1996

Facilitating Choice: Judging the Physician's Role in Abortion and Suicide

George J. Annas

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When I was invited to give this talk I thought, "I'll just give my standard slide show on death in America." I thought I would just talk about the right to die, something I can do in my sleep, and everybody would be happy. And you probably would, since it's a pretty good speech. I am going to give it at a Pennsylvania Judges Conference in a couple of weeks, and they will like it.[1] But it is not very challenging, either for me or for you. So, what I want to explore with you today is how judges have reacted to legal problems physicians confront at the beginning and end of life, and how their reactions have led to the deprofessionalization of medicine.[2] I am going to suggest, in outline form, that judges, while very well-meaning in their decisions regarding the medical profession, have led us in a deprofessionalizing, consumer-choice direction, something quite the opposite of what they intended. Specifically, judicial decisions at the beginning and end of life involving abortion and the right to die have created a climate in which law has become the dominant force defining medical ethics.

Health Law

First, a word about health law itself. When I broke into this field in 1970, it really didn't have a name. Most people used the term "legal medicine," while some people called it "law and

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[1] The speech to the Pennsylvania judges, *The Right to Die in America: Sloganeering from Quinlan and Cruzan to Quill and Kevorkian*, is published at 34 DUQUESNE L. REV. 875 (1996).

[2] By deprofessionalization, I mean that physicians are no longer always accountable for their actions, and that as a consequence medical judgment has been so eroded as to be virtually irrelevant in the contemporary practice of medicine.

medicine." It was one of those "law and the banana" fields (as they're referred to in law schools) that are not thought of as legitimate fields of study for lawyers at all. Physicians called it "forensic medicine" which includes forensic pathology[3] and forensic psychiatry.[4] So when you thought about law and medicine in 1970, it really was forensic medicine, the title, if not the total content, of this conference.[5] That was it.

As the 70's progressed, and certainly in the 80's and 90's, health law became a rubric which now includes at least four subdivisions. The first is forensic medicine, that whole field that you are by now very familiar with. The next one is health care regulation. It started out as just medical malpractice, and sometimes was taught as an advanced trial practice course. Next is health care finance; there are many schools that have courses just in health care finance, even if they don't have a health law course. And the fourth area is what we now call bioethics, the area that I am going to talk most about today.[6]

Now what is this thing we call bioethics? When the term was first proposed in the 60's, it was thought to encompass ethics in all the biology realms: environmental ethics, medical ethics, and biological ethics. Bioethics as commonly practiced by ethicists, (or "bioethicists" and sometimes called medical ethicists), has come to be, as Dr. Cyril Wecht[7] and I were talking about at lunch, almost exclusively focused on the doctor/patient relation-

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[3] Expert opinion and testimony primarily regarding cause of death and extent of physical injuries.

[4] Expert opinion and testimony primarily regarding mental illness, competence, and insanity.

[5] The Quinnipiac College School of Law Conference on Forensic Evidence and Legal Medicine, October 26-27, 1995.

[6] Boston University School of Law now has a concentration in Health Law as does Boston University School of Public Health. In the law school, we have a basic course in Health Law, which includes health care regulation, as well as advanced courses, such as, Antitrust in Health Care, Bioethics, Psychiatry, and Disability Law. Text books mirror this. The West HEALTH LAW textbook, by Furrow, Johnson, Jost and Schwartz has been broken up into three separate books: Regulation, Financing, and Bioethics. You can buy the big book or you can buy either one in a paperback book, which are those three subject matters. My own Little Brown textbook, AMERICAN HEALTH LAW, written with Ken Wing, Sylvia Law and Rand Rosenblatt, will eventually be three separate books in the same three areas as the West textbook. It is the way that both textbooks and the field are going.

[7] Cyril H. Wecht, M.D., J.D., Coroner of Allegheny County, Pittsburgh, Pennsylvania, clinical Adjunct Associate Professor of Pathology, University of Pittsburgh School of Medicine, Adjunct Professor of Law, Duquesne University School of Law. (Moderator of the Conference on Forensic Evidence and Legal Medicine at Quinnipiac

ship. This has been in reaction to medical paternalism, and has demanded the active involvement of the patient in decision making. Bioethics also involves a search for values, and how people decide value-laden questions in our society.

Health law, although now generally recognized as a real field, is an applied field. Basically, it is all law applied to a specific sector of society. If you're a capitalist, you call it the health care industry. You can call it medicine and science, that's fine. It is really law applied to that sector, and it encompasses all kinds of law. Today when we talk about values, what kind of a society we want to be, and what role medicine and science should play in it, we are often talking about constitutional law as applied to this particular area. That is mostly what I am going to talk about today.[8]

Roe v. Wade[9]

The field of health law was center stage when the Supreme Court decided *Roe* in 1973. When that case came to the Court (only a few of us here are old enough to remember this), there were two relatively new Justices on the Court from Minnesota, Chief Justice Warren Burger and Justice Harry Blackmun. Justice Burger decided to assign his junior colleague from Minnesota to write the opinion, and Blackmun took it very seriously. He had spent the last ten years as General Counsel to the Mayo Clinic in Rochester, Minnesota and he has in retrospect, even 25 years later, called those the happiest days of his life. He did not mean being on the Court was not a privilege and a great challenge. What he meant was that he loved working with physicians. He thought it was the most fulfilling work a lawyer could do.

Justice Blackmun was not quite as romantic about medicine as the lawyer on *Chicago Hope*, Alan Birch,[10] but almost. He re-

College School of Law (October 26-27, 1995); author of introductory article to this issue).

8 *See generally* Annas, G.J., *Health Law at the Turn of the Century: From White Dwarf to Red Giant*, 21 CONN. L. REV. 551 (1989).

9 Roe v. Wade, 410 U.S. 113 (1973). For a more complete discussion of most of the cases mentioned in this speech, see George J. Annas, JUDGING MEDICINE (1988) and George J. Annas, STANDARD OF CARE: THE LAW OF AMERICAN BIOETHICS (1993).

10 Alan Birch, hospital lawyer on CBS Television's CHICAGO HOPE, played by Peter MacNicol.

ally thought that medicine was wonderful, and he saw his job in writing *Roe* as getting the government off the backs of physicians so they could exercise independent medical judgment. In fact, in *The Brethren*,[11] Woodward and Armstrong wrote that Justices Brennan and Marshall had to encourage Blackmun to acknowledge and support pregnant women, not just physicians. To Blackmun, however, the physician remained central. He put it this way in *Roe*: "The decision vindicates the right of the physician to administer medical treatment according to his (sic) professional judgment. . .the abortion decision in all its aspects is inherently, and primarily, a medical decision, and the basic responsibility for it must rest with the physician."[12] And in the much less cited companion opinion to *Roe, Doe v. Bolton*,[13] Blackmun made his disdain for government regulation of medical practice, even a required second opinion, clearer: "If a physician is licensed by the State, he (sic) is recognized by the State as capable of exercising acceptable clinical judgment . . . Required acquiescence by co-practitioners has no rational connection with a patient's needs and unduly infringes on the physician's right to practice."[14]

Roe and *Doe* have been seen as major human rights opinions that vindicate the rights of women. They do. But mostly, the author of the opinions was trying to help keep the government away from the practice of medicine. That is why he characterized abortion as a medical decision to be made by doctors according to medical judgment; government stay out of it! That is where we started. Justice Blackmun in *Roe* and *Doe* tried to make the legal system even more pro-physician,[15] but his decisions were the first in a series that have actually helped undermine medicine as a profession.

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[11] BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT (1979).

[12] Roe, 410 U.S. at 165-66.

[13] Doe v. Bolton, 410 U.S. 179 (1974).

[14] *Id.*, at 199.

[15] Judges, as I try to tell my medical students and my physician friends, love doctors. Doctors don't believe it. They always think, "I'll get sued if I do this, I'll get sued and go to court, it's going to be the end of my life. The judge is going to hate me, the jury is going to hate me." It's all baloney. Judges identify with physicians and love them. A doctor has to be just horrible for a judge to find her wanting and three-quarters of jury verdicts have always favored physicians. It's just the worst doctors who get to court in the first place, as you know. The legal system really does love doctors.

Karen Ann Quinlan

The next really important bioethics case was from New Jersey, the case of Karen Ann Quinlan.[16] Karen was a young woman, just 21 years of age when she was rushed to an emergency department. She had stopped breathing for two fifteen minute periods. Rather than just pronouncing her dead, the physicians "successfully resuscitated" her and put her on a mechanical ventilator. She never regained consciousness. Her parents were devastated and tried to do everything to help Karen recover, although there really was no hope from day one. After six months they finally agreed with the physician that the ventilator should be removed. The physician had been pushing to remove the ventilator. Karen's father, Joseph Quinlan, who had opposed discontinuation, said in effect, "OK let's stop it, the time has come. I realize there is no hope for my daughter and she would not want to live this way." The doctor agreed.

But then the doctor made a classic mistake that many physicians still make - he consulted with his lawyer, turning a medical care question into a legal question. The doctor then returned to the Quinlans and said, in effect, "You know I would like to do this, but I cannot unless you get a court order that says I am legally immune from any criminal or civil liability." This occasioned the second major judicial move in the direction of medical deprofessionalization. The first step was Justice Blackmun saying that government should not interfere with physicians when they exercise medical judgment. Now we had a doctor insisting on legal immunity before he would do the right thing medically and ethically; something he believed in; something he believed was right. Well the Quinlans were devastated. But they found a young legal aid lawyer, Paul Armstrong, who took their case. The trial court judge said he could not order the ventilator removed because no doctor was willing to testify that it was consistent with medical ethics to take Karen off the ventilator.[17] This was shocking because ventilator removal was consistent with

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16 In re Quinlan, 355 A.2d 647 (1976).

17 In re Quinlan, 259, 348 A.2d 801, 819 (1975) ("It is significant that Dr. Morse, [Ms. Quinlan's attending physician] a man who demonstrated strong empathy and compassion, a man who has directed care that impressed all the experts, is unwilling to direct Karen's removal from the respirator.") *Id.*

medical ethics, even though the physicians would not say it in public. Therefore, when the case got to the New Jersey Supreme Court, the court was stuck with the fact that all the expert medical testimony said it was against medical ethics to take Karen off the ventilator. How could the court deal with that?

The New Jersey Supreme Court did two interesting things. The first was to decide that Karen had a constitutional right of privacy which was broad enough to allow her to refuse treatment based on *Roe*.[18] The second was that the state had no compelling interest sufficient to interfere with this right. But to get to this latter conclusion the court had to deal with the question of medical ethics, the protection of which had been labeled a compelling state interest. Are we going to use the law to force doctors to do something that they believe is ethically wrong? Or are we going to say, we don't believe the physician witnesses; the expert witnesses lied? Courts hate to say that. Remember judges love doctors. So, if you read the *Quinlan* case (and I recommend this) you will see some strange lines regarding how physicians set the standard of care, and the relevance of fear of liability: "The brooding presence of such possible liability [malpractice and criminal], it was testified here, had no part in the decision of the treating physicians. As did Judge Muir [the trial judge], we afford this testimony full credence."[19] Well, I think you can only read that last sentence as saying, "unlike the lower court, we don't believe that the stated factor [of potential liability] has not had a strong influence on the standards [of medical ethics] and the decision not to remove Karen from the ventilator."

Basically what the New Jersey Supreme Court said (I'm paraphrasing now), is that if we took these doctors aside (we know we have to talk to them in open court, but if we could just take them in the back room) and say to them, "Doctor, what do you think the right thing to do is?" They would say to us, "Take her off, my God it is horrible having someone in a persistent vegetative state, a permanent coma on a mechanical ventilator for ten years, twenty years, that's just awful, no one would want to live like that. We should take her off." Since the court believed this, it redefined the problem. The court said that fear of liability was the

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[18] In re Quinlan, 355 A.2d 647, 662 (1976).
[19] *Id.*, at 666-67.

problem, and that "there must be a way to free physicians, in the pursuit of their healing vocation, from possible contamination by self-interest or self-protection concerns which would inhibit their independent medical judgments for the well-being of their dying patients."[20] And this is where the famous ethics committee comes in. The court said, in effect, "You're worried about getting sued. We can't give you blanket immunity for anything you do, but in cases like this, where you have a patient with no reasonable possibility of returning to a cognitive state and the parents want the ventilator removed, go to an ethics committee, do not come to us. If the ethics committee agrees with you, then you can remove the ventilator with criminal and civil immunity."

I am sure Chief Judge Hughes felt, like Justice Blackmun, that he was supporting the medical profession, supporting medical judgment and supporting medical ethics, by getting the law off physician's backs so that they could do the right thing. He believed that if he just gave the physicians legal immunity, they would go out and do the right thing. The physicians in *Quinlan* did go to an ethics committee and got immunity and they did remove Karen from the ventilator. As you may remember, she nonetheless continued breathing on her own, largely because the doctors slowly weaned her off the ventilator. She lived another nine years. Her parents did not believe in removing her feeding tube, an act which would be a major legal issue in the right to die arena for the next decade.

Fortunately almost all Americans agree with the outcome of the *Quinlan* decision. Almost everyone has said (if they were alive at the time of the *Quinlan* case, or thinking about it), "I never want to be like Karen Ann Quinlan. If I'm never going to regain consciousness, don't let me linger like that." The *Quinlan* case energized the living will movement; people wrote things like: "I don't want to be kept alive on machines if there is no hope for me ever recovering from a coma or severe brain damage."

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[20] *Id.*, at 668.

Nancy Cruzan

The feeding tube issue was much harder than the mechanical ventilator for a lot of people, as it was for Karen Quinlan's parents. It is harder because feeding, even by feeding tube, has symbolic overtones. Nobody thinks people are required to avail themselves of all available medical machinery, like ventilators and dialysis machines, to stay alive. But aren't feeding tubes different? Isn't food something natural, not medical, and so something that should be provided to you? Although it took some time, courts ultimately said that feeding, at least through tubes, is a medical treatment and can be refused like any other medical treatment. Basically, the right of privacy was defined as a right to make decisions central to one's personhood, and the right to liberty was defined as a right not to be touched or treated without your consent, which included not being touched by doctors and nurses. So no exception was made for feeding tubes, and the law continued to be that patients can refuse *any medical intervention,* including tube feeding. That seemed to be fine until the *Cruzan* case got to the U.S. Supreme Court.[21]

Nancy Cruzan was a young woman like Karen Quinlan, almost the same age, who was (as a result of an automobile accident) in a persistent vegetative state, exactly the same medical condition. The only difference was that Nancy was not on a mechanical ventilator; tube feeding was all she needed to stay alive. Nancy Cruzan's parents finally decided that it was too much, that she would not want to stay alive like that. They wanted to disconnect the feeding tube. Nancy was a ward of the State of Missouri at the time and the state insisted that the parents go to court to get immunity for the physicians. Like the doctors in *Quinlan,* her doctors would not do the right thing without a court's blessing. The trial court ruled that removal was perfectly appropriate. Unlike most cases, however, in this case the state decided to appeal.[22] The Missouri Attorney General

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21 Cruzan v. Director, Missouri Dept. of Health, 497 U.S. 261 (1990).

22 Missouri is one of the leading right to life states, one of the two states where most of the abortion cases that get to the U.S. Supreme Court come from: Missouri and Pennsylvania. *E.g.,* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992); Webster v. Reproductive Health Services, 492 U.S. 490 (1989); Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986).

thought he was doing a good thing for his own career by appealing this case, so he did.

The Missouri Supreme Court reversed the lower court.[23] The court agreed that every competent adult has the right to refuse any treatment, the right to say, "Don't touch me without my consent." It is almost an absolute right. But if you really take informed consent seriously, the court stated, refusal needs to be informed as well. But Nancy Cruzan was in a coma and could not talk. So to effectively refuse treatment, the court insisted that she would have had to have said something like, "If I am ever in a persistent vegetative state, if I am ever like Karen Ann Quinlan, and all I need to sustain my life is tube feeding, I do not want any tube feeding even though I know I may die a slow death without tube feeding."

On a theoretical level this does makes some sense. But on a real, practical level, the way we live our lives, it makes no sense. In any event, *Cruzan* went to the U.S. Supreme Court in 1990, when the Court was gearing up to overturn *Roe.* It looked as if the Court had the votes to overturn *Roe* (possibly a five to four split) and it looked as if the Court didn't want to expand the concept of privacy before it got back to abortion. So, the Court did not follow *Quinlan,* in that it did not use the word "privacy." Instead the Court stated that Nancy Cruzan had a liberty interest in refusing treatment.[24] But the Court also held that Missouri could procedurally define how she could exercise her liberty. Missouri required a very high level (clear and convincing) of evidentiary proof of Nancy's wishes before the court had to authorize removal of life sustaining treatment per her guardian's wishes. Since the Cruzans had not presented that level of proof at the lower court, the Supreme Court affirmed the Missouri Supreme Court's ruling.[25]

The *Cruzan* opinion turned out the way it did because of Justice Rehnquist's wooden application of what he considered a basic rule in a close case. There has to be a presumption (many doctors have said this also, and it's usually true) that you "err on the side of life." Put another way, if the choice is between life

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[23] Cruzan v. Harmon, 760 S.W.2d 408, 416 (Mo. 1988) (en banc).

[24] Cruzan, 497 U.S. at 278-79.

[25] *Id.,* at 284.

and death, we should always choose life. In general this is certainly correct, but in *Cruzan* this was not the choice. The choice was between death and death. How long do you want to be comatose before you die? That is an almost meaningless question. If it is life and death, it is easy; all of us know how to make that decision, but these are death and death choices. Since we are a death-denying culture, it is especially hard because we do not think we are ever going to die. The Justices were basically split four to four. Justice Sandra O'Connor decided the case by going with the Chief Justice.[26]

Justice O'Connor generally agreed with Justice Rehnquist but she also agreed with dissenter Justice William Brennan, that is, that twenty-one-year-old women don't go around thinking about how they might die and what things physicians might use to take care of them and keep them alive if they are in a coma.[27] She thought, however, that Nancy might reasonably have said, "If I can't make medical decisions for myself, I'd like my mother to make them for me." Justice O'Connor thought that if she had said this, it would be a constitutionally protected delegation of decision making authority.[28] O'Connor's concurring opinion, though not the holding in the *Cruzan* case, energized the health care proxy movement, encouraging people to name someone to make health care decisions for them. Most states have since passed health care proxy laws which provide an easy mechanism for people to designate someone else to make decisions for them in case they are not able to make them for themselves. That makes perfect sense to me. But again, it's more theoretical than practical.

Unfortunately, Americans will not sign forms like this. Americans hate to sign organ donor cards, wills, or even living wills or health care proxies. How many of you have a living will or health care proxy? Very few. So even though we have the legal mechanisms in place, Americans are not going to use them: there's no legal solution to the death problem. So that was *Cruzan*, a partial procedural solution, again letting the doctors off the hook by concentrating on procedural mechanisms rather

26 Cruzan, 497 U.S. at 287.
27 *Id.*, at 289-90.
28 *Id.*

than insisting that physicians do the right thing by honoring their patient's wishes, as personally expressed or as expressed on their behalf by their family.

Casey v. Planned Parenthood[29]

Then came *Casey*. Everyone assumed that *Casey* was going to overrule *Roe*. I assumed that Presidents Bush and Reagan, who had appointed Justices of the Supreme Court on the basis that they agreed to overturn *Roe*, finally had six votes to overturn *Roe*. At least it looked that way. So I think every honest legal commentator was astonished when they read the so-called joint opinion. Justice Sandra Day O'Connor again took the lead and, with Justices Souter and Kennedy, wrote the joint opinion. Although *Casey* did not overturn *Roe*, it did reinterpret *Roe*. The core of *Roe*, which remains true today, is that the states cannot criminalize abortion prior to fetal viability.[30] But regulation got easier under *Casey*. States can now bother women a lot more than before. States no longer need to demonstrate a compelling interest to have a waiting period, they merely cannot "unduly burden" a woman's decision to terminate her pregnancy. And women do not have a right to privacy any more, they have a "right to liberty," just like in *Cruzan*. Nonetheless, it was a terrific opinion that substantially saved *Roe*.

For my purpose today, the most important lines in the joint opinion are the ones about the doctor and patient. We have been talking about what doctors should do, and whether there is a profession of medicine that involves the exercise of medical judgment. Justice O'Connor, who is responsible for this part of the opinion, writes: "Whatever Constitutional status the doctor-patient relation may have, [and she's going back to Blackmun's opinion in *Roe* which says abortion is a medical decision] as a general matter, in the present context it is derivative of the woman's position."[31] According to *Casey*, the doctor-patient relationship does not underlie or override the two more general rights under which the abortion right is justified: the right to

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29 Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992).

30 Roe, 410 U.S. at 163-65.

31 Casey, 505 U.S. at 884.

make family decisions, which comes from *Griswold v. Connecticut*[32] and *Skinner v. Oklahoma*,[33] and the right to physical autonomy, which is exemplified in *Cruzan* (the right not to have doctors touch or treat you without your consent.) So, the Court regrounded the abortion right in terms of liberty (decision making) and bodily integrity (the right not to be touched), and repudiated the notion of independent physician rights and the medical nature of the abortion decision. In fact, in the joint opinion, physicians may as well not exist as a profession. They're technicians. They really have no judgment to exercise other than deciding how to technically perform the abortion procedure. In this regard the Court moved to the polar opposite extreme of Blackmun's view of doctors in *Roe*.

Medicine Today

So, where are we today? How have physicians fared under judicial love, judges who want to make the lives of physicians better by getting the law out of their lives? Judges have done two things. They have tried to define the personal value decisions of individual Americans as medical decisions, as Blackmun did in *Roe*, and they have tried to give physicians legal immunity for doing what their patients (and the families of their patients who couldn't talk for themselves) wanted them to do. Both of those actions have, I believe, severely undercut the profession of medicine. One of the hallmarks of professionalism is responsibility, accountability for one's acts. Immunity eliminates accountability. Nor could anyone ultimately accept Blackmun's argument that the abortion decision is fundamentally a medical decision to be made by the doctor. Nonsense. The decision must be made by the woman, grounded in her liberty, not the doctor's liberty. Blackmun's physician-centered *Roe* was so undercut by the patient-centered view of O'Connor in *Casey* that the physician is cut out entirely.

We now celebrate individualism in the United States in terms of rights talk in general, and patients' rights in particular. It is the right of patients to make choices, to do what they want. Doctors are no longer medical professionals who must use medi-

[32] Griswold v. Connecticut, 381 U.S. 479 (1965).
[33] Skinner v. Oklahoma, 316 U.S. 535 (1942).

cal judgment under the applicable professional standard of care. They are "providers" who respond to consumer demand.[34]

The American Medical Association (AMA) has failed to get effectively involved with critical medical ethical issues. It's pathetic. The AMA does have a Council on Ethical and Judicial Affairs, but it's unimpressive. In a recent statement the AMA said it is ethically acceptable to kill an anacephalic child, who is legally alive, in order to take its organs.[35] You may or may not agree with that, but that is a bizarre ethical position to take in 1995 when you would think the plight of forty million uninsured people might be a little higher on the agenda than harvesting a few more organs by killing anencephalic newborns. Recently, in an infamous deal with Newt Gingrich to take more money to sign on the Medicare Reform Dismantling Act, the AMA spokesman said it was not true that they took "billions of dollars" for their votes.[36] He said in the front page of the *New York Times*, "There isn't a precise figure. We don't know the amount."[37] Now, I don't expect the AMA or the American Bar Association to be unconcerned about the income of their members. Obviously that is their primary goal; but it should not be their only goal. It is sad when the AMA becomes so self-interested that it undercuts anything that might be called either ethics or professionalism. But that seems to be where we are.

Choice and the Market

With the defeat of the Clinton Health Care Plan, we seem to have decided not to have a national health insurance scheme. The Clinton Plan was fought on the basis of one word with the Harry and Louise ads. One word, the same word we have been talking about; we do not call it liberty any more, we call it "choice." The Clinton Plan was going to take away your choice. And when we are talking about abortion, we are talking about choice; the right to die, my choice. Choice has overwhelmed

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[34] *See* George J. Annas, *Reframing the Debate on Health Care by Replacing Our Metaphors*, 332 NEW ENGL. J. MED. 744 (1995).

[35] Council on Ethical and Judicial Affairs, *The Use of Anencephalic Neonates as Organ Donors*, 273 JAMA 1614 (1995). This opinion has since been repudiated by the AMA.

[36] Robert Pear, *AMA Defends Its Decision to Back Medicare Proposals*, NY TIMES, Oct. 12, 1995 at A1 (quoting Kirk Johnson, Senior VP).

[37] *Id.*

America, and what is choice? Well, it turns out it is even more an American characteristic than liberty. Choice is based on the market. Anything I have the money to buy, I should be able to buy. My choice. That is a classic American value. And now we have decided that we are going to apply the market, together with rights talk, to medicine. And it seems a perfect fit, especially since we have now deprofessionalized doctors. Doctors no longer use medical judgment and are not accountable for their decisions, so consumer-patients will make the decisions. Physicians should just carry out our wishes; they are only technicians. Most physicians have fallen right in line.

New managed care plans and Health Maintenance Organizations (HMOs) are advertised on the television all the time. HMO ads have taken over from the cigarette ads, and what do they advertise? They advertise choice. Choice is exactly what you *can't* have when you join an HMO. HMOs know Americans want choice, so they advertise it. They advertise all sorts of specialists to get you to sign up for their plan. But the whole point of their plan is to save money by keeping you away from their specialists. The new name for your primary care physician is "gatekeeper." You get a primary care physician, but we call her a gatekeeper and her job is to keep you away from those specialists and out of those expensive hospitals. That literally is her job. And if physicians do not do it, if they don't save money for the plan or follow plan protocols, they can be fired. And their contracts provide that they can be fired without cause.

Managed care executives note that society gave the medical profession an unlimited budget, and they overspent it. They've broken the bank. Now, the managers argue, they must tell physicians how to practice medicine. This sounds bad, but the managers insist it is reasonable because physicians did not know how to practice medicine anyway; they did not have any standards. Physicians did what the financial incentives dictated under fee for service payment. We also say that about lawyers all the time. David Wecht[38] said it this morning, that it is just a question of money. Well, in one sense, lawyers really are hired guns and

[38] David N. Wecht, Esq., *AIDS: Medical, Legal and Societal Concerns*, Address at the Forensic Evidence and Legal Medicine Conference at Quinnipiac College School of Law (Oct. 27, 1995).

certainly, when you are in an adversarial system, it is a question of money. But you do not expect law to be only a question of money. You do expect there to be some rules. Even in the O.J. Simpson case,[39] we expected some rules of justice to be followed and we were disappointed, I hope, in Judge Ito for not controlling that circus.

We expect justice not to be for sale. And we certainly expect health care and medical care not to be for sale. Right now they are. The reason physicians cannot fight against the market, now that the market is running medicine, is because there is no strong medical ethics core to the medical profession. Now doctors are often told what their profile is going to be. Doctors are now told how many patients they can see, what tests they can do, and what they can and cannot say to their patients. This is because doctors cannot credibly say, "I have professional ethics. There are some things I cannot do. I am a patient advocate. I have an ethical obligation to advocate for my patients. I must be loyal to my patients." Physicians should be able to say that, but they can't because they have not done it. This is at least partly because physicians have been given a blank check by the judiciary and by American society for the last twenty-five years, and they have used it to act irresponsibly.

And doctors are not ready to take responsibility even now. They have convinced themselves that the main problem in medicine is malpractice litigation. Malpractice is a big problem and should be dealt with directly. But malpractice litigation is a trivial issue in the grand scheme of things. Even the Republicans know this, but they are happy to give a bone to the AMA if that is what they want, to get their support for much more important issues in terms of how much hospitals and doctors will be paid by Medicare. In trying to do good for doctors, and I believe both Justice Blackmun and Justice Hughes wanted to do good for doctors, they thought they were supporting the profession of medicine. By granting them immunity, and by saying that patient decisions were really doctor decisions, the judges thought they were upholding this grand tradition of the Hippocratic Ethic, that is, do no harm, be loyal to your patients and act in

[39] California v. Simpson, No. BA097211, 1995 WL 704382 (Cal. Super. Oct. 3, 1995).

their best interests. But patient decisions are patient decisions. Granting physicians prospective legal immunity is just another way of condoning and encouraging irresponsible, unaccountable and therefore unprofessional decision making. This is simply not acceptable. So the new rule is that doctors do whatever the health care plan tells them to do. That is what managed care is. It's not so much about managing the patients as managing the doctors.

Physician-Assisted Suicide

Once we conclude that medicine really is a consumer good, that physicians should do what their consumer-patients want, that patients have rights and they have the right to tell you what to do, the next step is inevitable. Remember with *Cruzan* and *Quinlan* we were talking about the right to refuse treatment: the right to refuse to be touched or treated, to be left alone. But we often did not use that term. It was too clumsy, the right to refuse treatment did not sound right. We like slogans in this country, so we used the "right to die." The right to die was shorthand for the right to refuse treatment, but not for the average American. The right to die sounds like a real right, a positive right, not a negative right, not the right to be left alone - the right to be killed.

So Americans are now saying, "Look doctor, you're taking such lousy care of people at the end of life—abandoning them, not giving them sufficient pain medication, not letting people die with their families, making people die in Intensive Care Units in pain and in misery—that I'd prefer to just end it all. Kill me." Well, the doctors first said, "That is against our medical ethics." To which the American public basically said, "Nonsense, you don't have any medical ethics. You doctors do whatever we pay you to do. You're technicians."

Physicians are seen as reasonable suicide assisters for two reasons. Number one, physicians have the magic pills. This is the rationale behind Oregon's Ballot Measure 16,[40] which gives

[40] Death With Dignity Act ("An adult who is capable, is a resident of Oregon, and has been determined by the attending physician and consulting physician to be suffering from a terminal disease, and who has voluntarily expressed his or her wish to die, may make a written request for medication for the purpose of ending his or her life in a humane and dignified manner in accordance with this Act.") Section 2.01.

doctors immunity for prescribing lethal drugs to terminally ill patients with six months or less to live.[41] Why should doctors be upset about that? "Don't talk to us about medical ethics," the Oregon voters said, "give us pills. You do what we say." Doctors' rights are derivative, as Justice O'Connor said, from their patients.[42] "If we tell you to do it, and you get immunity, you have nothing to say about it any more. You have no medical judgment to exercise. No medical ethics to uphold. You have no risk or accountability, you do what we say, it's our choice. Kill us." Actually the pills are a compromise. "We will kill ourselves, but physicians, you give us the pills to make sure we can kill ourselves cleanly."

Even though doctors have become technicians, we have retained the belief that doctors are special. They are not special any more in the sense of medical judgment, but they still come with the Hippocratic tradition of beneficence, that doctors actually try to do good, really try to help people. That's why Oregon Ballot Measure 16 and other measures don't allow you to go to your local druggist and get the pills, nor do they authorize the sale of the pills at a supermarket like Stop & Shop or a convenience store like the local 7-11. We want our pills from a physician, because we just don't want their technique, we want their blessing. This is the second reason we want physicians involved. We want the doctor to say, not just "Here are the pills to kill yourself," but "It's a good idea. It's OK to do it." It turns out to be hard to kill yourself. It turns out we don't like to do it ourselves. It is a little messy. Although it is perfectly legal: there is no law against suicide in this country. The right to die movement in this country, however, says we want a doctor to prescribe it.

So far, however, except for Ballot Measure 16 in Oregon, the law has not gone that way. Suicide has been decriminalized, but there is no constitutional right to kill yourself and no constitutional right to have somebody else kill you or assist in your suicide. The only argument that there might be, since you must

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[41] Death With Dignity Act ("No person shall be subject to civil or criminal liability or professional disciplinary action for participating in good faith compliance with this Act. This includes being present when a qualified patient takes the prescribed medicine to end his or her life in a humane and dignified manner.") Section 4.01(1).

[42] Casey, 505 U.S. at 884.

have a physician involved is, well, isn't physician-assisted suicide just like abortion? The woman cannot abort herself, that is what *Roe* is all about; the doctor performs the abortion. So if you are going to say it is a constitutional right for a woman to have a doctor perform an abortion on her, why shouldn't it be a constitutional right for a terminally ill patient to have a doctor help her die? Judge Noonan in his 9th Circuit Opinion,[43] was amazed that people cannot tell the difference between an abortion and killing a patient. I agree with him,[44] but he should have taken the analogy more seriously, since there are some striking similarities.

Moreover, since we are a technological society, we are always looking for technological fixes. One thing we are looking for is an abortion pill which could solve the problem of getting doctors involved at all. Women would be able to take a pill and effectively perform an abortion on themselves. RU486[45] is not like this yet, since you have to see a doctor three times to take it, but someday women should be able to take a pill at home and

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[43] Compassion in Dying v. Washington, 49 F.3d 586 (9 Cir. 1995).

[44] Four months after this speech Noonan's decision was reversed in an 8-3 en banc decision. Relying on *Casey* and *Cruzan*, the court held that terminally ill patients have a constitutional liberty right to have physicians prescribe lethal drugs for them to take themselves in order to end their lives and that the state cannot interfere with this right by declaring such an act an assisted suicide, and therefore, illegal. *Compassion in Dying v. Washington*, 79 F.3d 790 (9th Cir. 1996). The court's position was that physicians' prescriptions of lethal drugs for terminally ill patients is just another choice that individuals should have. As to the question of medical ethics and whether physicians themselves might have any reason not to accede to patient requests for lethal drugs, the court concludes not only that the Hippocratic Oath "does not represent the best or final word on medical or legal controversies today" but also that the court believes doctors will do whatever courts tell them it is legal to do regardless of their traditions. *Id.*, at 829. Drawing on the abortion analogy, the court writes:

> [R]egardless of the AMA or its position, experience shows that most doctors can readily adapt to a changing legal climate. Once the Court held that a woman has a constitutional right to have an abortion, doctors began performing abortions routinely and the ethical integrity of the medical profession remained undiminished. Similarly, following the recognition of a constitutional right to assisted suicide, we believe that doctors would engage in the permitted practice when appropriate, and that the integrity of the medical profession would survive without blemish.

Id., at 829-830. Nonetheless, the court did not require physicians to follow their patients' wishes in assisted suicide, it said it was only "extending a choice to doctors as well as to patients. . ." *Id.*, at 830. *See also* Quill v. Vacco, 80 F.3d 716 (2nd Cir. 1996) (holding New York statutes that penalize assisted suicide unconstitutional for violating the equal protection clause of the 14th Amendment).

[45] Manufactured by Roussel Uclaf and commonly referred to as the "French abortion pill."

perform an abortion on themselves. Then we would not have to involve the benevolent medical profession. We can argue about whether this is a good thing or a bad thing. To the extent that abortion is a moral decision for which women should take responsibility, an abortion pill would mean that women alone would take responsibility for abortions.

On the other end of life, suicide, we also want a pill. We want a "magic pill" to end our lives. A cyanide capsule or an overdose of morphine, or whatever, we don't care, as long as it works. What we seek at both ends of life is choice and control.

Control and Medicine

We want to control nature. We want to control birth, to control death, and to control our lives. But no matter how many choices we get to make we are never going to be able to control our lives or our deaths. As Americans we hate to accept that there are going to be limits to our lives. We do not accept death. We do not accept unwanted pregnancies. We do not accept anything.

Dr. Wecht[46] mentioned that in the future we are going to have more genetic tests, and we will. We are going to have, for example, tests for the breast cancer gene, predictive tests for colon cancer, predictive tests for Alzheimer's disease. What do we have in law or medical practice to prevent those tests from being performed on fetuses and to prevent women from demanding an abortion if their fetus has the breast cancer gene or the colon cancer gene or the Alzheimer's gene? I am going to give you a personal opinion: prenatal screening for genes that predispose one to a late onset disease followed by abortion is horrific. All of us are going to die of something, and if we live long enough, that something is going to have a genetic component to it. We will be able to detect what that genetic component is likely to be in a fetus. But there is no genetically perfect child. All children (and all of us) are imperfect and mortal.

If our goal in using medicine to enhance choice is to have perfect people, or immortal people, we will fail. Neither perfection nor immortality are reasonable goals. We must stop our ob-

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[46] C. Wecht, *supra* note 7.

sessive silliness about immortality and perfect kids. We must concentrate on quality of life rather than quantity of life, and recapture a medical profession that is willing to help us make responsible choices by making some judgments. I think there is still a chance to get our medical profession back - but we will not do it by pretending that personal decisions are medical decisions, or by giving physicians immunity for following medical ethics or making medical judgments. Give us some advice. Tell us, for example, that it is against medical ethics to use prenatal screening techniques to identify fetuses that have a genetic predisposition to breast cancer or Alzheimer's disease. We need our physicians to enter into a dialogue with the American public not just about what we can do, but what we should do; not just about what is possible, but what is right and good; not just about what techniques we can apply, but whether or not we should apply them, and what our goals are.

Alexander Solzhenitsyn provides a useful closing thought to the question of whether we should be happy to have the law trump medical ethics. Asked in 1978 to give a commencement address at Harvard University, shortly after he had come to the US from the USSR, he readily conceded that a society with no objective legal scale is a "terrible one," but forcefully argued that a society with *only* a legal scale is equally dreadful:

> A society [medical profession] that is based on the letter of the law and never reaches any higher is taking small advantage of the high level of human possibilities. The letter of the law is too cold and formal to have a beneficial influence on society. Whenever the tissue of life [medical practice] is woven of legalistic relations, there is an atmosphere of mediocrity, paralyzing man's (sic) noblest impulses.[47]

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[47] Alexander Solzhenitsyn, *The Exhausted West*, HARVARD MAGAZINE, July/Aug. 1978, at 22, *quoted* and *discussed in* George J. Annas, *Reconciling Quinlan and Saikewicz: Decision Making for the Terminally Ill Incompetent*, 4 AM. J. LAW & MED. 367 (1979).