No. 88-1503

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

NANCY BETH CRUZAN, by her parents and co-guardians, LESTER and JOYCE CRUZAN,
Petitioners,
v.

DIRECTOR OF MISSOURI DEPARTMENT OF HEALTH, *et al.*,
Respondents,
v.

THAD C. MCCANSE, Guardian *ad litem*,
Respondent.

On Writ of Certiorari to the Supreme Court of Missouri

BRIEF OF THE UNITED STATES CATHOLIC CONFERENCE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS*

All active Catholic Bishops in the United States are members of the United States Catholic Conference ("Conference"), a nonprofit corporation organized under the laws of the District of Columbia. The Conference advocates and promotes the pastoral teachings of the Bishops in such diverse areas as education, family life, health care, social welfare, immigration, civil rights, criminal justice, and the economy. When permitted by Court rules and practice, the Conference files briefs as *amicus*

curiae in litigation of importance to the Catholic Church and its people throughout the United States. Of the values that the Conference seeks to promote through its participation in litigation, respect for human life is of the highest importance.

As pastors who have shared in the suffering of families and friends facing illness, handicap and death, the Bishops are gravely concerned over recent social and legal trends regarding the withdrawal of life-sustaining care and treatment from nonterminal patients. Procedures for providing nutrition and hydration to unconscious or otherwise disabled patients are a central focus of these disturbing trends. The Conference's considered judgment regarding such procedures is that "the law should establish a strong presumption in favor of their use," because "food and water are necessities of life for all human beings, and can generally be provided without the risks and burdens of more aggressive means for sustaining life." [1] Recognizing that "negative judgments about the 'quality of life' of unconscious or otherwise disabled patients have led some in our society to propose withholding nourishment precisely in order to end these patients' lives," the Bishops urge that society "take special care to protect against such discrimination." [2]

In its concern for the inherent dignity of human life, the Catholic Church firmly opposes euthanasia. Euthanasia is defined as "an action or an omission which of itself or by intention causes death, in order that all suffering may in this way be eliminated." [3] The Church locates euthanasia's terms of reference "in the intention

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[1] NCCB Committee for Pro-Life Activities, *Statement on the Uniform Rights of the Terminally Ill Act*, in 16 *Origins* 223 (Sept. 4, 1986).

[2] *Id.*

[3] Sacred Congregation for the Doctrine of the Faith, *Declaration on Euthanasia*, in 10 *Origins* 155 (Aug. 14, 1980).

of the will and in the methods used." [4] Catholic teaching recognizes that each individual has an obligation to preserve his or her own life and health, and therefore an obligation to consent to ordinary means of sustaining life. Others have an obligation to help provide such means, so that their denial is "equivalent to euthanasia." [5] The Church also recognizes that a patient may legitimately refuse useless or excessively burdensome means for sustaining life, but does not endorse the view that life itself may be categorized as useless because a person lacks various mental and physical abilities.[6]

The Conference also looks with particular concern upon some recent proposals that suggest allowing the states to determine who will be provided life-sustaining treatment based on the cost of the care involved. Their concern over this threat to the poor and disadvantaged is intensified by recent cases in which judges and attorneys have stated that withdrawal of tube feeding is a form of intentional killing. have nevertheless endorsed such withdrawal and have suggested that active euthanasia through lethal injection should also be authorized as a more "humane" solution.[7]

The Conference encourages lawmakers to "place the patient's right to determine medical care within the con-

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[4] *Id.*

[5] U.S. Catholic Conference, *Ethical and Religious Directives for Catholic Health Facilities* 7, no. 28 (1975).

[6] *Document of the Holy See for the International Year of Disabled Persons* (Mar. 4, 1981), in 10 *Origins* 747-48 (May 7, 1981); U.S. Catholic Conference, *Pastoral Statement of the United States Catholic Bishops on Handicapped People* (Nov. 15, 1978); Pope John Paul II, Address to the Eleventh European Congress of Perinatal Medicine, in *L'Osservatore Romano* no. 18 (English ed. May 2, 1988).

[7] *See, e.g., Bouvia v. Superior Court,* 225 Cal.Rptr. 297, 307-308 (Cal. Ct. App. 1986) (Compton, J., concurring) and "Complaint for Declaratory Relief in *Rodas* Case," in 2 *Issues in Law & Medicine* 499 (May 1987).

text of other factors which limit the exercise of that right," and has warned that "statements which define the right to refuse treatment in terms of the patient's constitutional rights (*e.g.*, a 'right of privacy') tend to inhibit the careful balancing of all the interests that should be considered in such cases." [8] Such interests include the preservation of life, the rights of the family, the protection of children, the prevention of discrimination, the ethical integrity of the medical profession, and the moral fabric of our society.

All parties have consented to the appearance of this *amicus*.

SUMMARY OF ARGUMENT

The petition of Nancy Cruzan asks of this Court something that has never before been requested: that the Court find in the Due Process Clause of the fourteenth amendment a principle of personal liberty that would deprive her of life. This concept, as proposed by petitioners, would set personal autonomy and rights of self-determination above all other interests and concerns, negating even any remote possibility that she will be able to exercise her rights in the future. If granted, this petition would place in the Constitution the idea that personal liberty includes the right to choose death if it should appear preferable to life.

Whether they believe that food and fluids should be provided to sustain her life indefinitely, that she should be allowed to die through their denial, or that this case is simply too difficult to call, people know the name Nancy Cruzan. It is difficult not to feel empathy for Nancy Cruzan and her family. Since the day this Court granted a writ of certiorari in this case, and even before, the national consciousness has been aware that Nancy Cruzan's fate affects us all.

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[8] NCCB Committee for Pro-Life Activities, *Guidelines for Legislation on Life-Sustaining Treatment*, in 14 *Origins* 527 (Jan. 24, 1985).

In evaluating the petition, however, this Court is construing a Constitution according to standards evolved over two centuries of history, tradition, and experience. Whatever the compassion of her cause, Nancy Cruzan's case does not embody the kind of proposed right that is consistent with our shared national experience. The very right proposed as a matter of personal autonomy—unlimited, exclusive self-determination—has never been a part of the foundation of our democratic system. This Court long ago rejected such a proposition as antithetical to individual freedom within an ordered society. *Jacobson v. Massachusetts*, 197 U.S. 11 (1905). In the case of *Bowers v. Hardwick*, 478 U.S. 186, 194 (1986), this Court summarized over a half century of constitutional jurisprudence and noted that only those rights found by our history and tradition to be necessary to a free society have been incorporated in the concept of liberty under the fourteenth amendment. Unrestricted personal autonomy is not such a right.

Neither is the more specific claim being made in this case found anywhere in our nation's "historic practices." *Michael H. v. Gerald D.*, 109 S.Ct. 2333, 2342 (1989) (plurality). Petitioners claim that Nancy Cruzan is being forced to live a life that she would prefer to terminate by withdrawal of nutrition and hydration. For purposes of constitutional analysis, this argument is analogous to the claim made in "wrongful life" cases by children who would prefer never having been born to living a life with physical or mental impairments. That such claims have been universally rejected is indicative of a tradition that does not protect the "right" being asserted on behalf of Nancy Cruzan.

Just as personal autonomy was never the principle underlying constitutional liberty, it was not the basis for the common law's development of the doctrine of informed consent in medical malpractice cases. Informed consent arose to protect not patients' autonomy but their lives and health. Indeed, whenever tension has arisen between a

person's right to consent and his or her physical well-being, such as in a medical emergency, consent has given way. When applied in accord with its original intent, the common law properly balances the interests at stake in termination of treatment cases. Constitutionalization of the asserted right to make medical decisions embraces a personal liberty that would override all other interests and rights implicated in these situations. The common law would be supplanted, and the ability of legislatures to enact and courts to construe careful public policy would be destroyed. This result would be both unfortunate and contrary to history and tradition. Therefore the judgment of the Missouri Supreme Court that rejected a constitutional right in this case should be affirmed.

ARGUMENT

I. THE DECISION TO TERMINATE A LIFE IS NOT ENCOMPASSED BY THE CONSTITUTIONAL RIGHT OF PRIVACY.

Expatriation is unconstitutional under the eighth amendment in part because "the expatriate has lost the right to have rights." *Trop v. Dulles*, 356 U.S. 86, 102 (1958). "Yet, demonstrably, expatriation is not 'a fate worse than death.'" *Furman v. Georgia*, 408 U.S. 238, 289 (1972) (Brennan, J., concurring) (quoting *Trop, supra*, at 125 (Frankfurter, J., dissenting)). Justice Brennan continues:

> Although death, like expatriation, destroys the individual's "political existence" and his "status in organized society," it does more, for, unlike expatriation, death also destroys "[h]is very existence." There is, too, at least the possibility that the expatriate will in the future regain "the right to have rights." Death forecloses even that possibility.

408 U.S. at 289-90. Nancy Cruzan's death will terminate her "right to have rights." It is ironic, therefore, that petitioners' request to terminate Nancy Cruzan's nutri-

tion and hydration, and thus her life, is being advanced in the name of her rights.[9]

This Court is being asked to find in the fourteenth amendment a constitutional right truly unique in its "finality and enormity"—a right "in a class by itself." 408 U.S. at 289 (Brennan, J., concurring). For Nancy Cruzan, life itself will be terminated if petitioners' constitutional argument succeeds. It is on the basis of *other* rights being claimed for her that this termination is sought. Those other rights are the right to be free of "unwarranted physical invasions," the right to "self-determination," and "notions of autonomy." Brief for Petitioners (Pet. Br.) at 18. Those rights too will be terminated for Nancy Cruzan if the Missouri Supreme Court decision is reversed.[10] It is appropriate then to determine whether the rights being asserted on Nancy Cruzan's behalf are of a type sufficient to impose on the State of Missouri a constitutional requirement to condone

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[9] Professor Laurence Tribe raises the question of whether a person in Nancy Cruzan's apparent condition can be considered to have rights at all. L. Tribe, *American Constitutional Law* 1368 n. 25 (2nd ed. 1988). Some, including the neurologist serving as expert witness for petitioners at trial, have proposed that patients with conditions such as coma or persistent vegetative state have no rights and should be excluded from legal personhood. Cranford & Smith, "Consciousness: The Most Critical Moral (Constitutional) Standard for Human Personhood," 13 *American Journal of Law & Medicine* 233 (1987). Such speculation is beyond the scope of this brief, the issue being whether the rights being claimed for Nancy Cruzan should be incorporated within the fourteenth amendment.

[10] This *amicus* has profound respect for the deep personal crisis affecting petitioners. The purpose of these arguments is not to say that petitioners want to terminate Nancy Cruzan's rights, nor that there is any malicious intent behind the very difficult path they have pursued in this case. It is however to illustrate, without euphemism, the wholly contradictory nature of their arguments. They quote from *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), enumerating liberties that Americans cherish. By approving their petition, this Court would enshrine among those basic freedoms a right that negates all others.

allowing someone to die who could live indefinitely if provided food and fluids. *Cruzan v. Harmon*, 760 S.W.2d 408, 412 (1988), *cert. granted*, 109 S.Ct. 3240 (1989) (No. 88-1503).

A. Only Those Rights Found By Our History And Tradition To Be Necessary To A Free Society Are Protected By The 14th Amendment.

Ours has always been a society that "strongly affirms the sanctity of life." *Furman v. Georgia*, 408 U.S. at 286 (Brennan, J., concurring). The fourteenth amendment guarantees this foundational value by denying to the states the power to "deprive any person of life, liberty, or property, without due process of law." Since the addition of those thirteen words to the Constitution, this Court has often struggled with the scope and meaning of the word "liberty." *Compare, e.g., Duncan v. Louisiana*, 391 U.S. 145 (1968) *with id.* at 162 (Black, J., concurring) *and id.* at 215 (Harlan, J., dissenting). Yet it is plain that "life" is necessary to the exercise of any other rights. Now this Court confronts a petition asking that Nancy Cruzan be allowed to die in the name of her own liberty. Pet. Br. at 17. This unique interpretation proposed for the fourteenth amendment stands in stark contrast to this Court's decisions defining the contours of protected liberties.

For the last century or more in constitutional adjudication, this Court has sought to demarcate those personal actions deserving constitutional protection, on the one hand, and the interest of the government, the competing interests of other persons, and the common good, on the other. Some personal interests have had to be subrogated to societal values in order for our free society to thrive or even survive. Others have received heightened protection under a body of case law which developed a theme of personal liberty and privacy. It has been a continuing search for the fundamental values worthy of constitutional protection.

In its early cases, the Court sought to apply faithfully the teaching of *Jacobson v. Massachusetts*, 197 U.S. 11, 26-27 (1905), that "liberty itself, the greatest of all rights, is not unrestricted license to act according to one's own will." In many instances, the Court has protected personal choices nowhere explicit in the Constitution—choices involving the education of children,[11] the selection of a spouse[12] and similar interests, both personal and communal.[13] Even in these instances the state retains regulatory authority sufficient to insure that individual choices be worked out in a balance respectful of all persons affected and the legitimate interests of society.[14]

The early debate on what became the privacy doctrine in this century occurred during the process of incorporation of federal rights to the states through the fourteenth amendment. In a seminal decision, *Palko v. Connecticut*, 302 U.S. 319 (1937), the Court articulated the standard necessary to sort those rights incorporated from those not. The incorporated rights were those found among the "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." *Id.* at 326. And only those rights "implicit in the concept of ordered liberty" were finally incorporated. *Id.* at 325. In his famous dissent in *Poe v. Ullman*, 367 U.S. 497, 542 (1961), Justice Harlan stated that the search for these fundamental constitutional values was intended to be a "rational process" that must reflect the "traditions of the country, not judges." Thus, he found that personal liberty was somewhat of a "continuum which, broadly

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[11] *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

[12] *Loving v. Virginia*, 388 U.S. 1 (1967).

[13] *Meyer v. Nebraska*, 262 U.S. at 399 and cases cited therein.

[14] *Loving*, *supra* note 12; *Meyer*, *supra* note 13; *Jacobson v. Massachusetts*, 197 U.S. at 26-27; *Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1944).

speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . ." *Id.* at 543. That language was endorsed by the Court in *Moore v. City of East Cleveland*, 431 U.S. 494, 501-502 (1977) (plurality opinion).

In *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986), the Court combined the *Palko* test and the test utilized by the plurality in *Moore*,[15] stressing that the specific claim in question had to be "deeply rooted in this Nation's history and tradition" or "implicit in the concept of ordered liberty" to survive fourteenth amendment analysis. 478 U.S. at 194. This mode of analysis for discerning those rights legitimately incorporated in the Due Process Clause of the fourteenth amendment was confirmed last Term in the case of *Michael H. v. Gerald D.*, 109 S.Ct. 2333 (1989).

B. The Claimed Right To Be Free Of A Wrongful Life Has Been Universally Rejected.

In *Michael H. v. Gerald D.*, both Justice Scalia for the plurality and Justice Brennan for the dissent emphasize the need to define precisely the right for which fourteenth amendment protection is claimed. 109 S.Ct. at 2344 n.6, 2351-55. Petitioners in this case focus on three claimed rights: avoidance of unwarranted bodily invasions,[16] self-

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[15] "Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition." *Moore*, 431 U.S. at 503 (footnote omitted).

[16] Although petitioners' first argument addresses "unwarranted bodily intrusions," what they mean by this is problematic. Pet. Br. at 17. Apparently they do not intend to remove Nancy Cruzan's gastrostomy tube, but only to cease most food and fluids, while administering anti-convulsive medication through the tube in order to reduce seizures during dehydration. Trial Transcript (TR.) at 490. Food and fluids, however, are presumably no more intrusive than medication.

determination, and personal autonomy.[17] Since none of these is sufficient to bring their claim within the constitutional definition of "liberty," this analysis could be greatly abbreviated. As instructed by this Court's debate in *Michael H.*, however, one must examine more closely the underlying substance of the claims being made on behalf of Nancy Cruzan.

This case was filed in 1987 on Nancy Cruzan's behalf. Pet. Br. at 9. Petitioners are seeking to vindicate what they see as her constitutional rights; they do not assert their own rights or rights of her siblings.[18] Indeed, at trial they repeatedly disavowed that the interests they serve are any other than Nancy Cruzan's. TR. at 437-38, 452, 520, 528. Therefore, it is necessary and appropriate to scrutinize closely Nancy Cruzan's cause of action.

Nancy Cruzan is not blaming the state or the hospital for placing her in her present condition.[19] She acknowl-

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[17] Petitioners also emphasize the importance of "family decision-making," a concept valued by this *amicus*. *See, e.g.*, Brief *Amicus Curiae* of the U.S. Catholic Conference in *Ohio v. Akron Center for Reproductive Health* and *Hodgson v. Minnesota*, Nos. 88-805, 88-1125, 88-1309 at 14-18. However, none of the cases relied upon by petitioners suggests that families have unrestricted authority to treat incompetent members as they please. Pet. Brf. at 23-4. The rights at stake in those cases, from *Meyer* to *Michael H.*, are markedly different. The integrity of the family has been both upheld and limited to protect individual family members. *Parham v. J.R.*, 442 U.S. 584 (1979); *Prince v. Massachusetts, supra.*

[18] This *amicus* brief does not address the issue of whether parents, guardians or other third parties have standing or capacity to either assert or waive the constitutional rights of children or incompetent persons. Even if they do, as petitioners argue (Pet. Brf. at 20-22), they still must state a claim upon which relief can be granted to the child or incompetent. Since, as argued herein, Nancy Cruzan does not have the *constitutional* rights being advanced, petitioners can assert no greater rights.

[19] The precise nature of her medical condition remains unclear. Petitioners assume she is in a "persistent vegetative state" but

edges that an automobile accident caused her injuries and that she (through her family) consented to insertion of the feeding tube in order to sustain her life. Pet. Br. at 2-3, 30-31. Her complaint is that the state has a duty to stop her nutrition and hydration at her family's request, and that the state has violated her constitutional rights by refusing to do so. Pet. Br. at 30-33. She says she is injured by the state's breach of its duty because she is being forced to live a life that she does not want to live. Pet. Br. at 8-9, 37-40. The remedy she seeks is Court-sanctioned termination of her food and fluids, resulting in her death. Pet. Br. at 5-6, 9.

As *Michael H.* instructs, the question now is whether the conduct of the state is a legal injury for which relief has traditionally been afforded "under the historic practices of our society, or whether on any other basis [citizens have] been accorded special protection" from such harm. 109 S.Ct. at 2342. "The protection need not take the form of an explicit constitutional provision or statutory guarantee, but it must at least exclude (all that is necessary to decide the present case) a societal tradition of enacting laws *denying* the interest." 109 S.Ct. at 2341 n.2 (emphasis and parentheses in original). Courts, reflecting societal traditions, have explicitly denied relief for the injury being claimed in this case. Therefore, Nancy Cruzan's effort to locate a right to end her life within the fourteenth amendment must fail.

An analogy to that series of cases known as "wrongful life" cases is particularly enlightening.[20] The first wrongful life case recorded in this country involved an illegiti-

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there is substantial medical opinion otherwise. *Compare* Pet. Br. at 2 *with* TR. at 748-64.

[20] The term "wrongful life" typically denominates a medical malpractice claim brought by parents on behalf of their physically impaired child whom they allege they would have aborted, or not conceived, if they had known the child would be born only to have to live with a disability.

mate son's claim that "[h]is adulterine birth has placed him under a permanent disability. He protest[ed] not only the act which caused him to be born but birth itself." *Zepeda v. Zepeda*, 190 N.E.2d 849, 857 (Ill. App. Ct. 1963), *cert. denied*, 379 U.S. 945 (1964). In rejecting the claim, the court noted that no state had ever allowed such a cause of action. The Illinois court was unwilling to create "a new tort: a cause of action for wrongful life." 190 N.E.2d at 851-52, 858. By 1988 enough courts had addressed this proposed theory of recovery that the Supreme Court of Colorado could reject it on the basis of a state by state survey. *Lininger by Lininger v. Eisenbaum*, 764 P.2d 1202, 1210 n.10 (Col. 1988).

In that case, Thomas Pierce Lininger, a child born blind, brought suit through his parents against several physicians claiming that:

> But for the physicians' alleged negligence, Pierce would have neither been burdened by the disadvantages of his impairment nor would he have experienced the benefits of life. He simply would not have existed.

764 P.2d at 1209. He did not allege that defendants caused his blindness, but only that they should have informed his mother of a genetic defect so she could have chosen to abort or not to conceive him. Noting "that from his perspective, it would have been better had he not been born at all" (764 P.2d at 1209), the court "agree[d] with the overwhelming majority of courts which have addressed the issue that a person's existence, however handicapped it may be, does not constitute a legally cognizable injury relative to non-existence." 764 P.2d at 1210 (footnote omitted).

In effect, the claim in the case at bar is that, from Nancy Cruzan's perspective, it would be better not to live at all than to continue in her present condition. She argues that the State of Missouri is forcing her to live a

wrongful life. This is precisely the claim of injury rejected by numerous courts because "life, however impaired and regardless of any attendant expenses, cannot rationally be said to be a detriment [] when measured against the alternative of [] not having existed at all." 764 P.2d at 1212; *see also id.* at 1210 n.10.[21] State legislatures addressing the issue have agreed with the courts, rejecting or limiting such a cause of action. 764 P.2d at 1208 n.9.[22]

Faced with the fact that such claims have met near universal rejection in courts and legislatures, the plaintiff in *Lininger* made an argument that parallels another of Nancy Cruzan's. Nancy Cruzan says she has a constitutional right to have her family make decisions for her and that right has been violated by the state. The Colorado court responded to the same argument this way:

> Even conceding that Pierce's parents were deprived of their right to make an informed decision regard-

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[21] The *Lininger* Court acknowledges that out of the dozens of courts rejecting wrongful life cases, three have recently adopted some form of action, "notwithstanding their apparent agreement that the child has suffered no cognizable injury." 764 P.2d at 1211. For purposes of this analysis, however, the question is not whether there has been some recent judicial modification of "historic practices of our society" (109 S.Ct. at 2842), but what those practices reveal: in this instance, they reveal that two of the three states in question—New Jersey and California—previously addressed wrongful life claims and rejected them. *Gleitman v. Cosgrove*, 227 A.2d 689 (N.J. 1967); *Stills v. Gratton*, 127 Cal. Rptr. 652 (Cal. Ct. App. 1976). The third state, Washington, which did not have a wrongful life case until 1983, has seen its reasoning emphatically rejected by later cases. *Compare Harbeson v. Parke-Davis, Inc.*, 656 P.2d 483 (Wash. 1983) *with Wilson v. Kuenzi*, 751 S.W.2d 741 (Mo. 1988), *cert. denied*, 109 S.Ct. 229 (1988); *Siemieniec v. Lutheran General Hospital*, 512 N.E.2d 691, 697-700 (Ill. 1987); *Azzolino v. Dingfelder*, 337 S.E.2d 528 (N.C. 1985), *cert. denied*, 479 U.S. 835 (1986).

[22] Footnote 9 of the *Lininger* opinion principally addresses "wrongful birth," a claim different from "wrongful life" and belonging to the parents (who make no claim here). 764 P.2d at 1204.

> ing his conception, the sole consequence of that deprivation was that Pierce was born.
>
> * * *
>
> Pierce's characterization of his injury does not change the nature of the detriment he claims to have suffered: namely, that he was born impaired instead of not being born.

764 P.2d at 1209. Neither does Nancy Cruzan's characterization change the true nature of her claim, *i.e.*, that she lives impaired instead of not being alive.

It is apparent then that this country has never recognized the specific type of legal injury being offered up to this Court for constitutional protection by Nancy Cruzan. What was said in *Michael H.* can be echoed here: "This is not the stuff of which fundamental rights qualifying as liberty interests are made." 109 S.Ct. at 2344 (footnote omitted). Even if the claimed right is defined in broader terms, such as "autonomy" or "self-determination," fourteenth amendment protection is unavailable.

C. The Concept Of Complete Personal Autonomy Is Antithetical To Our Constitutional Guarantees Of Ordered Liberty.

Historically, it was always understood that liberty to engage in certain personal actions was not license. In *Jacobson v. Massachusetts*, Justice Harlan explained:

> [T]he liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members. *Society based on the rule that each one is a law unto himself would soon be confronted with disorder and anarchy.*

197 U.S. at 26 (emphasis added). It is no coincidence that the word "autonomy" comes from the Greek words

autos, meaning self, and *nomos,* meaning law. J. Childress & J. Macquarrie, *Westminster Dictionary of Christian Ethics* 51 (1986). Literally then "autonomos" means: a law unto oneself. In terms of constitutional liberty, autonomy in the sense of unlimited self-determination is a concept long ago rejected by this Court as incompatible with a free society. Indeed, limitations on individual exercises of liberty are necessary to the very preservation of true freedom. 197 U.S. at 26.

In his concurring opinion in *Roe v. Wade* and *Doe v. Bolton,* 410 U.S. 179 (1973), Justice Douglas discussed the nature of "liberty" as including "*autonomous control over the development and expression of one's intellect, interests, tastes, and personality.*" 410 U.S. at 211 (emphasis in original). This right, the Justice said, is "absolute, permitting of no exceptions." *Id.* No other rights encompassed by his notion of liberty, including the right of privacy, were denominated autonomous, and no other Justice spoke of autonomy in relation to personal liberty or privacy in those first abortion cases. 410 U.S. at 223. Unfortunately, in *Thornburgh v. Amer. Coll. of Obstetricians and Gynecologists,* a bare majority employed "autonomy" to include a woman's decision to abort her child. 476 U.S. 747, 772 (1986). By so doing, the Court has infected the principle of liberty under the Due Process Clause of the fourteenth amendment with an impediment that threatens the right to privacy itself.

> Privacy reduced to its extreme is isolation, one of the conditions conducive to the success of totalitarian movements. It is the intention of free states to recognize and protect an area of privacy for the citizen but not to reduce that privacy to isolation. Recognizing the sociality of man as natural, states must recognize also that the affirmation of those rights the exercise of which is essential to the fundamental integrity of the person can only be accomplished in community. Alone the individual is naked and powerless, and the privacy he possesses becomes empty

> for lack of content, for a person cannot give content and meaning to these protected rights except in the shared living of affirmed values.

S. Jordan, *Decision Making for Incompetent Persons* 132-33 (1985). Unrestricted autonomy is "privacy reduced to its extreme." Each person becomes "a law unto himself," undermining the shared values necessary to the preservation of ordered liberty.

In *American Constitutional Law*, Professor Tribe speaks to the question of self-determination in relation to cases such as this:

> A right to determine when and how to die would have to rest on constitutional principles of privacy and personhood or on broad, perhaps paradoxical, conceptions of self-determination.
>
> Although these notions have not taken hold in the courts, the judiciary's silence regarding such constitutional principles probably reflects a concern that, once recognized, rights to die might be uncontainable and might prove susceptible to grave abuse, more than it suggests that courts cannot be persuaded that self-determination and personhood may include a right to dictate the circumstances under which life is to be ended. In any event, whatever the reason for the absence in the courts of expansive notions about self-determination, the resulting deference to legislatures may prove wise in light of the complex character of the rights at stake and the significant potential that, without careful statutory guidelines and gradually evolved procedural controls, legalizing euthanasia, rather than respecting people, may endanger personhood.

L. Tribe, *American Constitution Law* 1370 (2nd ed. 1988) (footnote omitted).

The petition of Nancy Cruzan asks of this Court something that has never before been requested. If granted, it would place in the Due Process Clause of the fourteenth amendment the idea that personal liberty includes

the right to choose death should it appear preferable to life. In construing the Constitution by reference to this nation's history and tradition, this Court should find that such a right is not entitled to constitutional protection.

II. PROPERLY APPLIED, THE COMMON LAW IS SUFFICIENT TO PROTECT ALL INTERESTS IMPLICATED IN TERMINATION OF TREATMENT.

In termination of treatment cases, courts routinely rely upon the common law doctrine of informed consent to analyze requests to withdraw or withhold medical treatment or food and water.[23] *See, e.g., Bouvia v. Superior Court*, 225 Cal. Rptr. 297 (Cal. Ct. App. 1986); *Brophy v. New Eng. Sinai Hosp.*, 497 N.E.2d 626 (Mass. 1986); *In re Quinlan*, 355 A.2d 647 (N.J. 1976); *In re O'Connor*, 534 N.Y.2d 886 (N.Y. 1988). Although courts sometimes frame the doctrine as if it served patient autonomy, "informed consent" actually reflects a tradition of protecting patients' lives and health from choices made exclusively by physicians. In more recent times, in termination of treatment cases, this doctrine has sometimes been improperly severed from its common law roots.

The original doctrine—developed consistently over a lengthy period of time—preserved individuals' legitimate freedoms to determine the course of their medical treatment without disregarding the coexisting interests of others, including the family, the medical profession, and the community. Contrary to some recent applications, it stopped short of recognizing absolute bodily autonomy on the part of the patient. To constitutionalize this area of law, as proposed by petitioners, would absolutize "bodily autonomy," thereby displacing informed consent

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[23] Like the Missouri Supreme Court below, this *amicus* will not argue whether providing food and fluids to Nancy Cruzan through a gastrostomy tube is properly termed "treatment," "therapy," "care" or simply feeding. 760 S.W.2d at 423. The Conference's general position on nutrition and hydration is stated in the Interest of *Amicus, supra.*

as it has been understood and eradicating proper judicial and legislative functions.

A. Informed Consent Developed in Order to Protect People from Harm During Medical Procedures, Not To Extend Autonomy.

In the instant case, petitioners claim that the informed consent doctrine arose to protect autonomy. Pet. Br. at 18.[24] In fact the doctrine arose to protect *persons*, who are not completely autonomous individuals. *See* Argument I.C., *supra*. Petitioners have missed a crucial middle step necessary for proper analysis of the informed consent doctrine: patients' rights to informed consent are protected so that patients may employ those rights *to protect their health and life*. This principle is manifest in the common law, discussed below. Courts have confused recent social emphasis on absolute personal autonomy with the goal of informed consent, obliquely ignoring the full import of the doctrine.

Around the turn of this century, courts were requested to rule on the scope of the common law's protection of patients' interests in medical decisionmaking. Patients

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[24] Petitioners' casual informed consent argument fails to consider the full doctrine in its medical context. Pet. Br. at 18-20. Their discussion of self-determination and autonomy primarily employs non-medical cases, and relates to situations other than the doctor-patient relationship. *E.g., Rochin v. California*, 342 U.S. 165 (1952) (due process criminal evidentiary issue). Petitioners' reliance on the *Report of the President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, "Deciding to Forego Life-Sustaining Treatment"* (U.S. Govt. Printing Office 1983) fails to square with the fuller teaching of that Commission on "The Values Underlying Informed Consent," in *Making Health Care Decisions: the Ethical and Legal Implications of Informed Consent in the Patient-Practitioner Relationship*, vol. 1, chap. 2. In this latter document, the Commission concludes: "In situations where there is a choice of respecting the individual's decision or overriding it . . . overriding an individual decision is usually justified on the ground of promotion of well-being rather than of respect for self-choice." *Id.* at 48.

claimed that they had suffered injuries because their physicians failed to obtain consent or adequately to disclose relevant risks and dangers before carrying out a medical procedure.[25] In this series of cases, the courts found that the patient should be permitted beforehand to determine whether he or she wished to assume the risks and dangers attendant upon a particular medical procedure. This then is the foundation of the common law principle of informed consent:

> Ordinarily, where the patient is in full possession of all his mental faculties and in such psychological health as to be able to consult about his condition without the consultation itself being fraught with dangerous consequences to the patient's health, and where no emergency exists making it impracticable to confer with him, it is manifest that his consent should be a prerequisite to a surgical operation.

Pratt v. Davis, 79 N.E. 562, 564 (Ill. 1906).

Typically, since plaintiffs sought damages for the torts of negligence (in cases of uninformed consent) or battery (in cases where no consent was obtained), they were required to prove all the elements of a tort, *i.e.*, that the defendant, through act or omission, proximately or intentionally caused an injury to plaintiff, which resulted in damages. *See Prosser and Keeton on Torts* § 32 (W. Keeton ed. 1984). In negligence theory, the standard causation test is that the patient, or a reasonable person in the patient's position, would not have undergone the procedure with knowledge of the relevant risk or danger which caused the patient's injury. *See Natanson v. Kline*, 354 P.2d 670 (Kan. 1960); *Canterbury v. Spence*, 464

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[25] In the typical case, plaintiffs claimed that they suffered a physical injury from the medical transaction at issue. These were either new post-treatment injuries, or the loss of an organ or other body part, the removal of which was unconsented. *See, e.g., Mohr v. Williams*, 104 N.W. 12 (Minn. 1905) (hearing impairment); *Pratt v. Davis*, 79 N.E. 562 (Ill. 1906) (uterus removed without consent).

F.2d 772 (D.D.C.), *cert. denied*, 409 U.S. 1064 (1972). If the informed consent principle protected only "bodily autonomy," courts would not have required plaintiffs to show either an injury or causation, but only unconsented-to touching. This would have been akin to strict or intentional liability, not negligence.[26]

That the informed consent doctrine is aimed at the preservation of bodily health, and not patient autonomy, is also clear from its exceptions. When the application of the doctrine does not serve the goal of preserving life and health, it gives way to exceptions that will. These are generally two: (1) when there is an emergency and immediate remedial treatment must be undertaken to preserve the patient's life or health,[27] and (2) when it is apparent that full disclosure regarding the proposed treatment or procedure will only harm the patient's health.[28]

A related development occurred parallel to the growth of the informed consent doctrine—recognition of a state's right to regulate the medical profession for the health

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[26] In cases involving the unauthorized removal of a body part, courts have demonstrated particularly clearly that the purpose of requiring informed consent was *preservation* of bodily wholeness, relying upon a presumption that *"every physical endowment, function and capacity is of importance in the life of every man and woman*, and that occasion will arise for the exercise of each and all of them" *R. Co. v. Hill*, 9 So. 722, 724 (1903) (emphasis added). And where plaintiffs suffered a new post-treatment injury, the harms are consistently described in terms of hindrance of the patient's bodily functioning or risks to continued life. *Schloendorff v. Soc. of N.Y. Hosp.*, 105 N.E. 92 (N.Y. 1914) (post-operative gangrene bringing pain and amputation); *Bakewell v. Kahle*, 232 P.2d 127 (Mont. 1951) (post-procedure impairment in walking, vision, digestion and partial paralysis).

[27] *Canterbury v. Spence*, 464 F.2d at 788-89; *Pratt v. Davis*, 79 N.E. at 564; *Schloendorff v. Soc. of N.Y. Hosp., supra*, note 26.

[28] *Canterbury v. Spence*, 464 F.2d at 788-89; *Pratt v. Davis*, 79 N.E. at 564.

and welfare of its citizens. *Dent v. West Virginia*, 129 U.S. 114 (1889). State regulation gave powerful support to existing common law's efforts to protect patients from harm by medical personnel:

> The power of the state to provide for the general welfare of its people authorizes it to prescribe all such regulations as in its judgment will secure or tend to secure them against the consequences of ignorance and incapacity, as well as of deception and fraud.

129 U.S. at 122; *see also, Semler v. Oregon State Board of Dental Examiners*, 294 U.S. 608, 611 (1935) ("The state may thus afford protection against ignorance, incapacity and imposition."). This right and tradition has been preserved to the present day. Buttressing common law's authentic informed consent doctrine, state regulation helps maintain a proper balance of the interests at stake.

B. Using Common Law Concepts, Courts Have Properly Balanced The Interests At Stake.

In both *In re Eichner*, 438 N.Y.S.2d 266 (N.Y. 1981) and *In re Storar*, 438 N.Y.S.2d 266 (N.Y. 1981), the New York Court of Appeals demonstrated the wisdom of relying on the common law in medical decisionmaking cases. These two termination of treatment cases illustrate how the common law properly considers interested parties' claims in evaluating an asserted right to withdraw or withhold medical treatment. Numerous interests —including the state's own interests and the interests of the practice of medicine—were accorded real weight in the balance with the patient's asserted interest in withdrawing treatment. Family members were intimately involved not only as representatives or witnesses, but also as persons worthy of consideration in their own right. The results varied based closely upon the unique facts of the patients' situations.

In *Eichner*, the New York Court of Appeals held that Brother Joseph Fox's right to terminate his respirator was grounded in the common law.[29] The court first considered the traditional informed consent principle as announced in the *Schloendorff* case, then turned its attention to weighing coexisting societal interests. At stake were the state's interests in preserving life, the common good of the community, and doctors' obligations to provide medical care. 438 N.Y.S.2d at 273. The court further noted that: "In other cases, the state may be able to assert additional interests, such as, prevention of suicide, or, perhaps, protection of minor children or dependents. These concerns are not applicable here." 438 N.Y.S.2d at 273 n.6. After balancing all relevant concerns unaffected by inapplicable constitutional precepts, the court allowed withdrawal of the respirator.

In *Storar*, regarding continuing blood transfusions for a 52-year-old man with the mental age of an 18-month-old child, the same court relied upon the common law and recognized the state's interests as *parens patriae* in protecting the life and health of dependents in grave medical circumstances. Although John Storar was probably suffering from terminal cancer, and the blood transfusions at issue could not cure it, the court found that "they could eliminate the risk of death from another terminal cause." 438 N.Y.S.2d at 275. Also, the evidence showed that the transfusions did not cause excessive pain and could maintain him at his mental and physical norm. 438 N.Y.S.2d at 275-76. Having been incompetent his entire life, he had never expressed a desire to terminate treatment in such circumstances. The court found that society's interest in preserving life could outweigh the medical decision made by his mother on

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[29] The court held also that there was no need to reach the constitutional question since the "relief granted to the petitioner, Eichner, is adequately supported by common law principles." 438 N.Y.S.2d at 273.

his behalf: "[A] court should not in the circumstances of this case allow an incompetent patient to bleed to death because someone, even someone as close as a parent or sibling, feels that this is best for one with an incurable disease." 438 N.Y.S.2d at 275-76.

Eichner and *Storar* show the kind of balanced consideration of all views, concerns, and interests possible under the common law standard, when applied with its primary intention of assessing the consequences of proposed medical treatment for the patient's well-being. The goals framed by Nancy Cruzan's representatives center not upon the impact of artificial feeding on her well-being, but rather upon a preference for a certain quality of life. Pet. Br. at 38-40. *Eichner* and *Storar* instruct us that the common law informed consent principle would properly weigh that claim against other legitimate interests.

C. Constitutionalization of the Asserted Right Would Supplant the Common Law and Inhibit The Proper Balance of Interests.

This Court does not need to speculate about the likely effect of giving constitutional protection to a right to terminate medical treatment and/or food and water to end the lives of incompetent patients. The probable consequences are all too obvious by reference to the Court's existing abortion jurisprudence.

When this Court constitutionalized abortion in *Roe v. Wade*, it indicated that it did not *intend* an unlimited right.[30] But the cases following *Roe* illustrate the near

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[30] The Court held only that "a state criminal abortion statute . . . that excepts . . . only a life-saving procedure on behalf of the mother, without regard to pregnancy stage and without recognition of the other interests involved, is violative of the Due Process Clause of the Fourteenth Amendment." 410 U.S. at 164. Chief Justice Burger concurred in the result stating: "[T]he Court today rejects any claim that the Constitution requires abortions on demand." 410 U.S. at 208 (Burger, C.J., concurring). Justice Doug-

futility of trying to give proper balance to constitutional abortion.[31] *Roe*, for example, specifically reserved a number of issues including the rights of spouses, parents, and fathers. But *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976) and *Bellotti v. Baird*, 443 U.S. 622 (1979) indicated that, with very few exceptions, those persons had no rights regarding the "medical decision" made between a woman and her physician. Similarly, the acknowledged state regulatory interest in the medical profession disappeared in 1983 when it was conflated with the interest in protection of maternal health in *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 428-29 (1983). And in *Thornburgh*, a woman was further isolated in her privacy right, even from her physician, when the Court struck down, *inter alia*, Pennsylvania's informed consent and medical practice requirements for women considering abortions. Abortion rights were denominated "autonomous" and elevated far above all originally counterbalancing state interests. 476 U.S. at 772.

The policy implications of a constitutional "right" being made applicable in this case are illustrated in recent termination of treatment cases. Asserted state interests in protecting life, preventing suicide, protecting the integrity of the medical profession, and protecting the interests of third parties, have been all but vitiated in misplaced deference to a constitutionalized individual right

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las included the announced abortion right within a category of privacy interests subject to exceptions in favor of state interests. 410 U.S. at 215 (Douglas, J., concurring). For this reason, among others, the plurality in *Webster v. Reproductive Health Services* distinguished the cases. 109 S.Ct. 3040, 3058 (1989).

[31] The *Roe* majority explicitly announced that "it is not clear to us that the claim asserted by some *amici* that one has an unlimited right to do with one's body as one pleases bears a close relationship to the right of privacy . . . ." 410 U.S. at 154. In the ensuing years, however, the mother's right did become virtually absolute.

to withdraw or withhold treatment or food and water. In *Quinlan* the New Jersey Supreme Court held:

> The Court in *Griswold* found the unwritten constitutional right of privacy to exist in the penumbra of specific guarantees of the Bill of Rights. . . . 381 U.S. at 484 . . . . Presumably, this right is broad enough to encompass a person's decision to decline medical treatment under certain circumstances, in much the same way as it is broad enough to encompass a woman's decision to terminate pregnancy under certain circumstances. *Roe v. Wade.*

355 A.2d at 663.[32] No further constitutional analysis was attempted; instead, *Roe v. Wade* was taken as directing the result urged.

After some members of the American Medical Association adopted a position allowing withdrawal of food and fluids from unconscious patients, some courts pronounced the state's interest in supporting the integrity of the medical profession coextensive with the judgment of this private entity. *See, e.g., Bouvia v. Superior Court* at 303-304; *In re Farrell*, 529 A.2d 434, 446 (N.J. 1987). This equation overlooks two critical facts. First, the state has

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[32] Professor Tribe, speaking of the Karen Quinlan case, has said:

> Especially given the scholarly and legislative ferment over "living wills" whereby persons can make their own plans in advance rather than submitting to substituted judgment in cases like Karen Quinlan's, the *Quinlan* decision seems to have been a premature if reasonably thoughtful constitutionalization of a difficult and still fluid area. Viewed as a prod to intensive legislative consideration, the decision's guidelines seem defensible. *But by casting its holding in federal constitutional terms, the New Jersey court may have needlessly foreclosed more intelligent legislative solutions in that state.*

L. Tribe, *American Constitutional Law* 937 (1st ed. 1978) (footnotes omitted) (emphasis added).

It is noteworthy that most states addressing the question have sought to distinguish nutrition and hydration from those treatments to be routinely withdrawn under a "living will." Soc. for the Right to Die, *Handbook of Living Will Laws* 6-7 (1987).

traditionally exercised rights to regulate the medical profession, to maintain its integrity not merely at the level that physicians deem acceptable, *see* Argument II.A., *supra*. Second, AMA resolutions, including the one at issue, do not necessarily represent the majority opinion of physicians; excluded are those who are not AMA members and those members dissenting from the resolution.[33] Courts should not abdicate individualized decisions or preclude proper legislative action.

The state's interest in the protection of innocent third parties is the only one of the four interests usually identified in termination of treatment cases that has maintained some force; yet, the interest has been *de facto* reduced to the protection of vulnerable children who would be left behind if parents were to die as a result of the withdrawal or withholding of treatment or food and water. *Application of President and Directors of Georgetown College*, 331 F.2d 1000 (D.C. Cir.), *cert. denied*,

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[33] The AMA claims to represent about one half of currently practicing physicians. Brief of the American Medical Association, *et al.*, as *Amicus Curiae* in Support of Petitioners, at 1. In an empirical survey, 73% of physicians said they would continue intravenous fluids even for a dying comatose cancer patient to prevent dehydration. Micetich, Steinecker & Thomasma, "An Empirical Study of Physician Attitudes," in *By No Extraordinary Means: The Choice to Forgo Life-Sustaining Food and Water* 39-43 (J. Lynn ed. 1986). In another survey, most health professionals experienced in nutritional support disagreed with the statement that "starvation is an acceptable way of dying for the terminally ill patient." U.S. Congress, Office of Technology Assessment, *Life-Sustaining Technologies and the Elderly* at 311, OTA-BA-306 (July 1987). The National Federation of Catholic Physicians' Guilds approved a resolution affirming that food and water are "modalities of ordinary care owed to all patients." *NFCPG Newsletter* (Summer 1986) at 4. In 1984, the American Academy of Pediatrics and numerous other medical organizations helped to enact federal legislation encouraging states to treat the withdrawal of nutrition and hydration from handicapped infants, even those who are "chronically and irreversibly comatose," as a form of actionable child neglect. *See* 130 *Cong. Rec.* S8951-8956 (daily ed. June 29, 1984).

377 U.S. 978 (1964). The impact of the individual's death upon the larger family and the community is not invoked; the autonomy model is the guide. Also, when the spouse and the family agree or when all family members are mature and old enough to "participate" in the decision, this interest, too, is overcome. *In re Farrell*, 529 A.2d at 413-14.

The state's interest in preventing suicide has similarly been vitiated in recent "constitutional" termination of treatment jurisprudence. Individuals with non-terminal conditions who have clearly indicated a firm intent to withhold or withdraw treatment *for the purpose of ending an undesired life* have been permitted to do so. In *Bouvia v. Superior Court*, the majority denied it was legitimating a right to suicide although Ms. Bouvia apparently applied for the right to terminate her food and water because of her quality of life, resulting from cerebral palsy and arthritis and from disappointing marital and academic situations.[34] Applying constitutional principles, the court said:

> A desire to terminate one's life is probably the ultimate exercise of one's right to privacy. . . .

225 Cal. Rptr. at 306.

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[34] The trial court in *Bouvia* felt that a refusal of treatment accompanied by an intent to die was sufficient to establish suicide. 225 Cal. Reptr. at 304-305. Commentators have likewise characterized Ms. Bouvia's situation as suicide. Longmore, "Elizabeth Bouvia, Assisted Suicide and Social Prejudice," 3 *Issues in Law and Medicine* 141 (Fall 1987); Moore, " 'Two Steps Forward, One Step Back': An Analysis of New Jersey's Latest 'Right to Die' Decisions," 19 *Rutgers Law Journal* 955, 967 (Summer 1988). *See also* Ikuta, "Dying at the Right Time: A Critical Legal Theory Approach to Timing-of-Death Issues," 5 *Issues in Law and Medicine* 3, 20 (Summer 1989): "While it is clear that a court would authorize a hospital to stop patients from blowing their brains out with a gun or hanging themselves with their bedsheets, the court's guidance seems less useful in making more subtle distinctions between suicide and permissible decisions."

Emulating the development of abortion jurisprudence, many recent termination of treatment cases have thus elevated a constitutionalized "privacy right" to withdraw or withhold medical treatment or food and water to a level where other interests are not realistically considered. Should this Court constitutionalize such a "privacy right," it can be assured that such an unbalanced jurisprudence will follow. In pointing away from the Constitution for answers to the issues posed by these cases, Professor Tribe (*supra*, at 1367) effectively acknowledges that using notions of autonomy and self-determination to constitutionalize this area of law reaches toward a moral, if not a legal, morass:

> Under these circumstances, when the person is not threatened with imminent death or with a life of enduring pain, and when the medical procedure is routine and minimally invasive by any standard, the state's acquiescence in the person's choice to refuse treatment appears not substantially different from state sanction of suicide.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of Missouri should be affirmed.

Respectfully submitted,

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