

The Empty Search for an Imprimatur, or Delphic Oracles are in Short Supply

by Leslie Steven Rothenberg, J.D.

The two accompanying articles in this issue — Lee Dunn's retrospective analysis of the *Eichner*¹ and *Storar*² decision rendered by the New York Court of Appeals, and Father John Paris' recent analysis of the theological implications of decision making involving seriously ill newborns — raise a common theme of the need for sensitive and sensible decisions in the care of critically ill patients. Who is to be given the responsibility for making such decisions, and to what degree will a desire to obtain legal "protection" for such decisions determine the involvement of courts and lawyers with what at least begin as medical and familial issues? Furthermore, at a more fundamental level, can one realistically seek and find guidance of a helpful nature at the courthouse or statehouse?

For this writer — a lawyer who teaches young physicians a few ideas about the application of principles of medical ethics to clinical treatment decisions in acute hospital settings (often intensive care units and oncology services) and who also consults with physicians, nurses, patients and patients' families regularly about dilemmas they perceive arising out of the treatment of such patients — I find my personal answers to these questions to be relatively quick in coming. Having been involved in literally hundreds of such decision making scenarios, plus more than one's fair share of judicial proceedings concerning medical treatment questions, I have been led to the conclusion that the need to involve courts and judges in such matters represents for me a sad, personal sense of professional failure. I do everything possible (as an intended favor to both

patients and our local probate judges) to avoid judicial involvement with the medical treatment issues.

That a lawyer can respect judges and courts, and yet find them inappropriate to involve in the resolution of the complex medical, moral and ethical questions raised in these situations, deserves some explanation. My discussions with probate and juvenile court judges who have been confronted with

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medical treatment questions suggest that few trial court judges regard their role as necessarily positive, either for the patient or the legal process. They complain of lawyers forcing these issues to court as a means of meeting the perceived requirement (forgive the earthy, but very descriptive phrase) to "cover your ass" with a piece of paper from the court. Whether the posterior to be protected is that of the lawyer's client or that of the lawyer or even the health care provider is often unclear. The fact that such trial court decisions may be inherently incapable of providing such protection (immunity from subsequent civil or criminal liability) is more certain.

The judges with whom I have spoken or corresponded do not welcome such assignments and often resent them as inappropriate. These men and women, who are occasionally described as "professional decision makers," find themselves at sea with the issues involved, unaided by statutory or case precedents in most states, and often unprepared for the potential media interest that such cases may generate. Occasionally they speak of their concern that the legal proceedings may only add to the stress of the patient and the family without providing clear and meaningful resolution of disputes

over such treatment choices.

Some even go so far as to say that these are societal issues which can only be resolved by the state legislatures. In *Eichner/Storar*, the New York Court of Appeals issued a plea to the New York Legislature to set standards for future cases. Two other state supreme courts also proposed legislative action: the Florida Supreme Court in *Satz v. Perlmutter*³ and the Delaware Supreme Court in *Severns v. Wilmington Medical Center*.⁴ Yet, to my knowledge, none of the three legislatures in question has made any significant effort to come to grips with these perplexing questions, much less passed useful legislation.

Fearing attacks by pro-life groups or senior citizen lobbyists, depending on the positions taken, legislators shy away from what they see as controversial issues with no clear constituency backing new laws or changes in existing statutes. Law (the legal system as it is reflected in statutes) is often many decades behind advances in medical science and technology. Those thoughtful people who have contemplated legal initiatives fear that rapid change in medical treatment options may make statutory standards too inflexible. Their preference seems to be with informal decision making of the traditional kind, which in this context involves patients, physicians and (when appropriate) family members of patients. There are a few diehards, however, particularly in Massachusetts, who believe that wisdom cannot be found in any setting other than a probate courtroom.

For that reason, I particularly welcome Father Paris' thoughtful comments which were presented during the Society's recent conference on *Ethical and Legal Aspects of Health Care for Children* in Los Angeles.⁵ His remarks won instant praise from conference faculty and participants alike. His down-to-earth view of the struggles to

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treat patients humanely, juxtaposed with his discussion of the more lofty goals and morals by which we seek to be guided, struck this listener as containing the right balance needed to find a way of relating to these issues. Particularly striking is his condemnation of the "vitalist" school — those physicians, lawyers, and others who seek to save human tissue and organs at the cost of human personality and dignity. Reading nineteenth century penal statutes can make one a willing (or even reluctant) believer in the proposition that the death of a patient is an evil which must be avoided regardless of the suffering that such avoidance brings to the patient and those who sincerely love the patient.

Father Paris did not shrink from the incredibly worrisome issues involving decisions whether to treat or not treat newborns with congenital anomalies; patients in the persistent vegetative state (such as Karen Quinlan) whose care involves the question of nasogastric feeding tubes and whether their nonuse constitutes starvation and killing; and the resource allocation questions that we, as a society, continue to avoid for fear of their implications (e.g., Father Paris' description of the "six million dollar" patient in Illinois).

There is greater public perception of these dilemmas than at any time in the recent history of their technologically-created existence. The cases of the conjoined twins in Danville, Illinois, who were not fed at parental request, and the Down syndrome child in Leicester, England, whose physician was prosecuted for attempted murder because of his decision to withhold treatment, have gained international publicity. The Down baby in Bloomington, Indiana, who died seven days after birth following the decision of two Indiana courts not to overrule a physician-parent decision not to treat or feed the child also was the subject of national media attention for several days. Shortly after this case was publicized, President Reagan was reported to have issued an order to the Justice Department and to the Department of Health and Human Services that hospitals be reminded of federal requirements barring refusal of care to the handicapped and potential loss of federal funds to

hospitals which discriminated in their care of handicapped infants.

If only that statute, or any other law, provided guidance in making decisions about treating newborns with severe birth defects! Should a child born with no brain (anencephaly) and no chance for survival be given maximal treatment for the days or weeks that child will survive before certain death, regardless of cost? Should a Down child with a surgically treatable defect

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go untreated and die because the child's parents do not want a retarded child and would rather not be burdened with this child? If one has limited space in a neonatal nursery or intensive care unit and has to choose to give care to one of these children or the other, can one make a moral choice, or is any choice immoral?

These are the issues which Father Paris seeks to address in his article. One need not be a religionist, I suggest, to find his discussion of morals and values relevant, if not distinctly helpful in thinking about these issues. But true New Englander that he is, Father Paris provides us with an analogy that strikes home in its simplicity. His example of the Maine cab driver who, with his gift of common sense, would not accept a fare to Bangor in a raging blizzard reminds us of the need

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to use our common sense in seeking to answer — or at least to understand and muddle through — these complex questions involving the medical treatment of others.

Judges should not be mistaken for clergy in black vestments. Legislators should not be mistaken for Delphic oracles. Our legal system, with all of its very positive virtues, cannot replace

the more intimate struggle among those caring for the patient and those who care about the patient, to resolve many of these questions. Surely, prosecutors and courts need to intervene when clear abuses of patients take place in the guise of medical treatment or nontreatment. Yet, to look to marbled courtrooms or legislative chambers for ultimate answers is, in my judgment, not only to look futilely, but to discourage those who must solve these issues now and to reinforce the lawyerphobia which preoccupies so many lawyers and physicians when they are faced with such questions. The imperfect answers lie within us, and the more we work collaboratively, always keeping the patient as our first concern, the better our chance to honor the needs and dignity of patients.

References

1. *Eichner v. Dillon*, 426 N.Y.S.2d 517 (Sup. Ct., App. Div. 1980), consolidated with *In re Storar*, 420 N.E.2d 64 (N.Y. 1981).
2. *In re Storar*, 434 N.Y.S.2d 46 (Sup. Ct., App. Div. 1980), 420 N.E.2d 64 (N.Y. 1981).
3. *Satz v. Perlmutter*, 379 So.2d 359 (Fla. 1980).
4. *Severns v. Wilmington Medical Center, Inc.*, 421 A.2d 1334 (Del. 1980).
5. Held April 1-2, 1982, and chaired by the author, the proceedings of this conference will be published by the American Society of Law & Medicine in conjunction with the Health Administration Press of the University of Michigan. For an overview of the conference, see *LACMA PHYSICIAN* 112(9): 27-33 (May 1982).