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Dennis J. Horan

Marianne E. Guerrini

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# The Order to Treat: Judicial Intervention in Benign Neglect of Defective Infants

Dennis J. Horan and Marianne E. Guerrini

*Mr. Horan, a Chicago attorney, specializes in the law which concerns the patient-physician relationship. He teaches medical-legal law at the University of Chicago Graduate School in the Hospital Administration program. He lists the relationship of morality to law as one of his prime interests and he and his associate, Marianne E. Guerrini, both members of the same legal firm, collaborated on the following article.*

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Recent years have seen a strong upsurge in articles, speeches and other discussions of a special form of euthanasia: benign neglect of defective infants. Characterizing the lack of earlier discussion as a "public and professional silence on a major social taboo,"<sup>1</sup> Doctors Raymond S. Duff and A. G. M. Campbell shattered this silence in a 1973 article outlining 43 cases of withholding treatment of defective infants at a major university medical center. This began a flood of discussion which has reached from U.S. Senate subcommittee hearings<sup>2</sup> to articles in both legal<sup>3</sup> and medical periodicals.<sup>4</sup> While there has also been a concurrent discussion of the legal implications of failure to treat a defective infant, only recently have the courts stepped in to clear up speculation and declare in no uncertain terms what the duty of hospitals and physicians is with regard to the care of a child born with a birth defect that is capable of treatment.<sup>5</sup>

This paper will focus on two recent cases that stand for the proposition that the medical profession has a duty to treat the defective child, *even in the face of parental refusal to consent to treatment*. This is an aspect of euthanasia of defective infants that has received frighteningly little attention in the medical community. In their article in the *New England Journal of Medicine* in 1973,<sup>6</sup> Professors Duff and Campbell speak of 43 cases related to withholding treatment of

defective children, including fifteen multiple anomalies, eight trisomies, eight cardiopulmonary diseases, seven meningomyeloceles, three central nervous system disorders and two short bowel syndromes. In each case the decision was made not to treat and the child died. Duff and Campbell conclude their paper with the observation: "If working out these [moral and ethical] dilemmas in ways such as those we suggest [withholding treatment and giving only sedation plus water sufficient to slake thirst] is in violation of the law, we believe the law should be changed."<sup>7</sup> They totally fail to discuss the fact that their suggestion is in clear violation of the law as it now stands in every state of this country.

We must make it clear that there is a very necessary distinction of whether we are talking about a treatable or non-treatable case. Where there is no treatment available for a specific defect, the law does not require the physician to treat the hopeless. The law does not require useless acts by the physician; the standard of care requires only that he exercise that degree of care and skill of ordinarily well-qualified physicians. Thus, in the truly terminal case of the newborn who will die regardless of what ordinary or extraordinary means are employed, questions of potential criminal and civil liabilities surrounding withdrawal of treatment do not arise. Nor does withdrawal of treatment under those circumstances constitute abandonment of a patient. What we see there is the exercise of sound medical judgment based upon purely medical (not social) factors, such as expected outcome and prognosis.

The picture changes radically when we are discussing treatable cases where the prognosis is or may be guarded, but nevertheless an acceptable form of medical intervention exists which will correct the current condition of ill-being, which otherwise would cause death.

We find this type of "classic" case arising time after time in literature, both legal and ethical. Returning to Duff and Campbell's first discussion of their cases, we note the following example:

An infant with Down's Syndrome and intestinal atresia, like the much publicized one at Johns Hopkins Hospital was not treated because his parents thought that surgery was wrong for their baby and themselves. He died several days after birth.<sup>8</sup>

In the Johns Hopkins case referred to, which was reported in a film by the Kennedy Foundation made several years after the occurrence, the child lived for 15 days after the decision was made.<sup>9</sup>

These cases bring up the question of potential legal liability for parents, physicians and, for that matter, anyone else involved in the denial of treatment to these children. Law professor John Robertson has done a comprehensive legal analysis of withholding care from the defective newborn.<sup>10</sup> Commenting on the Duff and Campbell paper, Robertson points out how surprising it is that there is no discussion,

and no indication that the parents have been informed of the legal rights and obligations surrounding these decision-making problems and the infant's death as a possible solution. Robertson finds potential criminal liability for the parents as the result of such a decision. All of the conditions are met for homicide by omission: first, the omission of a legal duty to protect another which the parent owes to the child; second, a willful (i.e., knowing) failure to act with knowledge of the probable result — withdrawal of treatment which will result in death; and third, that the failure or omission is the probable cause of the child's death. If the failure to act (provide treatment) is intentional, the result could be first or second degree murder. If the state of mind of the people involved in the decision-making process is such that they are incapable of making a rational decision, it could be classified as gross negligence resulting in involuntary manslaughter.<sup>11</sup>

One involved in a decision-making process of this sort must always keep foremost the reality that the born child is a person under the law and has the same rights under the Constitution and criminal laws of this country. The fact that the child may be profoundly retarded or have myriad physical problems does not in any way diminish that child's rights. The U.S. Supreme Court has recently emphasized that those with mental impairments are accorded the same protection as any other person under the law.<sup>12</sup>

This is particularly important for the physician to remember. For purposes of this discussion, we will not consider further the question of potential civil and criminal liabilities of parents who refuse to give consent to treatment of a defective infant. Whatever the parents' situation, the courts have now recognized both a right and a *duty* on the part of anyone involved in the care of a defective child to render such treatment as is medically appropriate, whether or not that child is defective.

### Ruling on Parental Inaction

In *Application of Cicero*,<sup>13</sup> a New York trial court ruled that parental inaction may not be allowed to deny treatment to a defective child. The case involved a child who was born with a meningo-myelocoele, a relatively low spinal lesion. Treatment by surgery would probably still leave the child with a permanent impairment of her legs below the ankle, as well as inability to control bowel or bladder. Without surgery, death was almost a certainty. The parents refused to consent to surgery and insisted that the child be released to their care and to "let God decide" as to the child's fate. The chief executive officer of the hospital petitioned the court to be appointed the child's guardian for the limited purpose of consenting to the surgery. The court rejected the parents' argument that granting the

doctor's petition would infringe upon their parental rights to decide the treatment, upbringing and welfare of their child, stating:

Parental rights, however, are not absolute. Children are not property whose disposition is left to parental discretion without hindrance. [Cites omitted] Where the child's welfare demands judicial intervention, this court is empowered to intervene. [Cite omitted.] Certainly, every physician who prefers a course of treatment rejected by a parent is not privileged to have the court decide upon the treatment under its *parens patriae* powers [Cites omitted.] But where, as here, a child has a reasonable chance to live a useful, fulfilled life, the court will not permit parental inaction to deny that chance.<sup>14</sup>

The *Cicero* decision goes one step beyond an earlier decision by the same court which had emphasized the rights of a mentally "defective" person to surgery to correct a physical defect. *In Re Weberlist*<sup>15</sup> had earlier held that a mental hospital would be empowered to consent on behalf of a retarded patient to surgery to correct a cleft palate and other physical defects. The case emphasized the patient's right to treatment which was available to correct physical problems, even though nothing could be done to change his mental status. *Weberlist* involved a situation where the parents could not be located and thus the decision does not have the impact of *Cicero*.

The *Cicero* case is crucial because it outlines the duty and responsibility of a physician to seek judicial intervention to protect the rights of a defective infant where the parents have refused to consent to treatment. Although courts had earlier ordered blood transfusions for children of Jehovah's Witnesses, for example, this is one of the few reported decisions in which the situation has arisen in the court where treatment was sought on behalf of a defective child.

The implications of this decision cannot be ignored by the medical profession. The physician and hospital have a duty to the child apart from any duty that the parents hold. This responsibility is contractual in nature and has been held to arise whether express or implied.<sup>16</sup> The physician and hospital agreed to the rendition of medical services for the benefit of the mother and the born child and the parents agreed to pay for them. When the parents withhold treatment, the issue as to consent to treatment for the child arises. The key point is that the refusal of parental consent in these circumstances does not extinguish the physician's or the hospital's obligation to continue to act on behalf of the child.<sup>17</sup> At least one other commentator has pointed out that the child is a third-party beneficiary of any contract between the parents and hospital or physician and, as such, the parents and hospital or physician cannot unilaterally cut off the child's rights.<sup>18</sup> In addition to the criminal liability which may arise<sup>19</sup> (and this is a more real concern to the physician than the hospital since it is very unlikely that criminal charges will be brought against a hospital or

other institution), another area of the law which we refer to as tort law or personal injury law, is applicable to this situation. In tort law, failure to treat can amount to the commission of a willful or intentional tort, a negligent omission, or abandonment of the child.<sup>20</sup> The fact that the parents have consented to withdraw treatment does not protect the physician and hospital. The statement that "the parents wouldn't give consent" would be no defense to a lawsuit for money damages brought by a third party as a result of the child's death.

Potential criminal and civil liability arising from the physician and hospital's independent duties to the defective child (that is, independent of any duty owed the child by its parents) do vary from that duty owed to the healthy, "normal" child. The dilemma for the physician and hospital really only begins when the parents refuse to consent to treatment. At that point the duty to the child must be recognized as independent from any consideration of the desires and wishes of the parents. How should the physician then conduct himself? His field is medicine; his expertise is in the area of medical judgment. When, in the exercise of sound medical judgment based upon the child's condition, he or she makes a judgment as to whether or not medical treatment should be withheld, the physician is acting in a safe, sound and secure manner within the limits of the law. When judgments are made which transcend medical judgment, when he or she in effect determines that for social reasons (family situation, "quality of life," etc.) that some should live and some die, the physician has crossed the boundaries of the law. Where parental consent is withheld, the physician must obey the mandate of the *Cicero* court to seek state intervention to make those decisions that are beyond the physician's area of expertise and right.

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  6. See note 1, *supra*.
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