priate 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 decisors 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 devices[3] 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 opinion each of which suggested upholding the decision of the trial court. Judge Higgins provided a comprehensive survey of cases from other jurisdiction in support of the constitutional principle involved in the right to refuse med-

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ical treatment, while Judge Blackmar relied on principles of common law and equity, rather than the Constitution.

Judge Welliver agreed with Judge Blackmar and Judge Higgins, but stated that on his view, the majority implicitly held the Missouri Living Will Statute constitutional, although the statute admittedly did not apply in this case. In Judge Welliver's opinion, the list of procedures which the Missouri statute did not define as "death-prolonging," and which therefore could not be discontinued under the statute, was so extensive as to constitute a fraud on those who believed they had a right to die under the statute.

Less than a month before the Missouri Supreme Court rendered its decision in the *Cruzan* case, the United States District Court of Rhode Island confronted a situation that was strikingly similar to Nancy Cruzan's. In 1986, Marcia Gray, a healthy forty-five year old woman, had a stroke that left her in a persistent vegetative state. Shortly afterward, before it was clear that she would not recover, a feeding tube was implanted to provide her with nutrition and hydration. Subsequently, however, her husband, children, and other family members requested that feeding be stopped and that she be allowed to die. The hospital denied the request, and the Gray family went to court. Having been appointed his wife's guardian under Rhode Island law, Mr. Gray sought a declaratory judgment from the federal court establishing his right to refuse treatment on behalf of his wife.

Like the court in Missouri, the Rhode Island District Court found that there was a right to make medical decisions regarding one's body, based on both the common law and the Constitution, but that the right was not absolute. The Court defined the competing governmental interests as the preservation of life, the prevention of suicide, the protection of innocent third parties, and the integrity of medical ethics. Nonetheless, the Court found that the competing state interests were not sufficient in this case to override the patient's right to determine the course of her care. In particular, the Court rejected the argument that the state's interest in preserving life should control. That interest is strongest when the state seeks to protect someone "who may potentially be the subject of abuse."[9] Since the family in this case was trying to ensure that Marcia Gray's own wishes be carried out, she obviously did not need "protection" from the state that would counteract her wishes. The Court concluded as follows:

> The duty of the State to preserve life must encompass a recognition of an individual's right to avoid circumstances in which the individual himself would feel that efforts to sustain life would demean or degrade his humanity. It is antithetical to our scheme of ordered liberty and to our respect for the autonomy of the individual for the State to make decisions regarding the individual's quality of life. It is for the patient to decide such issues. Our role is limited to ensuring that a refusal of treatment does not violate legal norms.[10]

For many people who are not regularly involved with the law, it must be somewhat astonishing that two courts could look at essentially the same facts, at almost the same time, consider the same body of precedent, and come to diametrically opposed conclusions. Either there is some difference between these cases that is not apparent on the surface, or one of the courts is wrong and the other is correct.

It is possible for two courts to apply the same law and reach different results if the factual situations to which the law is applied differ. For example, Missouri might have found that Nancy had a constitutional right to die, but that the evidence was inadequate that she would choose to terminate her life and that in this instance her right was not triggered.[11] That was not, however, the holding of the Court. Instead, the finding was that at least when the patient was incompetent and a guardian was making the application to terminate treatment, the state's interest in life supersedes the interest of the patient to refuse medical treatment. The federal court in Rhode Island, on the other hand, determined that the state's interest in preserving life did not outweigh Marcia Gray's constitutional right to determine what medical treatment to accept or reject.

Both courts relied on *Roe v. Wade* for the principle that the individual has a right of bodily integrity, and both relied on *Bowers v. Hardwick*[12] for the proposition that the right to privacy is not unlimited. And yet, the Rhode Island court found that the right at issue was squarely within the privacy right protected by *Roe* and other decisions regarding bodily integrity, and very different from the question of consensual sodomy at issue in *Bowers*; while the Missouri court held that whether or not the right is protected, it is outweighed by the interest of the state. It seems to me that the Missouri court clearly is wrong in its reading of the law.

The first question is whether the right at issue—the right to refuse medical treatment—comes within those rights of bodily integrity protected by the line of cases that follows *Roe*. The Missouri Supreme Court stated that it was not convinced that the right to privacy extended to the freedom to refuse life-sustaining medical care, but it is hard to identify where the line might exist between that right and the freedom to terminate a pregnancy, the right at issue in *Roe*. If a person has a right to make decisions about the use of birth control, if a woman has a right to terminate a pregnancy, if an accused criminal has a right to refuse surgery to remove a bullet that might be important evidence against him,[13] then surely an individual has the right to choose whether or not to accept certain medical treatment. All of which is not to say that the state may not have an interest in the decision, but that comes into the second part of the equation—whether the interest of the state is sufficient to outweigh the individual's interest in bodily integrity—and should not be a factor in the initial decision as to whether the right exists.

If a person has the right to make decisions about the use of birth control, if a woman has a right to terminate a pregnancy, if an accused criminal has a right to refuse surgery to remove a bullet that might be evidence against him, then surely an individual has the right to choose whether or not to accept certain medical treatment.

Assuming then that the right to refuse treatment comes within the right to privacy, which point the *Cruzan* court accepted for the sake of argument, the second, and perhaps more difficult, question is whether the state has sufficient interest in the decision to override the patient's choice. According to the Supreme Court in *Roe*, the interest of the state must be "compelling" to counteract the interest of a woman in making the decision whether to continue a pregnancy. In the abortion context, the state interest has been deemed to become more compelling as the pregnancy pro-

gresses. In the second trimester, the state may regulate to protect the health of the mother, and in the third trimester, it may regulate based on its interest in the potential life of the fetus, even to the point where the state may proscribe abortion except where it is necessary to preserve the mother's life or health.

The Missouri Supreme Court in *Cruzan* felt there were two separate interests in life at stake. There was the interest in sustaining the life of the individual patient and the interest in the sanctity of life itself. To demonstrate Missouri's concern for life, the Court cited the recent Missouri abortion statute, which was struck down by the federal district court and the court of appeals and is now before the United States Supreme Court for review.[14] In addition, the Court determined that the exception from the Missouri Living Will Statute, which does not define death-prolonging procedure as the provision of food and water, was evidence of the state's concern for life at its end rather than at its beginning.

What the Court balanced was not the state's interest in life against Nancy Cruzan's right to make decisions regarding her own medical care (or her parents' right to make those decisions on her behalf), but instead considered the state's interest against the specific treatment at issue and determined that the treatment was not sufficiently invasive to be a burden to Nancy. If, at some time in the future, Nancy's feeding tube needed replacement, a procedure admittedly more invasive than the continued use of an existing feeding tube, would the Court therefore come to a different conclusion?

Is the issue in this case not a question of law—that is, the **legal** significance of the state's interest in the patient's life as opposed to the patient's right of self-determination—but a question of fact having to do with the intrusiveness of the procedure at issue?

Is the issue in this case not a question of law—that is, the **legal** significance of the state's interest in the patient's life as opposed to the patient's right of self-determination—but a question of fact having to do with the intrusiveness of the procedure at issue? And if that is the case, wouldn't it then be possible for a state to require in every case in which a woman wanted to have an abortion a weighing of her reasons—that is, the intrusiveness of the pregnancy—to determine whether that outweighed the interest of the state in the fetus? But that is clearly not what the Supreme Court held in *Roe*. Even in the third trimester, where the state does have a compelling interest in the life of the fetus, it may not proscribe abortion where the woman's life or health is at risk, and the Court does not restrict that exception to severe risks to her health or offer the state the possibility of weighing her health against the life of the fetus.[15]

In *Gray*, the federal district court held that Marcia Gray's right to determine her own medical care, whether or not the specific treatment at issue was invasive or painful, meant that the state could not assert an abstract interest in life that would prevent her from making those decisions herself. In *Cruzan* the court seemed more concerned with possible ramifications of the decision, such as whether it could be used in the future to allow the termination of a patient's life without her consent, than with the issue of Nancy Cruzan's right of autonomy.

If there is doubt about the expressions of intent made by the patient when competent, there is some ground for erring on the side of preserving life. If there is reason to doubt the motives of the relatives seeking a termination of treatment on behalf of the patient, the court should certainly be careful to determine what the patient herself would want in the circumstances. But once it has been determined that the patient unequivocally has expressed a desire not to continue to live in a persistent vegetative state, it seems clear that the right to privacy requires that the state defer to the individual's wishes.

By simply asserting an interest in life that outweighs the patient's right to autonomy, the Missouri Supreme Court fails to give sufficient weight to an individual's right to determine her own fate.

By simply asserting an interest in life that outweighs the patient's right to autonomy, the Missouri Supreme Court has failed to give the right of an individual in determining her own fate the weight it should have, based on previous decisions of the United States Supreme Court. It is clear that the state interest must be compelling to succeed, and that the right it should be balanced against is the right to individual autonomy, not the intrusiveness of the particular medical procedure at issue. By rejecting the Cruzans' application, the Court is not indicating only its regard for life but its disregard of Nancy's right to control her life.

[1] *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

[2] *Winston v. Lee*, 470 U.S. 753 (1985).

[3] *Griswold v. Connecticut*, 381 U.S. 479 (1965).

[4] *Roe v. Wade*, 410 U.S. 113 (1973).

[5] *Rochin v. California*, 342 U.S. 165 (1952).

[6] *Cruzan v. Harmon*, 760 S.W.2d 408, 416 (Mo. 1988) (en banc)

[7] *Cruzan*, 760 S.W.2d at 417.

[8] Id. at 424.

[9] *Gray v. Romeo*, 697 F.Supp. 580, 589 (D.R.I. 1988).

[10] *Gray*, 697 F.Supp. at 588 (quoting *Brophy v. New England Sinai Hosp., Inc.*, 398 Mass. 417, 434, 497 N.E.2d 626, 635 (1986).

[11] *Westchester County Medical Center ex rel O'Connor*, 72 N.Y.2d 517, 531 N.E.2d 607, 534 N.Y.S.2d 886 (1988).

[12] 478 U.S. 186 (1986).

[13] *Winston v. Lee*, 470 U.S. 753 (1985).

[14] *Webster v. Reproductive Health Services*, 851 F.2d 1071 (8th Cir. 1988), *appeal granted*, _____ U.S. _____, 109 S.Ct. 780 (1989).

[15] This point is made even clearer in *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986), where the question of state restriction of third trimester abortions was squarely before the court.