Correspondence

Confessions of a Diehard: A Reply to Leslie Rothenberg

Dear Editors:

In these pages, Leslie Steven Rothenberg recently presented the case against judicial involvement in withholding treatment cases.[1] As readers of the *American Journal of Law and Medicine* remember, this is an issue on which reasonable persons often disagree.[2] Mr. Rothenberg carries the often rancorous debate right to the opposition with his comment that only a few diehards (particularly in Massachusetts) favor judicial involvement. He may be right about this characterization. If so, this diehard from Massachusetts would like to respond.

No one can deny that cases involving life and death issues are difficult for all of the participants, whether they are attorneys, family members, or judges. As one who has been attorney of record in several such cases, as well as a master in a guardianship case that raised medical treatment issues, I am certainly sympathetic to the difficulty judges face when they must make the ultimate decision as to whether someone is treated or not. Thus, Mr. Rothenberg is correct in his assertion that judges do not relish the role of having to determine when treatment should be withheld. However, that factor is not determinative. The real question is whether the role of the judge (or perhaps, as Justice Liacos expressed it in *Saikewicz*, the ideal upon which the judiciary is based)[3] should encompass ultimate responsibility for treatment decisions. It is here that Mr. Rothenberg and I part company. As a Massachusetts diehard, I accept the view that the reason we have judges and a legal system is to make the hard calls. Where the conflicting emotions of family and professionals are involved and where decisions literally involve matters of life and death, I believe that presentation of the facts to a neutral arbiter is the way to go. This is far better than leaving decisions to either the family or medical professionals or to public opinion.

My faith in the legal system is by no means a naive one. I do not believe that judges always decide treatment cases correctly.[4] Nonetheless, some issues belong in court simply because of their nature. The dignity of incompetent patients is best maintained by assuring "detached but passionate investigation and decision"[5] in a courtroom rather than by returning such decisions to the closet. This defense of judicial involvement is not meant to denigrate the role of family or physicians. Obviously, there is significant emotional trauma for a family which is confronted with the matter of withholding treatment from a seriously ill relative, and I suspect that bringing these matters to court with the likelihood of considerable publicity may well exacerbate the trauma. My support of judicial involvement remains firm despite my recognition that there are considerable costs that result from bringing treatment decisions into the courtroom.

Finally, I realize that medical professionals will never be happy with a system which requires that their decisions be reviewed by judges. However, that is another price I'm prepared to pay. Court decisions have proven their merit, and the case of *In re Storar*[6] illustrates the point well. Here, despite the desire of the family and the apparent willingness of the treating physicians to stop treatment for a severely retarded man, the court acted to protect Mr. Storar by ordering that treatment be continued. Without a requirement of court involvement, there would have been no one to consider Mr. Storar's interests. The value of court involvement in this case was far greater than merely to "cover the ass" of some attorney. While conceding that wisdom can be found in other settings besides courtrooms, this diehard reminds Mr. Rothenberg that there is also great wisdom in the marbled chambers.

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6. 420 N.E.2d 64 (N.Y. 1981).

Mr. Rothenberg responds:

I appreciate Professor Brant's thoughtful comments about my recent editorial. Although I found a few of his remarks to be excessively defensive, I will limit my reply to three points.

First, contrary to Professor Brant's assertion in his letter, I never said that "only a few diehards (particularly in Massachusetts) favor judicial involvement." My words were: "a few diehards . . . particularly in Massachusetts, who believe that wisdom cannot be found in any setting other than a probate courtroom." Professor Brant's letter is unclear as to whether he personally subscribes to the philosophy I was describing, but I suspect that he doth protest too much.

Second, if Professor Brant believes that probate judges must make all medical treatment decisions for incompetent patients (or simply those involving the withholding or withdrawal of treatment), I would suggest that he and others begin developing programs to educate probate judges in Massachusetts and elsewhere on the legal, medical, and ethical aspects they must understand to adequately decide these cases. Once the educational function is completed, we will then face the problem of making such judges available 24 hours a day to decide emergency matters, but I assume that the citizens of Massachusetts and other states will understand this need and be happy to fund it with their tax dollars.

Finally, I think no worse example of seemingly benevolent court intervention can be cited than the Storar *decision of the New York Court of Appeals. As Lee Dunn made so clear in his companion article in the June issue, the court in its majority opinion made statements about the patient's medical status that were totally unsupported by the record and ignored much of the expert medical testimony given at trial. Furthermore, the hospital had no legal standing to challenge the decisions of Mr. Storar's mother-guardian. I concur with Lee Dunn that the court seems to have been unwilling to approve the withholding of blood transfusions "and, therefore, ruled against the manifest weight of the evidence." If this is an example of what Professor Brant calls "great wisdom in the marbled chambers," God help us all.*

More on the Role of Judges

Dear Editors:

The articles by Mr. Rothenberg, Mr. Dunn, and Father Paris in the June 1982 issue make several good points in advancing the societal dialogue concerning the withholding of treatment from incompetent individuals. I agree with Mr. Rothenberg's goal of minimizing judicial involvement in such cases and with the desire of Father Paris for a societal re-analysis and reinvigoration of religious traditions.

I do not believe, however, that the judiciary should be excluded from this area. It seems to me that, in some situations, the courts are clearly the institution best situated to make such decisions. Society has traditionally entrusted decisions of this magnitude to courts — not because judges are wiser than the rest of us, but because the judicial system has been developed precisely for the purpose of rendering objective decisions, in situations

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