

Guardianship

Rogers PR, *The Exercise of Equity Jurisdiction in Guardianship Proceedings, Part I*, GUARDIANSHIP NEWS 2(5): 33 (May 1982) [10-649].

Handicapped Persons & the Law

Appelbaum PS, *Do the Mentally Disabled Have the Right to Be Physicians?* HOSPITAL & COMMUNITY PSYCHIATRY 33(5): 351-52 (May 1982) [10-606].

Jankowski T, *Enforcement Alternatives in the Allocation of Financial Responsibility for the Support of the Handicapped Child*, PROBATE LAW JOURNAL 4(2): 2-10 (Summer 1982) [10-570].

Health Care Delivery

COMMUNITIES, HOSPITALS, AND HEALTH CARE: THE ROLE OF NEW YORK CITY HOSPITALS IN SERVING

THEIR NEIGHBORHOODS AND THE NATION. (United Hospital Fund, 3 E. 54th St., New York, NY 10022) (1982) 328 pp., \$20.00.

Health Care Financing

Becker BJ, *Divestment and Eligibility for Medical Assistance*, WISCONSIN BAR BULLETIN 55(3): 9-10 (March 1982) [10-509].

Pfizenmayer RF, *Antitrust Law and Collective Physician Negotiations with Third Parties: The Relative Value Guide Object Lesson*, JOURNAL OF HEALTH POLITICS, POLICY AND LAW 7(1): 128-62 (Spring 1982) [10-655].

Shapiro DI, *Cost Containment in the Health Care Field and the Antitrust Laws*, AMERICAN JOURNAL OF LAW & MEDICINE 7(4): 426-35 (Winter 1981) [10-661].

Medicaid Since Passage of the 1981 Omnibus Budget Reconciliation Act and Implications for Hospitals, HEALTH LAW VIGIL 5(12): 1-7 (June 11, 1982) [10-555].

HCFA Issues NPRM on Medicare/Medicaid Certification Process, HEALTH LAW VIGIL 5(13): supplement (June 25, 1982) [10-548].

New Requirements for Medicare Reimbursement of Management Contract Fees, HEALTH NEWS SUMMARY (Memel, Jacobs, Pierno & Gersh, Los Angeles) 6(7): supplement (May 14, 1982) [10-545].

Health Care Planning

Brasfield JM, *Health Planning Reform: A Proposal for the Eighties*, JOURNAL OF HEALTH POLITICS, POLICY AND LAW 6(4): 718-38 (Winter 1982) [10-629].

where important and possibly conflicting interests are at stake.

I acknowledge that courts are sometimes inconsistent and frequently wrong. What human institution is not? Courts, however, already possess the means for factoring into their decisions the relevant wisdom of society, through the testimony of expert witnesses, as well as information about the particular incompetent individual and his or her personal situation. And, the judiciary's reliance on precedent, combined with its appeals process and reporter systems, gives it a tendency towards consistency over time. I do not believe that the broadly-based committee decisionmaking mechanism which Father Paris appears to support could do better or, in the long run, even as well.

Father Paris refers to the case of *Powell v. Columbia Presbyterian Hospital*¹ to illustrate the point that judges' personal beliefs and value systems frequently enter into their decision-making. Certainly, this is a valid point but, I think, a poor illustration. Father Paris suggests that the *Powell* judge's ordering of a blood transfusion for a Jehovah's Witness, against her wishes, would, by the patient's religious beliefs, condemn her to hell. Being neither a theologian or a Jehovah's Witness (at least in the formal sense), I

hesitate to question this. But isn't volition still considered a requisite element of sin? Without making any judgment about the wisdom, ethics, or legality of ordering a transfusion in such a case, I suggest that there is merit in the rationale offered by Judge Skelly Wright after ordering a transfusion in a similar case, *Application of the President and Directors of Georgetown College*.² At Georgetown Hospital, Judge Skelly Wright asked the Jehovah's Witness patient,

whether she would oppose the blood transfusion if the court allowed it. She indicated, as best I could make out, that it would not then be her responsibility. . . .

Thus, the effect of the order was to preserve for Mrs. Jones the life she wanted without the sacrifice of her religious beliefs.³

It should be noted that the judge in the *Powell* case was fully aware of the *Georgetown* case. In fact, the *Powell* judge states that he "read [the *Georgetown* opinion] and was convinced of the proper course from a legal standpoint."⁴

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References

1. 267 N.Y.S.2d 450 (N.Y. Sup. Ct., Spec. Term 1965).
2. 331 F.2d 1000 (D.C. Cir. 1964).
3. *Id.* at 1007, 1009.
4. 267 N.Y.S.2d at 451.

Non-Treatment of Defective Infants: A Critical Note

Dear Editors:

In recent months several cases have pushed the question of withholding care from "defective" newborns to the front pages of national concern. This journal has recently published several articles on this topic, all of which seem to support some policy of selective non-treatment for some newborns whose lives could be saved but who will nevertheless be severely handicapped. Since I regard any such policy as impossible to justify, I would like to respond briefly to the sorts of positions taken by those who want to adopt such laws or policies. To this end, I make three points that I believe to be decisive in the case against selective non-treatment of some newborns. Until these points are answered, any policy of this sort fails minimal standards of acceptable law and policy.

1) Age. Why do most writers want to stop at newborns? If the newborn is

Chesney JD, *Strategies for Building Representative HSAs: The Impact of Legal Structure*, JOURNAL OF HEALTH POLITICS, POLICY AND LAW 7(1): 96-110 (Spring 1982) [10-653].

Paul-Shaheen P, Carpenter ES, *Legislating Hospital Bed Reduction: The Michigan Experience*, JOURNAL OF HEALTH POLITICS, POLICY AND LAW 6(4): 653-75 (Winter 1982) [10-628].

Webster TC, *Health Planning and Competition: Public Goods and the Impact of Demand Elasticity*, JOURNAL OF HEALTH AND HUMAN RESOURCES ADMINISTRATION 4(4): 465-86 (Spring 1982) [10-644].

Developments Concerning Certificate of Need (Texas), STATE BAR SECTION REPORT — HEALTH LAW 2(1): 3-6 (Spring 1982) [10-503].

Federal Health Planning System Hanging in Balance as Congress Considers Issue, FEDERATION OF AMERICAN HOSPITALS REVIEW 15(3): 11-28 (May/June 1982) [10-617].

Selected Highlights of Recently Enacted State Legislation — Certificate of Need, STATE HEALTH LEGISLATION REPORT 10(2): 17-19 (May 1982) [10-534].

HEALTH PLANNING IN THE UNITED STATES: SELECTED POLICY ISSUES. Edited by the Committee on Health Planning Goals and Standards, Institute of Medicine (National Academy Press, 2101 Constitution Ave., Washington, DC 20418) (1981) two vols., 431 pp., \$21.50 (paper).

Health Facility Management

Clarkin JF, Chizever SD, *Special Issue: Accounts Receivable Management*, TOP-

ICS IN HEALTH CARE FINANCING 8(3): 1-71 (Spring 1982).

Halper HR, *Increase in Hospital Merger Activity Expected to Intensify Antitrust Scrutiny*, FEDERATION OF AMERICAN HOSPITALS REVIEW 15(3): 29-31 (May/June 1982) [10-618].

Tax Quarterly: (I) Unrelated Business Income; (II) Unrelated Debt — Financial Income; (III) Legislative Developments; (IV) Other IRS Developments, HEALTH LAW VIGIL 5(13): 8-13 (June 25, 1982) [10-547].

HEALTH CARE ENVIRONMENT: THE USER'S VIEWPOINT. Edited by William C. Beck, M.D. and Ralph H. Meyer (CRC Press, Inc., 2000 N. W. 24th St., Boca Raton, FL 33431) (1982) 259 pp., \$94.00

to have care withheld because of some defect, that proposition logically applies to anyone else with the same defect. Minimal standards of fairness dictate that if life with that handicap will be so bad that the newborn must be deprived of it, then that benefit must be extended to everyone else so situated. Applied logically, this amounts to the policy that institutionalized children with this handicap ought to have treatment withheld if a life-threatening illness strikes. I submit that this policy, if applied fairly to the tens of thousands who qualify, is repugnant to the convictions on which our society was founded. But this is where the logic of the position advanced for newborns leads, and any policy that cannot be fairly applied to all who qualify, without repugnant results, must be rejected because it does not meet minimal standards of generalizability.

2) *Defect*. A more serious problem is the failure of anyone to provide even modestly persuasive statutory definitions of a life not worth living such that normal prohibitions on abuse and neglect need not apply. This must be done or the policy being advanced for newborns will destroy established legal prohibitions on child neglect, especially medical neglect, and will overturn a hundred years of cases regarding the obligations of parents to provide

life-saving medical care for their children. No one wants to go this far. Yet, where is the statutory definition of the lives that do merit this minimal protection?

The available alternatives are so poorly worded and so elastic in their application to hundreds of thousands of infants and children that it is astonishing that anyone should have thought of them as cogent. Consider, for example, the view advanced by McCormick and endorsed by a number of other writers, including Father Paris in this journal. This claim is that the crucial characteristic in question is the potential capacity to enter into human relationships. As a statute this will not do: what is a human relationship anyway? If it is defined as a relationship between two human beings either of an affective or a cognitive nature, the proffered criterion will exclude almost no infants. It is very difficult to find even profoundly retarded children who cannot establish some relationship with another human being. If, however, we really wish to have a criterion that will exclude some infants, then we must know how far toward the normal this range of neglect will be allowed to extend. To date, no one, least of all McCormick or Paris, has told us how far this will go in terms adequate for law or policy. Until someone does, this criterion fails even

the barest standard of statutory precision and clarity.

3) *Active Killing*. All writers seem to want to exclude as law and policy the active mercy-killing of some children. To include active killing would wreak fundamental changes in the common and statutory law of homicide and neglect. To exclude it on principled grounds, however, will require the adoption of the much discussed principle of the double effect. This conclusion is, I believe, agreed to by serious students on all sides of the issue. The neglected and crucial point, however, is that common and statutory law has not and cannot endorse such a principle.

Both criminal and tort law operate fundamentally with the proposition that intent is judged from behavior. Those consequences that a reasonable man should have foreseen are presumed to have been intended. The law cannot have it otherwise, for the investigation of subjective intent would render the law, especially criminal law, incapable of enforcing its sanctions. Anyone familiar with the difficulties of proving intent in such areas as voting rights litigation or fraud can document this point readily. But if we give up, as I submit we must, the investigation of subjective intent as a necessary part of invoking a legal sanction, then we must also give up the possibility of

HOSPITAL ORGANIZATION AND HEALTH CARE DELIVERY. By Luther P. Christman, R.N., Ph.D., and Michael A. Counte, Ph.D. (Westview Press, 5500 Central Ave., Boulder, CO 80301) (1981) 133 pp., \$15.00 (cloth), \$7.50 (paper).

Health Insurance

Alexander BR, *Punitive Damages in Illinois Insurance Cases: Beyond Ledingham, DeBolt, and Kelsay*, ILLINOIS BAR JOURNAL 70(10): 645-50, 664 (June 1982) [10-640].

Steslicke WE, *Development of Health Insurance Policy in Japan*, JOURNAL OF HEALTH POLITICS, POLICY AND LAW 7(1): 197-226 (Spring 1982) [10-657].

Health Legislation & Regulation

Lynk WJ, *Regulation and Competition: An Examination of "The Consumer Choice Health Plan,"* JOURNAL OF

HEALTH POLITICS, POLICY AND LAW 6(4): 625-36 (Winter 1982) [10-627].

Sigelman DW, *Palm-Reading the Invisible Hand: A Critical Examination of Pro-Competitive Reform Proposals*; Blumstein JF, *On the Other Hand: Some Comments on Sigelman's Palmistry (Response)*, JOURNAL OF HEALTH POLITICS, POLICY AND LAW 6(4): 578-624 (Winter 1982) [10-626].

Health Maintenance Organizations

Harrison DH, Kimberly JR, *Private and Public Initiatives in Health Maintenance Organizations*, JOURNAL OF HEALTH POLITICS, POLICY AND LAW 7(1): 80-95 (Spring 1982) [10-652].

Note, *Health Maintenance Organizations and the McCarran-Ferguson Act*, AMERICAN JOURNAL OF LAW & MEDICINE 7(4): 437-67 (Winter 1981) [10-662].

Hospital Law

Kaunitz KK, *Hospital and Medical Staff Liability for Infection Control*, HOSPITAL MEDICAL STAFF 11(6): 9-15 (June 1982) [10-635].

Selected Highlights of Recently Enacted State Legislation—Hospital Licensure, STATE HEALTH LEGISLATION REPORT 10(2): 27 (May 1982) [10-538].

a) Withholding Treatment

No Heroic Treatment Orders—Custody of a Minor, ADVISOR 3(4): 4-5 (June 1982) [10-557].

Human Experimentation

Gaylin W, *The Competence of Children: No Longer All or None*, HASTINGS CENTER REPORT 12(2): 33-38 (April 1982) [10-571].

any principled distinction between active and passive means of bringing about the death of an infant.

These questions must be answered. If they cannot, which I believe is the case, then the proposed policies espoused in this journal and elsewhere must fail. The most fundamental requirement is that any law or policy must meet the minimal requirements noted above. To date no one has produced a policy for selective non-treatment that does so.

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Catheters: A Matter of Negligence?

Dear Editors:

I am writing in reference to an article in the April 1982 issue, *Communication Failure: Some Case Examples*. In the review of *Sanchez v. Bay General Hospital* the author refers to an atrial line that was placed to draw off air emboli. I have been involved with critical care nursing for seven years and am unfamiliar with the utilization of such a line. We routinely place catheters in

the right atrium of the heart for the express purpose of administering fluids and medications. In the *Sanchez* case there were apparently some deficiencies in the delivery of care; however, I am concerned that incorrect information was used as part of the plaintiff's case.

If the catheter that the patient actually had in place was a pulmonary artery catheter then it would be appropriate not to use it for the administration of medications. Catheters used for placement into the pulmonary artery are generally of the Swan-Ganz type which is a multiple lumen catheter. It does have a port that opens into the right atrium of the heart and one that opens into the pulmonary artery.

Another point that I feel is inaccurate is the catheter's purpose of draining off air emboli. The tip of any catheter that is placed in a chamber of the heart or in the pulmonary artery is prone to movement and thus unlikely to be of use in removing air that might enter the circulation. I might add that I am totally unfamiliar with the idea of being able to aspirate air from the circulation, as hopefully not that large a volume ever enters the circulation. Also, small amounts of air are quickly assimilated into the blood or block off small vessels and cause their damage without time or ability to be aspirated.

I found the case interesting, but feel that the major point of negligence was in the lack of immediate and close observation of a post-operative patient. The discussion over the atrial line created confusion, and I wonder whether some information is lacking.

As a final comment, I find *Law, Medicine & Health Care* a useful and informative journal.

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Jane Greenlaw responds:

The undisputed facts in the Sanchez case as stated by the California Court of Appeals, Fourth District, Division One, were that "on the morning of the surgery, Dr. Norman Siderius placed an atrial catheter in Sanchez by inserting a plastic tube with a needle on the end into the vein of her left arm and advancing it up the vein until it entered the upper right mid-atrium of her heart. The purpose of the catheter was to drain off any air embolism that might develop."¹ Apparently, neither the accuracy of this description nor the efficacy of the procedure was at issue during the trial.

Readers' comments are invited.

Reference

1. *Sanchez v. Bay General Hosp.*, 172 Cal. Rptr. 342, 344 (Cal. App. 1981).