of competent patients, courts will very often need simply to permit competent patients to choose. (This does not mean, naturally, that legislatures could not determine that some choices were not open to competent patients—as some "living will" legislation specifies that nutrition and hydration are not forms of treatment that can be discontinued at patient discretion.)

It may, however, be quite appropriate to treat some incompetent patients differently. Other courts have tended to assume that, since competent patients have a right to refuse treatment, we must find someone to assert that right on behalf of incompetent patients. The Missouri Court wisely sees how problematic is that move. Feeding Nancy Cruzan does not seem to be useless, since it sustains her life (and does not just prolong a dying process). Feeding Nancy Cruzan does not seem to be burdensome, since, as far as we know, she cannot experience this treatment as burdensome. Therefore, a decision to withdraw nutrition and hydration is difficult to construe as a choice against either useless or burdensome treatment. It seems like a choice aimed not at her treatment but at her life. It is the only way to get her to die. Should not the Missouri Supreme Court think that at this point the state's interest in prevention of homicide becomes substantial? It should, and it did.

A decision to withdraw nutrition and hydration from Nancy seems like a choice aimed not at her treatment but at her life. It is the only way to get her to die.

The Court suggests that, at least for incompetent patients, we keep the language of medical prognosis central, that we ground treatment refusals for them in more than a choice asserted on their behalf. This leads us, finally, to consider the possible grounds for such a refusal. Is the provision of nutrition and hydration to Nancy Cruzan either useless or excessively burdensome? I suspect that most of our unexamined assumptions lie here, and that this is the most perplexing element in arguments about cases like this one. We can begin by considering the usefulness of feeding her. She is not a terminally ill patient and will not necessarily die soon if given nourishment and proper care. It is hard, therefore, to avoid saying that if we stop feeding her it is because we think her life is a useless one to live—not because the treatment is itself useless. The treatment seems useless because the life seems not worth sustaining. Is that not essentially what we tend to think?

This much is certainly true: Given alternatives, none of us would choose for ourselves the life Nancy Cruzan now lives. Judging from our perspective as competent adults, her life may seem comparatively worthless. But if we adopt that perspective in making such judgments, there are many lives that seem comparatively worthless. Our nursing homes are quite literally full of people whose lives we would not choose for ourselves. It is, therefore, not empty or irrelevant rhetoric when the Court writes: "The state's concern with the sanctity of life rests on the principle that life is precious and worthy of preservation without regard to its quality. This latter concern is especially important when considering a person who has lost the ability to direct her medical treatment." Nancy Cruzan is still living, still one of us. As such, she has a claim upon our continued care. She is, to be sure, severely disabled and—so far as we can tell—unlikely ever to recover from her disability. But this means only that we can probably never cure her. It does not release us from the obligation to provide her what care we can. The Court is quite right to worry about an argument which "seems to say that treatment which does not cure can be withdrawn" on that ground alone.

The argument that **does** need serious consideration here is one Paul Ramsey put forward in *The Patient as Person*—and later recanted. The argument does not perfectly fit the Cruzan case, since Ramsey meant to be talking only about dying patients, but it fits well enough. Ramsey argued that our actions toward the sick and dying ought to be governed by a categorical imperative: "Never abandon care." But he went on to explore two possible "qualifications" of this imperative, the first of which is especially relevant here. That first qualification was: "Never abandon care...except when [the patient is] irretrievably inaccessible to human care."[2] If there should be a patient who was really beyond our care, who could no longer receive that care, then, Ramsey wondered, could we really be obligated to give what could not be received? He wrote:

> The proposed justifiable exception depends on the patient's physiological condition which may have placed him utterly beyond reach. If he feels no suffering, he would feel no hunger if nourishment is withheld. He may be alone, but he can feel no presence...The sort of situation that may be covered and resolved by the present proposal in ethical analysis, if it is valid, are the cases of patients in deep and irreversible coma who can be and are maintained alive for many, many years...Acts of charity or moving with grace among the dying that now communicate no presence or comfort to them are no longer required. If it is the case that

> a wife is tragically mistaken when she takes twitches of the eyes to be a sort of language from her husband irreversibly comatose for seven years, or when she takes such reflex actions as the response of the lips to a feeding cup to be evidence of reciprocation and some minimal personal relatedness, then her care is now worthless. Indeed it is no longer care for him. It is no contradiction to withhold what is not capable of being given and received.[2]

If there is to be moral justification for withdrawing the feeding tube from a patient like Nancy Cruzan, this would be far better than the sorts of arguments the Missouri Court rightly rejects. For this argument is not grounded in a judgment that such a life is not worth living. It is grounded only in the judgment that there can be no obligation to give what cannot be received. And Ramsey quite clearly realized that under such circumstances, if such a justification were found acceptable, there would be little reason to bring about death only by withdrawing nutrition. In such cases "it is entirely indifferent to the patient whether his dying is accomplished by an intravenous bubble of air or by the withdrawal of useless ordinary natural remedies such as nourishment."[3] In either case we would not just be allowing the patient to die. We would be aiming at that death—and the justification, if there could be one, would be the sort sketched here.

This possible qualification of the duty never to abandon care Ramsey largely withdrew in his later work, *Ethics at the Edges of Life*. His reason was, simply, doubt whether we should ever say with confidence that a still living human being had passed beyond the reach of our care. "The serious objection to searching for such exceptions is that—even within the stringent limits of indications of a patient's impenetrable solitude silencing any need on our parts to feel an obligation to continue to extend care—one still might do the deadly deed to someone still in a penultimate stage, to someone who while beyond showing response to us may still be within reach of violation at our hands, and so not altogether in God's keeping."[4]

If it is hard to make the case that feeding Nancy Cruzan is **useless** (without judging her life—and not just her treatment—to be useless), we might yet consider the possibility that such treatment should be rejected on grounds not of uselessness but of excessive burden. At first blush this will seem a rather difficult argument to make. As the Court notes: "If the testimony at trial that Nancy would experience no pain if she were allowed to die by starvation and dehydration is to be believed, it is difficult to argue with any conviction that feeding by a tube already in place constitutes a painful invasion for her." If she is said not to possess our ordinary capacity for experience, she cannot be held to experience feeding as a burden.

But perhaps this does not quite get at what one might have in mind in describing such feeding as a burden to her. Thus, for example, the brief submitted by the plaintiffs-respondents, considering (and rejecting) some medical testimony which had suggested that Ms. Cruzan might have "some limited perception of her environment," had argued: "But even if the testimony was believable, it would not detract from Nancy's right to be free from unwanted, invasive, medical treatment. Indeed, it would make her dilemma all the more horrible and compel withdrawal of this treatment if she somehow had some limited perception of her condition..." Judge Blackmar, in his dissent, put what I take to be the same opinion slightly more graphically: "If she has any awareness of her surroundings, her life must be a living hell."

We should be clear that the Court quite rightly rejected the argument presented by the plaintiffs-respondents; for they had argued both that Ms. Cruzan was incapable of experiencing anything and that her treatment was burdensome to her. But if one supposes that we should never say with certainty that such a patient is beyond experiencing the care we give, we must take seriously the objection that this care would be experienced as terribly burdensome. I am not certain I am prepared to believe this. Judge Blackmar wrote that, on such a supposition, her life must be a living hell. But "hellish" is the one thing it would not be. For what is terrible about hell is the ultimate isolation to which it sentences one. To be in hell is to be utterly enclosed within the self—caring for no one **and** being cared for by no one. If Ms. Cruzan is not incapable of experiencing our care, it would be hellish to know that others were discussing how to get her to die. It would not, however, be hellish to know that others were—despite their frustration, anxiety, and sense of hopelessness—struggling to care for her as best they could.

Nancy Cruzan is not dying and therefore cannot simply be "allowed to die." A feeding tube is not prolonging her dying but sustaining her life. She is not a "vegetable," but a severely disabled human being. If we judge her life worthless, we may have difficulty refraining from making the same judgment about other human beings not in PVS. All this the Court has seen clearly and interjected into public discussion.

All this, of course, is speculation about what we cannot know. What we do know the Court has plainly stated: Nancy Cruzan is not dying and cannot therefore simply be "allowed to die." A feeding tube is not prolonging her dying but sustaining her life. She is not a "vegetable," but a severely disabled human being. If, adopting our perspective as competent adults, we judge her life worthless, we may have difficulty refraining from making the same judgment about other human beings not in persistent vegetative states. All this the Court has seen clearly and interjected into public discussion. One can only wish that the Missouri Court had been given an opportunity to speak sooner. But even now we should be grateful that it has done so.

Notes

1 Paul Ramsey, *The Patient as Person* (New Haven: Yale University Press, 1970), pp. 144ff.

2 *Ibid.*, pp. 161f.

3 *Ibid.*, p. 161.

4 Paul Ramsey, *Ethics at the Edges of Life* (New Haven: Yale University Press, 1978), p. 224.