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Father Richard McCormick1 and others2,3 have criticized Judge Robert Muir's statement that treatment of the Karen Quinlan case was a medical rather than a judicial decision which could be “concerned in by the parents but not governed by them.” These commentators have, in my opinion, misinterpreted his statement as an attack on the doctrine of informed consent. I believe that Judge Muir's interpretation is correct and crucial to the attending physician's playing an appropriate role in the kind of agonizing decision-making involved in this and other similar situations.

First of all, Judge Muir is referring specifically to the situation of proxy consent. This is the circumstance posed by the Quinlan case and Judge Muir repeatedly states in the text of his decision that he confines himself to the facts at hand in registering his opinion. The very next sentence, which follows the above controverted sentence, confirms that the judge is referring to proxy consent when he states: “This is so because there is always the dilemma of whether it is the conscious being's relief or the unconscious being's welfare that governs the parental motivation.”4 As a matter of fact, almost all litigated cases involve proxy consent. Most published medical studies indicate that those dying patients who realize they are dying virtually never object to the use of active measures to sustain their lives. Even the classic situation of the refusal of blood transfusion by Jehovah's Witness patients gets to the courtroom only if the Witness is pregnant and therefore is refusing treatment for another person - the unborn child.

Cantor, a lawyer, suggests that Muir's wording "completely reverses normal procedures." In his view, under the doctrine of informed consent "A physician does not make treatment decisions and then seek the concurrence of a patient or guardian." I would suggest that both by tradition and under the guidelines of the American Medical Association's new Model Informed Consent Law, Professor Cantor's understanding of informed consent is not supported. Patients seek out the doctor of their choice but they do not dictate therapy because they lack the expertise to do so. They may, of course, decline to concur in one physician's plan and seek another opinion. Eventually, however, they must find a physician in whose decision they concur. The only physician-patient relationship where the patient's view is controlling is the abortion-on-demand situation. We do not, as yet, have tonsilectomy-on-demand, penicillin-on-demand, or stop-the-respirator-on-demand.

Father McCormick agrees with Cantor (and with the New Jersey Supreme Court) in placing the decision for treatment in proxy situations with next of kin as a matter of privacy. The danger of this solution, of course, is that it disenfranchises the attending physician in those situations where the decision of the next of kin may be lethal to the patient and where the treatment recommended is neither extraordinary or futile. The New Jersey Supreme Court states that the Quinlans are exercising for Karen her "constitutional" right to privacy.5 This poses a formidable obstacle indeed for any attending physician who may wish to retain control over circumstances where near relatives may, as Gerard Hughes has suggested,6 “want the patient dead for the wrong reasons.” Such cases involve an immoral recourse to a right to privacy but are not always demonstrative of a black-and-white moral consent. The physician could not safely assume that any given judge or panel of judges would comprehend all the medical nuances, and, therefore, sustain his opinion. Karen Quinlan's prolonged survival after the discontinuation of the respirator support would tend to validate her original attending physician's judgment. There are now those who suggest that her "right of privacy" might include the parents' privilege of refusing ordinary food and drink. No one suggests that the Quinlans act out of anything less than a sincere desire for the well-being of their daughter. The effect of decisions made out of ignorance or misplaced compassion may be every bit as lethal as those made out of malice, however.

The following are situations drawn from my own recent personal experience which illustrate the kind of dilemma I am discussing:

1. The board of trustees of a community hospital, of which I am a member, was threatened with suit by a family for refusal to turn off a respirator. The patient was on the respirator because of an untoward reaction to a drug. The prognosis for her survival, after a short period on the respirator and after the effects of the drug wore off, was excellent. The patient was an 81-year-old woman who, when off the respirator, would return to her home as a thoroughly irascible, senile old lady in good physical condition. She owned the home in which she was now making life miserable for her next of kin. They were financially incapable of moving away. The board of trustees sustained the physician's decision to continue the respirator. Would a court have held that we had invaded the relatives' right of privacy?
2. A mongoloid child was born in our nursery with duodenal atresia. The parents, after consultation with their attorney, refused corrective surgery. This situation, not a rare occurrence, is paradigmatic of the importance of Judge Muir’s principle that the parents can “concur in but not govern” life-preserving therapy. This type of case was widely publicized as the “Johns Hopkins case” dramatized in a movie by the Kennedy Foundation and widely discussed by theologians. The attending physician at John Hopkins accepted the parental right to privacy and the infant was starved to death over an agonizing period of two weeks. At least two legal authorities have suggested that such management constituted not only malpractice but murder as well. If the child is not operated, the right of a handicapped child to equal access to medical care is abridged. Following the current recommendations of the American Bar Association the legal rights of the parents were terminated in our case. The child was successfully treated by surgery and then placed for adoption. Was the mongoloid child returned to “sapien and cognitive life” after the surgery? This was the standard articulated by the New Jersey Supreme Court in deciding that Karen Quinlan’s treatment need not continue. The court does not say that the attending physicians were wrong in applying the standards of good medical practice. It does not even say that Judge Muir was wrong. The court merely asserts that it is not “bound or controlled” by medical standards in intervening in this case. If a physician, operating under acceptable medical standards, refuses to terminate life support, the court will intervene on behalf of next of kin to protect their “right of privacy.” There is little comfort for the practicing physician in such a position and much cause for alarm. Father McCormick says that critics of the New Jersey Supreme Court were wrong because “they only criticized a constitutional vehicle when they could also have corrected it.” A constitutional right to privacy cannot be corrected except by amending the Constitution, a Herculean task as proponents of the Human Life Amendment have found to their dismay. Father McCormick’s confidence in the “corrective powers” of moral tradition would be shared by few anti-abortionists.

The moral tradition of the sanctity of unborn life, traceable back through centuries of Christian and English Common Law tradition, unfortunately exerts less societal impact (and less political leverage) than the latest decision of any high court. It was Judge Muir who was supportive of the physician-parent relationship and the Supreme Court of New Jersey has further disrupted this relationship with another anti-life judicial intrusion.

REFERENCES