The Role of Personhood in Treatment Decisions Made by Courts

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THE COURTS IN THE UNITED STATES ARE becoming increasingly more involved in the area of medical treatment. To scrutinize treatment decisions courts make is a complex task because it involves an analysis of elements designed both to enforce treatment and to withhold treatment in a variety of settings. Thus, mental patient advocates have argued a right to be treated[1] and now even more vociferously argue a right *not* to be treated.[2] For many years those advocating the rights of mentally retarded persons argued against their sterilization,[3] but now there is a move to reanalyze this position, even to the point of arguing a constitutional right to be sterilized.[4] In the area of nontreatment decisions for the incompetent person who is seriously or terminally ill, there are those who argue that all treatment should be rendered while others argue treatment is rendered far too long. One striking aspect of these arguments and counterarguments for treatment and nontreatment is that they can all

[1] See, e.g., *O'Connor v. Donaldson*, 493 F.2d 507 (5 Cir. 1974).
[2] See, e.g., *Rogers v. Okin*, 478 F. Supp. 1342 (D. Mass. 1979).
[3] See, e.g., *Frazier v. Levy*, 440 S.W.2d 393 (Tex. Ct. of Civil Appeals, 1969).
[4] See, e.g., *In the Matter of Lee Ann Grady*, 426 A.2d 467 (N.J. Sup. Ct. 1981).

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be supported by arguing that the patient is a "person" and therefore has certain legal rights to be, or not to be, treated. The courts, at least recently, have not been prone to base their decisions on the finding of personhood. The one exception to this involves "simple" cases involving brain death where courts have said that persons cease to exist at the point of brain death.[5] Other than this, courts have not explicitly relied on personhood criteria, although hints underlie some decisions that the perceived existence of personhood (or lack of it) helps in determining the outcome of the decisions.

There is no case that I know of that tries to define personhood for all purposes. When a court or legislature defines a term it is usually (if not always) with reference to a specific issue, or for a particular purpose. For example, in *Roe v. Wade*[6] the Supreme Court was asked to decide whether a fetus was a "person" as that term was used in the Fourteenth Amendment of the United States Constitution. If it were such a "person" then it would be entitled to constitutional rights and protections. The court decided that a fetus was not such a person and therefore not entitled to the same protection as those who had been live born. It does not mean that a fetus cannot be deemed a "person" for other purposes, such as enabling its mother to receive Aid for Dependent Children (AFDC) benefits during the pregnancy.[7]

Historical Overview

The only time that United States courts and legislatures have broadly defined the outline of personhood has been in relationship to slavery. Kenneth Stampp in his work *The Peculiar Institution* (1956) argues that slaves were recognized as both "things" and "persons."[8] It is not at all clear what he means when he talks about slaves as persons. It is very clear what it means when slaves are seen as things: slaves could

[5] See *Commonwealth v. Golston,* 373 Mass. 249 (1977).
[6] *Roe v. Wade,* 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed.2d 147 (1973).
[7] *Burns v. Alcala,* 420 U.S. 575 (1975). While the Supreme Court ruled that mothers of unborn children were not entitled to AFDC payments, this ruling was based on the legislative intent of the Congress, not on a larger finding of personhood.
[8] Unless otherwise specifically noted, the entire discussion of the rights and obligations of slaves is taken from chapter 5 of this excellent work.

not acquire title to any property, nor enter a contract. A slave could not be a party to a lawsuit nor was he a competent witness, except in a case involving another slave. Since slaves could not contract, they could not be joined in lawful wedlock. When a slave was executed by the state for a capital crime, the state usually compensated the owner for his loss of property—this being justified by the principle that the execution of slaves was similar to the seizure and condemnation of private property for which the owner was entitled to just compensation. Slave owners could deed, sell, or devise their slaves in any way they saw fit. Family ties of slaves were ignored when slaves were put up for sale by executors of estates or at sheriffs' sales for the satisfaction of debts—the obligation being on the seller to obtain the largest sum of money possible for this property. Slaves were awarded as prizes in lotteries and raffles, and were wagered at gaming tables and horse races. The death of slaves was treated as a grave misfortune for the slaveowner who thereby lost a valuable piece of property. Courts were filled with litigation bringing what were essentially consumer protection actions, arguing that slaves they had bought had hidden defects that the seller should have disclosed—past precedents involving the soundness of horseflesh. If one man killed the slave of a second, the slaveowner had a right to sue for money damages for his loss of property. When a hirer of a slave severely scarred the slave through brutal whippings, the owner brought suit for the reduction in the market value of his property.

Every slave state had a code which controlled the actions of slaves. Slaves were to show complete obedience to all white men. A slave never was to raise a hand against a white man or use abusive language. Slaves could not move about without a pass to be shown to any white man who asked to see it. No slave could be taught to read or write, or was allowed to beat drums or blow horns, possess guns or liquor, gamble, raise cotton, or own animals.

Slaves were rarely imprisoned for offenses, but were subject to beating, branding, and mutilation. This should not be surprising since it is not possible to punish someone who is not already free by taking away his liberty. It is possible, but not necessary, to further demonstrate the slave's role as property according to both law and practice.

In order to show that slaves were also deemed to be "persons," Stampp points out that certain state constitutions and statutes required

slave owners to treat slaves with humanity—to provide necessary clothing and food, and to abstain from unnecessary punishment. Some codes forbade field work on Sunday, while permitting necessary household work. Later codes prohibited "cruel whipping," "inhuman treatment," or the "malicious" killing of a slave by an owner or overseer. In a few especially egregious cases courts even enforced these laws. It seems to me that these protections, in the total absence of all civil rights, does not establish personhood. These protective laws go no further than current laws forbidding cruelty to animals.

The culmination of the "personhood" issue in regard to slaves is the ignominious *Dred Scott*[9] case. The issue in that case was whether a *former* slave was a "citizen" of the United States and therefore entitled to sue in a court of the United States. The Court's analysis of this issue started with the proposition that the words "people of the United States" and "citizens" are synonymous. The Court indicated that the drafters of the Declaration of Independence and the Constitution held to the opinion that "African negroes" were "beings of an inferior order," have "no rights which the white man was bound to respect," and were "treated as an ordinary article of merchandise." As a result, the Court concluded that the drafters did not intend these documents to "embrace the negro race, which by common consent, had been excluded from civilized governments and the family of nations, and doomed to slavery." The Court therefore held that members of this class were not entitled to the rights and privileges of a citizen of the United States, including the right to sue in a federal court. It was a 7-2 decision.

Thus far, it has been determined that, in terms of rights and protections, slaves were apparently not "persons." However, slaves had obligations and were accountable for crimes. In this sense they were persons, for animals cannot commit crimes since they cannot form the requisite intent necessary to establish criminality. Historically, even this statement must be hedged as there are reports of animals being punished for "crimes." A report from 1386 involved the conviction of a sow for having attacked a child (Kittrie 1971, 23). The sow was dressed in human clothing, mutilated, and then hanged in the marketplace. This early case of the personification of animals indicates an ability to ascribe human motives to nonpersons and the possibility of

[9] *Dred Scott v. Sandford,* 19 How. 393, 15 L.Ed. 691 (1857).

overinclusiveness in defining persons. It is interesting to note that one of the earliest expressions of the insanity defense compared the intent of a person with that of an animal—that is, a defendant was immune from punishment if he could show that he "doth not know what he is doing, no more than . . . a wild beast."[10]

The purpose of this perhaps overextensive review of the legal status of slaves is to demonstrate that relatively recent history indicates the capacity of our judicial and legislative systems to exclude from personhood status those who are clearly persons. At the same time, it demonstrates that, even in regard to the ultimate dehumanization of living human beings, personhood status was not entirely extinguished, especially in regard to the obligations and legal responsibilities of slaves.

Perhaps slightly more to the point is an interesting historical note we find in Blackstone's *Commentaries on the Laws of England* (1765–1769, 2:246). In the portion of this work dealing with inheritance, he makes reference to an entity referred to as a "monster."

> A monster, which hath not the shape of mankind, but in any part evidently bears the resemblance of the brute creation, hath no inheritable blood, and cannot be heir to any land, albeit it be brought forth in marriage: but, although it hath deformity in any part of its body, yet if it hath human shape, it may be heir.

Thus, these "monsters" may not inherit from their fathers even though they are born in wedlock. This means that, should this be the only issue of a marriage, then upon the father's death his land will go to the lord. Under the common law, which places great emphasis on the importance of the transfer of land within families, this is a very significant legal disability. While "monsters" are not treated like other persons born in wedlock for purposes of inheritance, it is not clear they suffered any other legal disabilities. In this sense, "monsters" are treated like illegitimate children, who are deemed *nullius filii* (the sons of nobody) and are therefore also incapable of inheriting since they have "no inheritable blood" (Blackstone 1765–1769, 2:247).

Today, in the United States there is no class of living human beings who are deemed to be nonpersons. Of course, determining when one

[10] *Rex v. Arnold*, 16 How. St. Tr. 684, 764 (1724), cited in Kittrie, n. 42, 131.

is dead (and therefore no longer a person) has been an issue of some dispute and is subject to change as our technology and values change. Thus, the Harvard (1968) criteria for brain death do not lead to the ineluctable conclusion that those who meet those criteria are to be removed from the class of living persons. Indeed, the main title of the article containing the criteria is "A Definition of Irreversible Coma." The authors could have concluded that those individuals meeting their criteria were alive but in irreversible coma. This is not necessarily the same as being dead. Even if it could be proven that all "vital signs" would inevitably cease to exist in a short time despite the use of all existing technology, it could be interpreted as meaning that these comatose individuals were close to death. This is not to argue that treating this population as dead is wrong, but merely to point out that by adopting this definition we *choose* to exclude this population from the class of living beings, thereby depriving this class from the protections living human beings have.

The Courts and Nontreatment Decisions

In terms of nontreatment decisions, I think the case of *Karen Quinlan*[11] represents the best opportunity to examine the role of personhood in such decisions. A close examination of the facts of this case is essential.

On April 15, 1975, Karen Quinlan stopped breathing for two fifteen-minute periods. The reason for this has never been established. She was brought to an emergency room where she was unresponsive to deep pain and her pupils were unreactive. She was placed on a respirator to assist her breathing. An electroencephalogram was characterized as "abnormal" but showing some activity consistent with her clinical state. After some time, although still comatose, she would grimace, cry out, and blink, although still "totally unaware" of anyone or anything. One physician testified that humans have brains that work in two ways. One is vegetative, controlling breathing, blood pressure, chewing, swallowing, and so forth. Quinlan still had this capacity to a certain degree. The second capacity is described by the physician as follows: "We have a more highly developed brain which

[11] *In the Matter of Karen Quinlan,* 70 N.J. 10, 355 A.2d 647 (1976).

is *uniquely human* which controls our relation to the outside world, our capacity to talk, to see, to feel, to sing, to think"[12] (emphasis added). This ability of the brain Karen did not have. The court notes that the medical consensus is that Karen is in a "chronic vegetative state" and existing at a "primitive reflex level." The court points out that while Karen moves, blinks her eyes, cries out, and has other reactions "one normally associates with being alive" the "quality of her feeling impulses is unknown." The court refers to her as being "vegetative" numerous times and finds that she will never be restored to a "cognitive or sapient life."

At one point, one physician, explaining why Karen would not receive blood in the event of a "massive hemorrhage" or be eligible for "major surgical procedures" states: "The subject has lost human qualities."[13] (The trial court judge found Karen to lack "those qualities unique to man.")

This review indicates that the court describes Karen in terms that leave the reader with a question about how this court views Karen's personhood—"vegetative," "lost human qualities," "reactions one *normally* associates with being alive" (emphasis added), and so on. Explicitly, however, the court does treat her as a person. Indeed, the case's outcome is based on Karen's constitutional right to privacy, a personal right, which permits her to refuse treatment through a guardian. It is her right as an individual, not the rights of her parents. To show the personal nature of this right, the court, at one part in the decision, states that Karen's guardian and family should determine whether *she* would exercise this right in these circumstances. It would seem that, if the court felt Karen's right to privacy was dispositive of the issue, the decision should end here. It does not. It is not until seven pages later, at the end of the opinion, that the court formulates the declaratory relief requested. It states (and states it twice for emphasis) the following scheme:

> Upon the concurrence of the guardian and family of Karen, should the responsible physicians conclude that there is no reasonable possibility of Karen's ever emerging from her present condition to a cognitive, sapient state and that the life support apparatus now being administered to Karen should be discontinued, they shall

[12] Idem. 355 A.2d 654.
[13] Idem. 355 A.2d 657.

> consult with the hospital "ethics committee" or like body of the institution in which Karen is then hospitalized. If that consultative body agrees that there is no reasonable possibility of Karen's ever emerging from her present comatose condition to a cognitive, sapient state, the present life-support system may be withdrawn and said action shall be without any civil or criminal liability therefor on the part of any participant, whether guardian, physician hospital or others. We herewith specifically so hold.[14]

This holding is unworkable in several regards. First, it ignores the issue of establishing Karen's wishes. The "ethics committee" which, in the court's scheme, is essentially a nonmedical, hospital-appointed group, is not given explicit power to determine Karen's wishes. Instead, it is to make a determination of the possibility of her return to a cognitive, sapient state, a task to which it cannot bring any expertise. Second, this committee of laypersons, appointed by the hospital, is empowered to immunize all actors (who will include their colleagues and employer) from criminal or civil liability for their actions. It is unprecedented for a non-judicial, private body to have this power. Given the apparent gravity of the task it is to perform, there is a remarkable lack of detail in regard to the size and membership of the committee, whether it must act unanimously or by majority vote, and so forth. Finally, it leaves the various actors with enormous discretion. Regardless of Karen's wishes, if the "family" (whatever this means), guardians, or physicians wish to keep Karen on the respirator she will remain there. In fact, Karen's physicians continued to refuse to remove her from the respirator after this case was decided. It was only when she was able to be successfully weaned from the respirator that Karen was removed.

Another portion of the case deals explicitly with the issue of whether removal from the respirator would constitute homicide, which is the "unlawful killing of a human being." The court concludes that such removal would not constitute homicide. The court gives a number of reasons for this conclusion which are legally quite sound. But one reason is questionable. The court states that after turning off the respirator "the ensuing death would not be homicide but rather expiration from existing natural causes."[15] This is wholly unconvincing. Assume

[14] Idem. 355 A.2d 671.
[15] Idem. 355 A.2d 676.

a situation in which a person temporarily requires a respirator but will eventually be able to be removed from the respirator and go on to live a normal, healthy life. Assume further that this person is intentionally and prematurely removed from the respirator. Although this person dies from what the court refers to as "existing natural causes," it is unquestionably a homicide.

Assume another situation. In this one, Karen Quinlan's "ethics committee" is scheduled to meet tomorrow, when it will most certainly conclude that she has no possibility of returning to a cognitive, sapient state. That night an old enemy of hers sneaks into her room and disconnects her respirator, causing her to die of "existing natural causes." Was a homicide committed? Is this different from the planned actions of the next day in which technicians or physicians were to disconnect the respirator?

What is really going on in this case? It seems to me the court finds that Karen belongs to a new class which could be called the "sort-of-dead," "quasi-dead," or, to use Victorian language, "living dead." We know she is not dead because the court specifically says she is not. Additionally, if she were truly dead the court would have found that the physician had no obligation and no right to treat her. As one court stated: "There is no legal basis for a duty to administer medical treatment after death."[16] In fact, if Karen were dead her parents would have the absolute right to control her body and any further manipulation of the body without their consent would be illegal.

Instead, what the court has done is to say that if her parents and physician wish to take her off the respirator, it is permissible to do so, and if either party wishes to continue to treat her, that is permissible too. The focus is on the feelings and sensibilities of the living parties, not any longer on Karen. She is so much like being dead that the court concludes the state no longer has an interest in keeping her alive. This, I think, accounts for the rather cavalier approach the court takes in analyzing the homicide issue, as discussed above, and its willingness to bestow great power on a poorly conceived "ethics committee." But to be more specific, it is probably more accurate to say that the state has no interest to keep her alive when her parents

[16] *In the Matter of Earle Spring*, 1980 Mass. Adv. Sh. 1209, 1214, 405 N.E.2d 115 (1980).

and physicians seek to terminate treatment; it is not clear that her enemy who disconnects the respirator in the night would be treated similarly.

It also seems to me that Karen has not stopped being a "person" for all purposes. The court explicitly holds that she has a constitutional right to privacy, although it seems to ignore this in its ultimate decision. If her father or mother were to die while she was on the respirator, then she would be entitled to inherit from them. She has the same right to receive public or private medical insurance benefits that anyone else has. She has the right not to be an experimental subject or mutilated in any way, although this is also true of corpses.

I do want to emphasize one more time that the court does *not* discuss personhood or even Karen's "quality of life." It does seem, however, that the court has in effect said that the state no longer has the same interest in protecting her life as it does in protecting those of the citizenry in general, and entirely delegates the state's protective role to her parents, physicians, and ethics committee. Finally, and obviously, Karen has none of the obligations associated with personhood.

A number of cases have been decided that are similar to *Quinlan.* One California case involved an 18-year-old man who was severely injured in an automobile accident. His medical condition was described as follows:

> The uncontroverted medical evidence was that Vincent Martin Young is in a stable and hopeless medical circumstance. He apparently cannot hear. His eyes are sewn shut for his own sake, but even if open, he cannot see as sight is generally known. He cannot breathe. He cannot feed himself. He has no control over his bodily functions. He cannot feel pain or pleasure. He shows no signs of thinking or of recognition of other persons or things. He has some brain activity, but it is at the 1 day to 1 month level of intelligence.[17]

It is hard to know how to interpret the last two sentences. How can one have "no signs of thinking or of recognition" and still have a "1 day to 1 month level of intelligence"? In its three-page decision the court has no problem turning over the decision to terminate the use of the respirator to his conservator, who is also his mother. The

[17] *In the Matter of Vincent Martin Young,* Superior Court of the State of California, Orange County, No. 100P63 (Sept. 11, 1979), page 2.

decision becomes hers alone—no mention is made in the decision of Young's desires. The court bases its legal decision on the proposition that "*people* have the right to refuse medical treatment" (emphasis added). The court concludes that the "person" has such a right and decides that the conservator can exercise on behalf of the conservatee if "she [the conservator] believes it to be in the best interests of the conservatee." Since Young cannot feel pain or pleasure, and has no power to think or recognize anyone or anything, it is not clear to me why *his* interest is served by having treatment terminated. This does not mean treatment should be continued—but it is only the family's interest that will be furthered and that in such a circumstance may be permissible, since Young, as the court describes him, may not have any interests at all.

Severns v. The Wilmington Medical Center[18] involved a 55-year-old automobile accident victim. She was in a persistent vegetative state with primitive reflexes and no "cognitive or sentient" brain functions. Removal of her respirator, requested by her husband, would lead to her death. One physician testified that Ms. Severns would not recover "brain functions indicative of a newborn to a three-month-old child." One physician testified that there was a one-in-a-hundred possibility that she would recover such function. There was also testimony that Ms. Severns suffered extensive injury to the upper portion of her brain which deals with "awareness, conscious thought, memory, personality, intellectual functions and speech." While the court agreed that Ms. Severns has a constitutional right to privacy, including the right to refuse treatment, it is the only court that recognizes the profound nature of the issue presented. The court states:

> We are on the threshold of new terrain—the penumbra where death begins but life, in some form, continues. We have been led to it by the medical miracles which now compel us to distinguish between "death," as we have known it, and death in which the body lives in some fashion but the brain (or a significant part of it) does not.[19]

While the court does not grapple with the issue it presents, its understanding of the fact that they are dealing with a problem of

[18] *Severns v. The Wilmington Medical Center*, 421 A.2d 1334 (Del. 1980).
[19] Idem. 23.

boundaries between life and death (personhood and nonpersonhood) is admirable.

There are two points that I would like to make here. The first is that all the cases discussed above involve patients who lack all of Joseph Fletcher's (1974, 4) original fifteen indicators of personhood, as well as his later four indicators. This is not to say that the courts referred to Fletcher's argument—or even knew of its existence—but the courts were, at least latently, struggling with the same issue Fletcher addressed and came to what I believe is a similar conclusion.

Second, in her work on fetal research, Sissela Bok (1976, 2–6) listed the reasons that underlie the protection of human life:

a. For the victim, harm and/or killing:
   (1) If anticipated, causes intense anguish, fear, and a sense of loss of all that can be experienced and valued in life,
   (2) Can cause great suffering,
   (3) Can unjustly deprive those who have begun to experience life of their continued experience thereof.
b. For the agent, killing and harming others can be brutalizing and criminalizing. It is not only destructive to the agent, therefore, but a threat to others.
c. For the family of the victim and others who care there can be deep grief and loss. They may be tied to the victim by affection or economic dependence; they may have given of themselves in the relationship so that its severance causes deep suffering.
d. All of society, as a result, has a stake in the protection of life. Permitting killing and harm sets patterns for victims, agents, and others, that are threatening and ultimately harmful to all.

If we examine this list in reference to the type of patient we have been discussing, we see that the policy against harm or killing does not seem to apply, with the exception of paragraph (c). More specifically:

a. (1) The patient cannot anticipate his death, or suffer anguish, fear and a sense of loss;
   (2) The patient is incapable of suffering;
   (3) The patient will not be deprived of his continued experience of life, since he is incapable of "experiencing" anything.

b. To avoid this, courts have continually supported their respect for medical ethics and have not *ordered* physicians to cease "treatment."
c. Families may suffer grief and loss at the termination of life-support systems. I believe this is why so much discretion is left up to the family—it is *their* feelings that seem to be the main issue in these cases. It is instructive that in *all* the cases discussed it is family members who argue for the termination of care. It would appear that the real source of the grief and loss is the onset of the persistent vegetative state, which is in fact the source of the loss, not the termination of life support. As a result the disposition of these patients is left to their families. In many respects this is similar to the disposition of dead bodies wherein the family, because of its feelings of affection for the deceased, are given the power to determine how to dispose of the body.
d. It is interesting that the *Quinlan* court directly speaks to this issue. In its opinion it states that if Karen's parents decide to disconnect the respirator "this decision should be accepted by a society, the overwhelming majority of whose members would, we think, in similar circumstances, exercise such a choice in the same way for themselves or for those closest to them."[20] The court seems to be saying that society does not have such a stake in this type of human life that the family should not be allowed to make decisions to terminate treatment. The patient population involved exists outside of the rest of society, and treating them in this way does not threaten the rest of us—if anything it shows a proper respect for this type of patient and the patient's family.

This discussion is not designed to judge the correctness of these court decisions, but rather is designed to try to explain the underlying beliefs that might lead to them.

Although a large number of courts have been confronted with nontreatment decisions, not all of them are based on perceived notions of personhood. Indeed, it is unfortunate that they have all been lumped in one category, called "nontreatment decisions," since there are at

[20] *Quinlan*, supra, 355 A.2d, n.15, 664.

least two very distinct groups. The first group involves the nontreatment of those in persistent vegetative states. The second involves the nontreatment of incompetents who suffer from terminal diseases which can, or might be, treatable to a certain extent. It is important to note that the first or *Quinlan*-type case group does not involve those with a "terminal disease"—that is, they do not suffer from heart disease, cancer, or some illness. In fact, they are in relatively "good health" and could survive for quite some time. The families of these individuals do not seek to withhold "treatment" of a disease, but rather seek the termination of artificial life support that sustains these patients.

By contrast, the second group does not need any support to stay alive in the immediate future, but needs treatment for a "terminal" disease. Thus, the famed *Saikewicz*[21] case involved a sixty-seven-year-old profoundly retarded man who suffered from leukemia. He needed no support to remain alive at the time the case was brought, but may have had his life extended from two to thirteen months had he received chemotherapy. The question in that case was whether he would have wished to undergo the rigors of the chemotherapy in order to extend his life for that period of time. While it is now common in the medical-legal literature to link these cases, they are in fact quite different. As the *Saikewicz* court pointed out, while Saikewicz was profoundly mentally retarded "his mental state was a cognitive one." Saikewicz's personhood was never in question, and the court did not permit turning over nontreatment decisions to family, ethics committees, or courts. The court instead truly attempted (how successfully is in question) to determine what Saikewicz's needs and wants would be. In a subsequent opinion by a lower appeals court in Massachusetts involving a 67-year-old woman who was in an essentially vegetative condition as a result of Alzheimer's disease and a stroke, the court distinguished this case from *Saikewicz* by pointing out that the treatment recommended in *Saikewicz* would make "possible an extension of a normal, cognitive, functioning existence for a period of months or years."[22] This was not true of Mrs. Dinnerstein, and the court felt comfortable leaving the decision of whether or not to

[21] *Superintendent of Belchertown v. Saikewicz,* 370 N.E.2d 417 (Mass. 1977).
[22] *In the Matter of Shirley Dinnerstein,* 380 N.E.2d 134, 138 (Mass. App. Ct. 1978).

enter a "do not resuscitate" (DNR) order for Mrs. Dinnerstein up to her family and physicians.

Interestingly, the Massachusetts Supreme Judicial Court (the *Saikewicz* court) had a subsequent opportunity to speak to this issue. This case involved Earle Spring,[23] a 79-year-old man who suffered from end-stage renal disease requiring hemodialysis. Although the nature of his mental impairment was unclear, the court described him as "completely confused and disoriented" as a result of "chronic organic brain syndrome." In describing the hemodialysis the court stated it "did not cause remission of the disease or restore him even temporarily to a *normal, cognitive, integrated, functioning existence,* but simply kept him alive."[24] The court did not explicitly rely upon this finding in concluding that he could be denied dialysis, but it certainly indicates its opinion of his "personhood." The language is even more astounding when one realizes that it comes from a court that only two and a half years earlier rejected making nontreatment decisions on the basis of "quality of life" considerations. The court on that occasion stated: "To the extent that the formulation equates the value of life with any measure of the quality of life, we firmly reject it."[25]

The distinction between these two types of cases becomes readily apparent in a New York Court of Appeals opinion which consolidated two cases that purely represent the distinction set out above. One case involved Brother Joseph Fox, an 83-year-old man who suffered a cardiac arrest during hernia surgery.[26] As a result of anoxia he entered a "permanent vegetative state" and required the support of a respirator. It was the unanimous opinion of the physicians who examined Brother Fox that he would never return to a cognitive, sapient state which the lower court characterized as "the ability to feel, see, think, sense, communicate, feel emotions and the like."[27] It will come as no surprise to learn that New York's highest court permitted Brother Fox to be removed from the respirator. It formed its opinion on the fact that Brother Fox expressed an opinion on a

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[23] *In the Matter of Earle Spring*, 1980 Mass. Adv. Sh. 1209 (1980).
[24] Idem. 1212.
[25] *Saikewicz*, supra, 370 N.E.2d, n. 27, 432.
[26] *In the Matter of Father Philip Eichner*, 52 N.Y.2d 363, 420 N.E.2d 64 (1981).
[27] *In the Matter of Brother Fox*, 102 Misc.2d 184 (Supreme Court, Special Term, Nassau County, Dec. 6, 1979).

number of occasions that he would never want to be kept alive through the use of artificial means if he was ever in a vegetative state like Karen Quinlan. However, one cannot help but wonder what the court would have decided if Brother Fox never expressed any opinion on the subject. I would guess he would still be permitted to be removed from the respirator. I note here that all of the members of the religious community in which he lived supported his removal from the respirator as did his ten nieces and nephews, all of his surviving family.

The case that the New York court consolidated with the Fox case involved John Storar,[28] a 52-year-old severely retarded man who lived in an institution all his life. Mr. Storar suffered from bladder cancer which had metastasized. The cancer was incurable and caused him to bleed into his bladder. As a result of this bleeding Storar required transfusions to remain alive. He was described as being in "strangling pain," which was increased by the transfusions since blood clots formed in his bladder causing painful urination. Storar's mother, who visited him daily and clearly had great love for him, decided that it would be best for her son to cease the transfusions, a decision supported by Storar's physicians. The court, however, rejected this decision. It argued that since Storar was mentally retarded he should be treated by the law as an infant. It then went on to state its belief that Storar really suffered from two separate diseases—bladder cancer and bleeding—one which could not be treated and one which could. As a result of this, the court found that this was just like a Jehovah's Witness case in which parents wished to withhold blood. By characterizing it this way, the court was able to conclude that parents have no right to let their children bleed to death, and ordered the transfusions to be administered.

The court's reasoning is so simple-minded it almost defies belief. This is not at all like a Jehovah's Witness case. In none of those cases is any child suffering from a terminal illness, and in none does the parent argue that the transfusion of blood is not in the child's best interest (at least in the secular sense). Additionally, it makes no sense to separate Storar's terminal cancer and bleeding. Finally, and most distressingly, the court really does treat this adult as an infant and does not analyze Storar's own constitutional right to refuse treatment, and how that right might be enforced. But, unlike Fox, Storar was

[28] *In the Matter of John Storar,* 52 N.Y.2d 363, 420 N.E.2d 64 (1981).

a walking, seeing, feeling, communicating person, and the court's collective heart would not permit him to bleed to death. On the same day, it had no trouble letting Fox die from lack of oxygen. The court itself distinguishes Fox from Storar, stating: "This case bears only superficial similarities to Eichner [the case involving Brother Fox] and the determination must proceed from different principles."

This brings us to the question of nontreatment of infants born with severe (and sometimes not so severe) defects. At the risk of overstating my case, I would argue that, while all would quickly agree that infants and children are "persons," they do not have the rights and obligations of persons, but acquire these rights and obligations slowly as they develop into adulthood. In fact, I would argue that they stand more in the legal position of slaves, as discussed earlier, than as free persons.

The Legal Status of Infants and Children

The demarcation between adulthood and infancy is the last bastion of basing rights and obligations solely on the basis of status. This distinction is taken as a given (the natural order of things), as was the inferiority of black men and women not too long ago. Children—no matter how sophisticated, mature, or intelligent—cannot vote, sign binding contracts, work without permission of their parents and the state, travel freely (they become "runaways"), marry, sue in a court of law (unless brought by an adult on their behalf), buy and read certain literature available to adults, consent to sexual intercourse under a certain age, run for office, drink intoxicating beverages, and so forth. The younger a child, the fewer rights he or she has. Although in recent years the Supreme Court of the United States has recognized children as having certain rights, they are by no means coextensive with those of adults, and it is remarkably easy to deprive children of the rights they do have. For example, the Supreme Court held that minors have a right to due process prior to their institutionalization in a state mental hospital. However, the due process required consisted of having a child's parent bring him to a mental institution and a psychiatrist at the institution (a "detached" fact-finder) accept him.[29]

[29] *Parham v. J.L. and J.R.*, 442 U.S. 584, 99 S.Ct. 2493, 61 L.Ed.24 101 (1979).

No court proceeding or the showing of mental illness or dangerousness were required as they are with adults.

No one has ever argued that young infants have any rights, except to be cared for in a minimal fashion, and of course they are unable to exercise any rights when very young. No one has ever argued that an infant's right to privacy is violated by placing him in a transparent crib in the nursery, which has a glass wall to facilitate viewing. Treating adults this way is unthinkable. On the other side, infants and children have few if any obligations, and these also increase with age. Thus, by common law, a child under the age of seven was deemed to be incapable of committing a crime, and between seven and fourteen there was a rebuttable presumption that they could not commit crimes (Perkins 1969, 837). They were seen as incapable of having the required "evil intent" (*mens rea*) necessary to commit a crime. It is not surprising, then, that as children acquire more rights through actions of courts and legislatures, they also acquire more obligations—that is, responsibility for their actions.

But young infants have virtually no rights and certainly no obligations. They exist as a special part of the human community. Historically, this has been very bad for infants. The abuse and misuse of children is well documented (Thomas 1972, 293).[30] Infanticide has a long and well-established history as a method of birth control, a way of avoiding the embarrassment of an illegitimate birth, or ridding oneself of a weak or defective child. First-borns were sacrificed to gods, and female children disposed of as useless. In ancient Greece a father had five days to decide whether his newborn would be accepted into the family. If the decision was in the negative, the child would be "exposed," left in public for someone to pick up if they desired. Under ancient Roman law, the father could kill, mutilate, sell, or offer his child in sacrifice. In 1646 in Massachusetts, the punishment for a child who was "stubborn and rebellious" and would not obey the "voice and chastisement" of his parents was death (Bremner 1970, 36). There are numerous Biblical references to infanticide and exposure. In 1781, there was an essay contest in Europe on how to prevent infanticide. There is a long history of child mutilation, and children in England were mutilated to make them more effective beggars. The history of

[30] Unless otherwise noted, the following historical discussion of child abuse is taken from this source.

child labor after the Industrial Revolution reveals children as young as five being chained to machines for sixteen hours a day. Children employed as chimney sweeps were the victims of one of the earliest recognized occupational diseases, "chimney sweep's cancer" (cancer of the scrotum).

The rights of parents to corporally punish children goes essentially unquestioned. Courts have in the mid-19th century permitted parents to beat children with ropes, fists, and whips. The Society for the Prevention of Cruelty to Animals was founded in 1866. The Society for the Prevention of Cruelty to Children was not founded until 1875.

The acceptance of corporal punishment of children by our society is well established in our law. The Model Penal Code specifically permits parents to punish their children so long as the force used is "not designed to cause or known to create a substantial risk of causing death, serious bodily harm, disfigurement, extreme pain or mental distress or gross degradation."[31] This is not dissimilar from some of the later slave codes regulating punishment.

Corporal punishment is also permitted in the schools. A federal district court decided in 1975 that schools had the right to punish children by paddling even when the parent of the sixth grader in question objected to the practice.[32] The court itself pointed out that "it is questionable at best whether the law would not privilege any degree of corporal punishment of an adult" and cites cases and statutes prohibiting the flogging of sailors, the use of the strap on prisoners, the beating of wives by husbands, and the employer's loss of rights to punish domestic servants. It is remarkable to me that the court finds that state agents can beat 12-year-old children but not hardened criminals. This case was upheld by the Supreme Court.[33] A 1977 Supreme Court case involved a junior high school student who was given twenty "licks" with a wooden paddle two feet long, three to four inches thick and one-half inch wide, for being "slow to respond to his teacher's instructions."[34] As a result of this punishment, he required medical attention and missed eleven days of school. The Court, finding that corporal punishment in schools is a widely accepted practice with deep historical roots, held that such punishment does

[31] American Law Institute Model Penal Code §3.08.
[32] *Baker v. Owen*, 396 F. Supp. 294 (M.D. N.C. 1975).
[33] 423 U.S. 907, 96 S. Ct. 210, 46 L. Ed.2d 137 (1975).
[34] *Ingraham v. Wright*, 430 U.S. 651, 97 S. Ct. 1401, 51 L.Ed.2d 711 (1977).

not violate the Eighth Amendment's restriction against cruel and unusual punishment or due process guaranteed by the Fourteenth Amendment. The Court does not base its conclusion on the factual finding that the punishment was not cruel or unusual, but rather on the legal ground that the Eighth Amendment protections do not apply to punishment rendered in schools. While the court is understandably cautious about extending the Eighth Amendment protections historically reserved to punishments for crimes, in this case the punishment was in fact *punishment,* was rendered by a state agent authorized to do so by state statute, and was delivered for infringement of a state rule. If one takes the decision seriously, as one must, it would appear that there are no constitutional constraints on a school's punishments of children since the Eighth Amendment does not apply at all—20 lashes for putting bubble gum under your seat?

This extensive discussion of children's rights is an attempt to indicate that children are treated very differently from adults. I would argue that they are not seen as "persons" in the full sense of the word. I believe that their physical "persons" are regarded with less respect than adults, and that our history and present practices support the idea that they are not "persons" entitled to respect. Furthermore, I would argue that the younger the child, the less like persons they are treated or perceived.

What is interesting about this hypothesis is that infants, for the most part, have had their lives protected by the courts when it comes to nontreatment decisions. None of these cases thus far have resulted in a decision by a state supreme court.[35] As a result, all we have is a scattering of lower court opinions, but almost all have resulted in

[35] Since the presentation of this paper, two cases involving nontreatment of newborns have been decided by state supreme courts. One, from Indiana, involves a decision not to treat or feed a newborn with Down's syndrome, who also suffered from a deformed esophagus. The court upheld the parents' decision not to treat the child, and the child eventually died (*Boston Globe,* April 16, 1982). Because the papers in this case have been sealed, an analysis of it is not possible, although it appears to be anomalous.

In the second case, the Massachusetts Supreme Judicial Court upheld the decision of an infant's physicians not to resuscitate the child if he had a cardiac or respiratory arrest. This decision was based on the medical testimony that the child suffered from untreatable and uniformly fatal cardiovascular deformities. Due to the child's medical condition, there were no treatment decisions to be made—death was apparently inevitable and imminent at the time the case was brought—and therefore this case does not seem to change the analysis that follows. Custody of a Minor, 385 Mass. 697 (1982).

decisions to treat. The most widely known case is the *Houle* case in Maine.[36] *Houle* involved a newborn who was born with no left eye, a rudimentary left ear with no canal, a malformed left thumb, and a tracheal esophageal fistula. The parents refused to have the fistula repaired, and the physicians sought a court order mandating treatment. After obtaining a temporary restraining order, the child's condition deteriorated. There were periods of apnea, convulsive seizures, a lack of response of the right eye to light stimuli, the existence of some nonfused vertebrae, and certainty of "some brain damage." At this point the physicians also felt the child should not receive further treatment. The court held:

> Recent decisions concerning the right of the state to interfere with the medical and moral judgments of a prospective parent and attending physician may have cast doubts upon the legal rights of an unborn child; but at the moment of live birth there does exist a ***human being*** entitled to the fullest protection of the law. The most basic right enjoyed by every human being is the right to life itself (emphasis added).[37]

The court therefore ruled that if the treatment was "medically feasible," it could not be withheld.

In a post-*Saikewicz* case in Massachusetts, the parents of a child born with "congenital rubella" petitioned the court to be permitted not to have her life-threatening heart condition treated.[38] She had cataracts in both eyes, appeared to be deaf, and had a "high probability" of "some degree of mental retardation." She also had a coarctation of the aorta which would result in her death if not treated. She was not "terminally ill" and would probably survive the surgery. The court ordered the treatment, citing *Saikewicz*, *Houle*, and *Quinlan*, but not analyzing them at all, or stating any rule of law.

Given all that I have said up to now about children's lack of personhood, the question becomes: "Why did the courts order treatment for these children and children like them?" This is a very hard

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[36] *Maine Medical Center v. Houle*, Maine Superior Court, Cumberland City, Docket No. 74-145 (Feb. 14, 1974).
[37] Idem. 3–4.
[38] *In the Matter of Karen Ann McNulty*, Mass. Probate Court, Essex County, No. 1960 (Feb. 15, 1978).

question, and all I can do is speculate as to its answer. First, I think there is opposition to appearing to extend the abortion decision to live-born children. This is obvious in *Houle,* but I do not believe it is of critical importance. I think a second consideration has to do with the lack of certainty of the potential for personhood these newborns have. The medical opinions in both *Houle* and *McNulty* are very tentative. In *McNulty* the child "*appeared* to be deaf," and it was probable she had "*some degree* of mental retardation." In *Houle* there was the certainty of "*some* brain damage." Thus, we really cannot know their potential for personhood. However, neither the Houle nor McNulty baby will grow up to be like Quinlan or Fox but at the worst will be more like Storar.

Third, with newborns there is a much greater risk of error in depriving them of their potential to grow and develop into "full persons" than there is in a *Quinlan*-type situation, where one has irretrievably *lost* one's personhood. In *Quinlan* we can compare what she is and will be with what she was; it is possible to compare her against herself, her past personhood with her future personhood. This cannot be done with newborns who have not "lost" anything. There is a difference between depriving someone of a chance to claim personhood and declaring the loss of personhood in one who had it in the past.

Finally, it is the very global incompetency that even normal newborns have that may protect defective newborns. The apparent difference between a defective newborn and a normal newborn is nowhere near as great as the differences between someone like Karen Quinlan and a normal 22-year-old. It therefore becomes much harder to draw legal distinctions between healthy and defective newborns than between similarly situated adults. To put it most starkly, since no newborns are "persons" it is virtually impossible to fall below their status. Regardless of all that has been said about the legal status of children, infanticide is not recognized by the courts as a legitimate activity, and without clear distinctions between the *present* capacities of healthy and defective newborns (notwithstanding their future potential), courts cannot justify differential treatment.

This explanation may help explain why "anencephalics" are always deemed to be the "easy cases" for nontreatment decisions. Even Ramsey (1978, 213), who is a strong proponent for treating defective newborns, argues that anencephalics need not be treated. He argues that "such an infant is 'human,' of course, in a generic sense. . . . However, it

has not been born alive." He goes on to say that such infants "demonstrate their status by dying, in all senses, rather quickly." But it seems to me that if one uses brain death, as Ramsey does, as the definition of death, one really cannot say that an anencephalic is not born "alive." What one can say is that we are *certain* that it will never be more than it is at birth. In this sense, I agree with Ramsey that it will *never* enter "the human community" and is therefore easily distinguishable from both healthy and other defective newborns.

A newborn's lack of "personhood" is probably less important in the judicial arena than in the hospital where these treatment decisions are made daily. Our societal feelings about where children and newborns fit into the larger society give the decision makers great leeway. With the great number of decisions made in this area, a very small number come to court. I believe that this is at least indicative of a societal acquiescence in the propriety of making nontreatment decisions for this population.

In one survey of 267 pediatric surgeons and 190 pediatricians, 76.8 percent of the surgeons and 49.5 percent of the pediatricians would acquiesce in a parent's decision not to treat the intestinal atresia of a newborn who also had Down's syndrome (Shaw et al. 1977, 588). In a newborn who had intestinal atresia and "multiple limb or craniofacial malformation" (no Down's syndrome), 62.5 percent of surgeons and 47.4 percent of pediatricians would acquiesce in a nontreatment decision. Without any data to support me, I would guess that if you asked a similar question about a 5- or 10-year-old child who had multiple limb or craniofacial malformation that resulted from a car accident, that acquiescence would decline considerably—"personhood" being much more solidly established. Finally, 7.9 percent of the surgeons and 2.6 percent of the pediatricians would acquiesce to a parent's nontreatment decision for a child with intestinal atresia and *no* other anomalies. While the authors argue that it appears that "most" of the 26 respondents who replied they would acquiesce misread the question, they do not argue that all did. In the eyes of the acquiescing respondents, these newborns must have very little standing in the human community.

I think it is fair to conclude from this discussion that defining personhood is probably not a means for resolving difficult treatment decisions, for a number of reasons. First, the fact that one is clearly a person does not mean that one is automatically entitled to treatment

or required to obtain treatment. Second, the fact that one is not a person does not mean that such an entity is not entitled to our respect or protection. Third, defining personhood is such an awesome task, and so fraught with danger, that it is probably not something either a judicial or a legislative body can or should do. Instead, we assume the existence of personhood from the moment of birth until the moment of death and make classifications of rights and obligations based on the status of these persons. It does seem, however, that the status of some individuals is so low—e.g., Quinlan or newborns—that it is not clear that they are accorded the rights and privileges of persons. I believe these conclusions help explain why no court bases nontreatment decisions on an explicit finding that the patient is not a "person." However, I do believe that at times courts do implicitly utilize personhood criteria in coming to their decisions and do so in a way that does not seem to offend societal values.

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