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# Catholic Ethical Teaching and Public Policy: How Do They Relate?

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and

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During the last several years, the issue of providing nutrition and hydration to patients who are terminally ill, permanently comatose, or otherwise severely impaired, has engaged a great deal of commentary in journals of medicine and medical ethics. More importantly, the issue has been addressed in many legal forums, both state legislatures and courts. In Florida, there are two important legal developments: passage of the "Life-Prolonging Procedures Act" in 1984, and the pending litigation of *Corbett v. D'Allessandro* before the Court of Appeals in the second judicial district. In that case, the trial court refused to permit the removal of a feeding tube from a comatose woman. The court held that to do so would be contrary to the 1984 act, which excludes nutrition and hydration from the category of medical treatments which can be removed from a patient who has executed a "living will". The *Corbett* case has attracted wide attention because it is the first test of whether the safeguards built into living will legislation may be applied even to those patients who have not signed a living will.

The *Corbett* case and the Life-Prolonging Procedures Act of Florida form a helpful background to our discussion. This is true not only because these legal developments directly confront the issue of nutrition and hydration, which is the subject of this conference, but also because of the involvement and influence which the Florida Catholic Conference had during the enactment of the Life-Prolonging Procedures Act.

A decade ago, when living will statutes were first proposed, the Catholic Church was virtually unanimous in its opposition. Even theologians who have a relatively liberal reputation on issues of medical ethics, such as Fathers John Paris and Richard McCormick, did not support these bills.

That position has changed, for a number of reasons, to one of modified opposition, which includes attempting to amend living will proposals with safeguards to prevent such bills from becoming a foot in the door to the legalization of euthanasia. My purpose is not to examine the reasons or the wisdom of the strategy which has apparently been adopted by the Catholic conferences in this and in several other states, however.

### **Death Legislation Desirable?**

The enactment of death legislation may not be a desirable course of action. However, if such legislation is offered in a dangerous form which may legalize mercy-killing, it is the duty of those who serve the Church's mission in the legislative arena to attempt to amend that proposal. Such attempts may not always be successful. They may also be erroneously interpreted as support for the pro-euthanasia ideology that sees such legislation as a first step toward more liberal public policy on the question of euthanasia. Nevertheless, when it comes to making difficult, strategic decisions either in the legislature or the courtroom, absolute purity of doctrine is impossible to maintain. The dilemma is this: how does one represent the mission of the Church in the creation of public policy which must be applied to a secular society which is, in important respects, only nominally Christian.

### **A Perplexing Problem**

This is the problem which confronts and perplexes Catholics as the Church becomes increasingly involved in a wide range of political issues. The issue we address here could likewise be addressed in connection with a number of social and political issues: abortion, capital punishment, aid to private schools, nuclear weapons.

### **Religion/Public Policy Interplay**

Yet, there are some unique aspects to the interplay between religion and public policy on the issues of mercy-killing and the provision of life-sustaining treatment. Catholic families are disproportionately represented in the cases which have received public notoriety: Karen Quinlan, Paul Brophy, Claire Conroy and Brother Fox. All were practicing Catholics. Moreover, those who sought the removal of treatment from these patients made it well known that their decision had been arrived at after prayer and lengthy discussion with pastors.

Even more significant than these personal factors is the role which Catholic moral teaching appears to play in the formation of judicial opinions on this subject. This can first be seen in the *Quinlan* case. Bishop Lawrence Casey of the Paterson Diocese issued a statement of instruction to the faithful of his diocese supporting the position of the Quinlan family on the basis of the Church's traditional distinction between ordinary and

extraordinary means of treatment. This statement was made part of the record through a friend of court brief filed by the New Jersey Catholic Conference. It is apparent in reading the New Jersey Supreme Court's opinion that Chief Justice Hughes (also a Catholic), took no small comfort from the Church's endorsement of the family's position.

### **Illumination of Problems**

A short discussion of the Catholic Conference brief, and the resulting opinion of the New Jersey Court, may illuminate some of the problems that we face now, a decade after that opinion.

In his statement, Bishop Casey clearly reiterated the Church's stance against euthanasia. This is the stance which is reflected in the 1980 Vatican Declaration on Euthanasia. It is also adhered to by virtually all Roman Catholic theologians. (I am not considering here the clear dissenters from Church teaching on this issue).

Likewise, Bishop Casey instructed his flock (and, eventually, the court) in the application of extraordinary means analysis to the specifics of Karen Quinlan's position. Again, his writing in this area was straightforward, orthodox, and non-controversial.

One cannot apply these same three adjectives to the opinion of the New Jersey Supreme Court. That opinion has received extensive analysis, and our intention here is to focus upon that aspect of the opinion which pertains to the legalization of euthanasia. In short, the court rejected the arguments of prosecutors and the attorney general of the state that removal of Miss Quinlan's respirator would constitute homicide, and accepted Bishop Casey's argument that it would not. Even if the removal could be considered a homicide, the court ruled, it could not be subject to prosecution because of the protection offered by the patient's constitutional right of privacy.

Scholars in law and ethics were quick to spot the potential consequences of this inventive line of legal reasoning. Yale Kamisar of the University of Michigan, one of the foremost scholars and champions of civil liberties in the nation, criticized the popular view of *Quinlan* as a right-to-die case. In an article in the *New York Times* after the death last year of Karen Quinlan, Professor Kamisar stated:

It is far more accurate to view [Quinlan] as a power-to-let-someone-else-die case. Why? Because letting people die when you have a special relationship with them and a duty to care for them is the equivalent of killing them . . . Quinlan could not consent to her death, or ask anyone else to let her die. Nor had she made a 'living will' or executed any directive requesting that she be allowed to die without 'medical intervention.'

The *Quinlan* opinion, Karmisar writes, thus badly smudged the distinction between the right to choose one's death, and the right to choose someone else's.

One does not have to accept the totality of Kamisar's argument to

recognize the basic truth of his statement: that the *Quinlan* case, despite the tragic circumstances and high motives of the Quinlan family, had much to do with euthanasia. And that the *Quinlan* opinion, if followed to its logical conclusion, could provide constitutional protection for the practice of euthanasia.

### Many Lessons from Quinlan Case

Among the many lessons of *Quinlan*, therefore, is that there is a great deal of difference between the role of the pastor or religious advisor and the role of the courts. What appeared to be perfectly defensible, humane and just in the statement of Bishop Casey, takes on a new light when stated under doctrines of constitutional law in the opinion of Justice Hughes. To a large degree, this difference is a difference of constituencies. In exercising his teaching authority, Bishop Casey is addressing a religious community which shares the presumptions of the sanctity of human life. More specifically, he is addressing those Catholics who, through professional roles or family circumstances, are facing similar circumstances. Although the teaching of the Church against euthanasia should be clearly stated to this audience, pastoral concern may temper the message so as to not unduly trouble the consciences of those who are facing difficult burdens.

Chief Justice Hughes, on the other hand, was creating public policy for a state in excess of seven million persons who may not share the same religious and personal convictions. On matters of life and death, particularly when dealing with a vulnerable class of medical patients, public policy must take into account the need for clarity and line-drawing. To some degree, Chief Justice Hughes achieved this by limiting the relief granted to Mr. Quinlan and vesting the final decision on removal of the respirator in the attending physician. However, the legal doctrines of the *Quinlan* opinion remain open for application to a wider range of factual circumstances.

Thus it is apparent that those dealing in the intersection of theology and law must not only take into account the different constituencies of these disciplines, but also the different social and legal climates which may be present or forthcoming. This is plainly seen in the issue of providing nutrition and hydration, the issue of concern for our gathering here, and the issue which will now be addressed.

There are many forces presently at work in the field of biomedical ethics. Among these forces are those which would weaken existing legal restrictions against the practice of mercy-killing, or euthanasia. Legislation has been drafted by the Hemlock Society in California which would amend that state's "Natural Death Act" to permit the direct killing of terminally ill patients by request. Meanwhile, courts are being asked, in cases like *Corbett* and *Brophy* in Massachusetts, to authorize the removal of feeding tubes from comatose patients. The result of this, as the trial court concluded in the *Brophy* case, will be the intentional death by starvation of these patients.

Jurists and legislators looking for guidance on these questions have customarily turned to the teachings of the Roman Catholic Church, and to the expert opinion of Roman Catholic theologians. There are two principal reasons for this. First, the ethics and morals of euthanasia and the removal of life support have received more comprehensive treatment in Roman Catholicism than in other theological traditions. Second, the Church has taken a strong stance in affirmation of the preservation and dignity of human life, thus leading secular authorities to rely on Church teachings as reliable indication of what does, and does not, constitute euthanasia.

### Teaching, Law in Accord

Church teaching and Anglo-American law have been in total accord in their condemnation of mercy killing, whether by active or passive means. The 1980 Vatican Declaration on Euthanasia states the following: "By euthanasia is understood an action or omission which of itself or by intention causes death, in order that all suffering may in this way be eliminated. Euthanasia's terms of reference, therefore, are to be found in the intention of the will and in the methods used."

Similarly, the law of homicide makes no exception for compassionate motive" or "death by benign neglect." *Every* intentional killing of a human being must be covered under the homicide law, for once an exception to that law is created, the law of homicide ceases to exist as to certain unprotected persons in our society, such as the mentally retarded, the senile, the infirm and the aged. Nevertheless, voices within the Church and the legal profession are asking for a relaxation of these strictures against mercy-killing.

I believe that these voices are evident in the current efforts to remove nutrition and hydration from the category of ordinary care that ought to be provided to patients as a matter of obligation. In many cases, the withdrawal of nutrition and hydration meets all of the conditions for euthanasia by omission. The withdrawal is performed with the intent of bringing about the death of the patient, and the certainty that death will result. Death results not from the underlying disease, but from the resulting starvation of the patient. Moreover, this death is often being sought in cases where it is evident that the patient suffers little or no discomfort from the mechanism of feeding, and death is not otherwise imminent.

I am not referring here to the withdrawal of futile or truly burdensome medical treatment, which may, in a limited number of cases, include the removal of nutrition and hydration. By burdensome, I mean treatment which itself causes unremitting pain or profound suffering to a patient where the hope for benefit from that treatment is very dim. However, I do not mean the "burden" of life itself, or the burdens to third parties. The removal of futile or burdensome medical treatment is licit as a matter of medical judgment when made in the best interests of the patient.



In distinguishing the removal of nutrition and hydration from other forms of removal of treatment, the manner of death must also be reckoned with. In *Brophy*, which is currently on appeal to the Massachusetts Supreme Judicial Court, the trial court found that death by starvation would have grave and inhumane physical effects upon the patient: hyperthermia, convulsions, retraction of the eyes into their orbits, and drying out and parching of the lips, mouth and skin.

If this manner of bringing about death for certain terminally ill and comatose patients is morally permitted, then, in the minds of most common sense observers, the only logical alternative to causing this grotesque manner of dying would be to perform active euthanasia — the direct injection of a lethal dose of anesthesia or drugs in order to kill the patient painlessly but instantly. Surely, many would argue that it is more humane to kill painlessly than to cause the additional prolonged agony of death by starvation.

### Some Responses to Arguments

Some have responded to such arguments by asserting that many patients will not suffer extremely by the removal of artificial means of nutrition and hydration, that provision of food and water in such cases is merely "symbolic", and that the indignity of "forced feeding" is the greater evil to be avoided. This thesis is becoming more prevalent in the writings of some Catholic ethicists, although it seems overly utilitarian for a Catholic viewpoint. A good response has been articulated by Daniel Callahan. He states that there are two important moral traditions at stake in the debate over providing nutrition and hydration: the general moral duty to feed the hungry and give water to the thirsty, and the specific medical duty to provide comfort and care to patients, even if nothing of medical value can be done for them. It is important to note the distinction that Callahan has drawn between the provision of comfort care, and the doing of things which might be considered to have *medical* value. One of the most vexing aspects of this entire debate is the basic disagreement over what we are doing when we provide food and water through mechanical assistance. Are we supplying an invasive, technological prolongation of life akin to a respirator or dialysis? Or are we meeting a basic need of all persons, a need which is not specifically medical?

Although several courts have attempted to resolve this question, it is evident that we are a long way from any dependable legal consensus which will offer guidance to the medical profession. The same can be said of the literature in biomedical ethics. Although most authorities seem to hold that nutrition and hydration can be withdrawn in some circumstances, there is a significant dissenting view, expressed by men such as Dr. Mark Siegler of the University of Chicago, and Prof. Gilbert Meilaender of Oberlin College, that removal of nourishment breaches fundamental canons of medical ethics.

## Callahan Comments

Thus Daniel Callahan sympathizes with our "spontaneous revulsion" at the thought of cutting off food and water. "We are being asked to do something that goes against our deepest social and moral instincts; that is why its importance is often called symbolic. Some issues are important because they are symbolic. Others are symbolic because they are important — something beyond the immediate issue at stake. I believe that is the case here; the larger stake is . . . the way we . . . understand the role of the physician . . . . We should know that it is no light, or merely symbolic matter to begin tampering with traditions based on considerable experience and designed to provide as solid a fortress as morality can offer against a human propensity to neglect, to abuse, to kill the powerless, the burdensome, and the inconvenient."

As Callahan's own position demonstrates, it is not necessary to be an absolutist on the question of withdrawing nutrition and hydration in order to be very concerned over the precedent that we set when we loosen the restrictions on such decisions. Callahan proposes that it should be permissible to remove food and water when a patient is imminently dying, or "utterly vegetative". He defends this on the same principles which are used to justify the removal of other forms of treatment from these patients: that the treatment is essentially useless since there is no possibility of recovery.

Regarding other patients for whom the removal of nourishment has been proposed—the severely senile and incapacitated patients such as Claire Conroy—Callahan states: "I can see no justification for withholding food and water under those conditions." Since we cannot know with certainty what is going on in the minds of such patients, we cannot presume to make the judgment that the person's life is not worth sustaining. Thus, Callahan proposes that a very firm and sharp line be drawn at the imminently dying and permanently comatose. He recognizes that there is a price for drawing that line, a price that may have to be paid by the prolonged suffering of some patients. But he encourages us to consider the burdens and benefits to society at large if we take the opposite course: to encourage and make routine the cessation of food and water to certain classes of patients. He asks: "What kind of society would that tend to produce, what kind of medical practice and medical practitioners, what kind of politics and attitudes towards the elderly?"

### Approach Has Difficulties

This lengthy quotation of Daniel Callahan is not to propose his position as the definitive resolution to this problem. Indeed, there are substantial difficulties with his approach, and as we have seen with his analysis of the abortion issue, his willingness to embrace a looseness of rules in certain exceptional circumstances has led him virtually to abandon all protection for unborn life. However, he is one of a very small band to



recognize the great societal impact of lowering the standards of medical ethics on this issue. He recognizes, for reasons which are perhaps more deeply felt by the heart and conscience than easily articulated by the mind, that the removal of food and water is different from the removal of other forms of medical treatment.

As a lawyer, I would go one step further than Daniel Callahan: If we continue to loosen strictures on the removal of nutrition and hydration, we will not be able to maintain our legal prohibitions against active forms of euthanasia. The removal of food and water will, in many cases, constitute euthanasia by omission — the wilfull ending of human life. As Catholic moralists, professionals and lay people, we may be able to satisfy ourselves that we have maintained a distinction, however small, between the removal of food and water and the practice of euthanasia. However, our society, which is not overwhelmingly Catholic, will not respect that distinction. If society witnesses the agents of Catholic health care licensing the removal of food and water as a more routine measure, it will not stop to listen to our detailed ethical justifications.

On the contrary, it is my fear that society will morally equate the removal of food and water with the injection of the lethal dose. So far, this has been a favorite tactic of the euthanasia movement: to equate the removal of respirators, dialysis and other burdensome forms of treatment from the dying with the active forms of euthanasia. When the issue switches to food and water, I believe that this tactic will triumph. Society will eventually see the starvation of the elderly as a cruel means of hastening death, and, as a "humane" alternative, lobby for acceptance of the instantly effective means of euthanasia.

If anyone doubts the willingness of society to move in this direction, I call to your attention the recent best-seller by Betty Rollin, called *Last Wish*. In that book, Miss Rollin details how she and her husband planned and carried out the assisted suicide of her mother. Response to the book, at least on the part of the media, was overwhelmingly favorable, so much so, I fear, that any legal action against Miss Rollin was ruled out.

### **Concern About Theologians' Policies**

One has to be concerned, therefore, with the fact that an increasing number of American theologians are recommending policies which would permit the removal of nutrition and hydration. The concern is especially acute where there is a failure to carefully distinguish the cases and circumstances where such removal is permissible and not permissible. In writings and court testimony, some theologians have claimed the removal of food and water is to be distinguished from mercy killing, but the justification given for this distinction is more suited to faculties of theology than to the plainer discourse of law and public policy.

Indeed, we hear more theologians speaking of the "diminished quality of the patient's life" as an acceptable criterion for deciding to starve the patient. Even "conservative" theologians who do not explicitly accept the quality of

life criteria, *do* accept factors such as financial burden to society, or the "psychological repugnancy" of tube feeding which, in the eyes of the law, are tantamount to quality of life criteria.

In addition, this is not a problem that is limited to dissenting theologians, for we hear even the soundest voices in moral theology providing a rationale for death by starvation that could be applied yearly to thousands of patients in the United States.

The impact of these teachings upon American public policy could be profound. The traditional ethics of medical practice in the United States has been submerged under the tidal wave of abortion on demand. As predicted, legalized abortion has led to the practice of euthanasia by omission upon handicapped infants. Now, we hear proposals from leading politicians that the elderly have a "duty to die" and get out of the way of the productive members of society. As a result, we cannot look to the still-developing profession of medical ethics to preserve our laws against mercy-killing. If the teaching of the Church backs away from its traditional stance against euthanasia by permitting death by design through starvation, the law will be likely to follow. The argument that it is more humane to kill painlessly and quickly than to subject patients to prolonged starvation could become overpowering. The result would be a wholesale change in the law and medical practice regarding mercy killing.

#### **Dyck's Words Relevant**

The words of Arthur Dyck, professor of medical ethics at Harvard University, are relevant here. Dyck states that once euthanasia is permitted in a small range of cases, it will gradually be applied to a wider and wider range of cases. This is because there is no principled way to limit the application of mercy killing to a narrow range of cases that are definitely circumscribed and carefully controlled. For example, is the case for euthanasia or death by removal of food and water stronger in the case of the comatose patient who can feel no hunger or thirst, or in the case of the cancer patient facing a miserable decline towards death? The list could go on and on. Indeed, a misapplication of the principles of distributive justice would lead society to demand that *all* who are suffering from terminal disease or disability be given the right to end their lives. Thus, as in the case of abortion, to open the door and legalize mercy killing in one case is to legalize it in a full range of cases that are never contemplated by the progenitors of the policy. For these reasons, what appears to be even a small inroad in legal protections against euthanasia must be resisted.

One must recognize, of course, that the demands of theologians and lawyers differ. I am aware of this distinction, and I cannot ask that the teaching of theology conform to the needs of the secular, materialistic world in which euthanasia is such a temptation. However, I do not think I am out of line in suggesting that, in light of the current climate, theologians must consider the profound nature of the public policy battle in which we are engaged at this time, before concluding their study of this issue. Acceptance

of this invitation would considerably broaden the scope of theological inquiry and study on these matters. It is apparent that traditional moral theology on such matters has focused on the question of the moral obligations of an *individual patient* to accept or reject a certain form of medical treatment or therapy. Today, it is apparent that this narrow scope of inquiry is not sufficient. The question facing the arbiters of the public policy is the responsibility of society to take care of those who are no longer capable of taking care of themselves. As we see in many facets of life, the temptation is very strong to diminish those responsibilities. The demise of those responsibilities within the medical and nursing professions, which have traditionally been devoted to zealous protection of the welfare of the individual patient, could be disastrous.

### **First Step for Theologians**

As a first step, moral theologians must recognize the difference between the factors bearing on the moral responsibility of the individual patient, and those weighing upon the standards of public policy. The nuances and ambiguities which are often acceptable in positions of moral theology may only serve the cause of confusion when applied to public policy. For example, recent statements in moral theology suggest that the "cost to society" of treatment may be taken into account in deciding to terminate treatment. In the United States, such statements reinforce the arguments of the advocates of euthanasia, and may perpetuate the unproven assumption that the cost of caring for the elderly and infirm is a luxury which our society can no longer afford. There is no empirical evidence which establishes that the curtailment of treatment for such patients would benefit other sectors of society. Yet, statements to this effect by moral theologians may unwittingly buttress the propaganda of the euthanasia societies.

As a second and related step, it would be helpful for theologians and the Church Magisterium to clarify the Church's stance toward public policy on this issue. In particular, in light of the attacks upon legal prohibitions against euthanasia, theologians should clarify that regardless of the precise moral position on the withdrawal of treatment in a particular case, it is acceptable for the law to maintain a stricter standard. There should be nothing startling about this proposal. At stake in the realm of moral theology is not only the preservation of Catholic doctrine, but the counseling and nurturing of individual souls. In order for this benefit to be available to all believers, teachers of moral theology must take into account a wide variety of circumstances. They must also avoid the error of unduly burdening the consciences of the faithful.

The stakes in public policy are quite different. Law must guide and regulate human conduct, and to do this effectively, it must draw sharp lines. Even if theologians do not prefer to focus their lines with the same degree of clarity, they must be aware of the consequences if the law fails to do so. This is particularly true if theologians are to continue in their role of advising the courts and legislatures on acceptable public policy in this area.

## Conclusion

In conclusion, I would like to offer a few specific thoughts on the status of public policy toward the provision of nutrition and hydration. Several courts, notably the California Court of Appeal in *Barber* and the New Jersey Supreme Court of Appeal in *Conroy*, have equated these measures with other forms of life support. So far, the legislatures which have specifically addressed this issue seem to disagree. Moreover, there are several other court cases in the pipeline, including *Corbett* here in Florida, and *Brophy* in Massachusetts, where trial courts have refused to equate food and water with extraordinary medical treatment. It is thus a very open issue at this time. If the law is to eventually permit the removal of food and water, I believe that it must do so on the most narrow and defensible of grounds: when the patient is imminently dying, within a matter of hours or days, and/or the provision of nutrition and hydration has become useless. By "useless" I do not mean in relation to recovery from the underlying disease, but useless to provide nourishment itself. This might be the case where the patient has lost the ability to metabolize, or there is no available means of supplying nutrition which does not itself constitute an undue burden to the patient.

Admittedly, this is a stricter standard than many of us might wish upon our patients. Yet, we cannot assume that our good will in advancing a more lax policy will be matched by all of those who will carry out this policy in the future. In order for us to fully meet our obligations to maintain the high standards of ethical practice in medicine, and to resist the temptations that society will offer to legalize the practice of euthanasia, we must be cautious and vigilant in our proposals on questions such as the provision of nutrition and hydration. This is one critical aspect of the relationship between Catholic ethical teaching and public policy, a relationship whose health must be maintained with a vigor equal to that which we offer our clients and our patients.

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