BYU Law Review

Volume 1982 | Issue 2 Article 4

5-1-1982

Live or Let Die; Who Decides an Incompetent's Fate? In re Storar and In re Eichner

Kevin W. Bates

CASE NOTES

Live or Let Die; Who Decides an Incompetent's Fate? *In re Storar* and *In re Eichner*

In the 1970s, two state courts addressed the questions raised by withdrawing or withholding medical treatment from an incompetent individual and set forth what, until now, have been the major themes in this area of the law. In *Superintendent of Belchertown State School v. Saikewicz*[1] and *In re Quinlan*[2] the Massachusetts and New Jersey courts decided that an incompetent's right to have medical treatment withdrawn or withheld was protected by the constitutional right of privacy. The two courts also agreed that some mechanism had to be provided whereby an incompetent's right could be exercised since incompetents were legally incapable of exercising it themselves. Both courts settled on the doctrine of substituted judgment as the appropriate mechanism for exercising the right of privacy. The courts disagreed only on the extent to which the judiciary should be involved in the decision, New Jersey allowing the decision to be made by an ethics committee without court approval, Massachusetts requiring court approval of each decision.

Until recently the right of privacy—substituted judgment analysis set out in these landmark cases was the only approach used by the courts. However, in a recent opinion deciding two companion cases, *In re Storar* and *In re Eichner*,[3] the New York Court of Appeals departed significantly from this approach. In *Eichner* the court refused to reach the issue of a constitutional right of privacy, finding instead that the common-law right to refuse treatment was a sufficient basis for its decision. In *Storar* the court rejected the substituted judgment analysis in favor of an alternative analysis.

This Case Note will defend the court's decision not to reach the constitutional question, suggest a more complete rationale

1. 373 Mass. 728, 370 N.E.2d 417 (1977).
2. 70 N.J. 10, 355 A.2d 647, *cert. denied*, 429 U.S. 922 (1976).
3. *In re* Storar, 52 N.Y.2d 363, 420 N.E.2d 64, 438 N.Y.S.2d 266 (1981).

for the court's rejection of substituted judgment in *Storar* and a mode of improving its alternative approach, explain that the holding in *Eichner* establishes the validity of living wills in New York, and show how the court's approach to judicial review will affect *Eichner* and *Storar* type cases differently.

I. *Storar & Eichner*

At the age of 83 Brother Joseph Fox, a member of a Catholic religious order, suffered a hernia. During surgery to correct the condition, Fox suffered cardiac arrest resulting in a loss of oxygen to his brain. This caused Fox to enter a deep coma with minimal brain activity, necessitating the use of a respirator to maintain vital bodily functions. Soon after Fox entered the coma, Father Phillip Eichner, director of Fox's order, was informed that Fox had no hope of recovery. Eichner requested that the hospital disconnect the respirator and allow Fox to die, but the hospital refused his request, even though Fox, while competent, had expressed his desire that his life not be prolonged by artificial means.[4] Eichner then applied to a New York supreme court for authority to direct removal of the respirator, and the trial court approved the removal.[5] The court refused to decide whether the constitutional right of privacy extends to the right to refuse treatment and declined to apply the substituted judgment doctrine employed in *Quinlan* and *Saikewicz*. Rather, the court decided that Fox's expressed desire not to be kept alive on a respirator was sufficient to exercise his common-law right to refuse treatment.

The Supreme Court Appellate Division agreed with the trial court's assessment that Fox's expressed desire not to be kept alive on a respirator was sufficient grounds on which to approve its removal.[6] The court disagreed, however, with the trial court's refusal to invoke a constitutional right of privacy. Citing *Quinlan* and *Saikewicz*, the court found that the constitutional right of privacy is broad enough to protect a patient's decision to ter-

---

4. Based on unchallenged testimony, *In re* Eichner, 102 Misc. 2d 184, 210, 423 N.Y.S.2d 580, 597 (Sup. Ct. 1979), the trial court found that Brother Fox had on several occasions discussed the *Quinlan* case with members of his religious community and had expressed his feeling on those occasions that "he personally would not want any of this 'extraordinary business' done for him under such circumstances." *Id.* at 192, 423 N.Y.S.2d at 586. Fox's condition at the time of the hearing was identical to Quinlan's.

5. *In re* Eichner, 102 Misc. 2d 184, 212-13, 423 N.Y.S.2d 580, 599 (Sup. Ct. 1979).

6. Eichner v. Dillon, 73 A.D.2d 431, 461, 426 N.Y.S.2d 517, 540 (1980).

minate treatment.[7] The court also disagreed with the lower court's refusal to employ substituted judgment as a means of exercising an incompetent's right to refuse treatment. The court decided that some means of exercising the right must be available to the incompetent who has *not* made a clear expression of intent since "a specific statement of intent . . . will occur only in a minority of cases"[8] and "to deny the exercise . . . is to deny the right."[9] The court chose substituted judgment as "essentially a sound approach, borne of the exigencies of the circumstances."[10]

The second of the combined cases involved John Storar, a lifelong patient at the Newark Developmental Center. Storar was severely retarded from birth with an IQ between ten and twenty and a mental age of approximately one and one-half to two years. In 1979 doctors diagnosed Storar as suffering from terminal and incurable cancer of the bladder. In order to counteract one of the cancer's side effects, a bleeding lesion in the bladder, Storar received periodic blood transfusions. He resisted the transfusions and his resistance eventually became so great that he had to be sedated before each treatment. When sedation became necessary, Storar's mother requested that the transfusions be stopped. The Newark Developmental Center responded by requesting a court order directing the continuation of the treatment, but the trial court ordered the treatment withdrawn.[11] The court decided that this case was controlled by the Supreme Court Appellate Division's opinion in *Eichner*. The court, therefore, employed the doctrine of substituted judgment and determined that Storar would have refused the transfusions had he been competent. On appeal, the Supreme Court Appellate Division affirmed the trial court's order to withhold the transfusions.[12]

In an appeal of the decisions in *Eichner* and *Storar*, the New York Court of Appeals upheld the order to withhold treatment from Fox and reversed the order to withhold treatment from Storar.[13] The court declined to decide the question of

---

7. *Id.* at 457-60, 426 N.Y.S.2d at 537-39.
8. *Id.* at 472, 426 N.Y.S.2d at 547.
9. *Id.* at 470, 426 N.Y.S.2d at 546.
10. *Id.* at 473, 426 N.Y.S.2d at 548.
11. *In re* Storar, 106 Misc. 2d 880, 886, 433 N.Y.S.2d 388, 394 (Sup. Ct. 1980).
12. *In re* Storar, 78 A.D.2d 1013, 434 N.Y.S.2d 46 (1980) (memorandum opinion).
13. *In re* Storar, 52 N.Y.2d 363, 383, 420 N.E.2d 64, 74, 438 N.Y.S.2d 266, 276 (1981).

whether the constitutional right to privacy includes the right to refuse treatment because "the relief granted [in *Eichner*] is adequately supported by common-law principles."[14] Neither did the court, in *Storar,* specifically deal with the doctrine of substituted judgment. However, the court impliedly ruled out the use of substituted judgment as a means of exercising an incompetent's right, stating that "it is unrealistic to attempt to determine whether [Storar] would want to continue potentially lifelong treatment if he were competent."[15] Then, having concluded that the common-law right of self-determination could not be exercised either by or for Storar, the court analyzed the facts as if Storar were an infant whose parents were seeking to terminate treatment. Under this analysis the court decided that the state's interest as *parens patriae* in protecting the child outweighed the parent's right to control the child. The court concluded by deciding that it would not require judicial review of decisions to terminate treatment.[16]

II. Analysis

A. *The Constitutional Right of Privacy v. The Common-Law Right to Refuse Treatment*

When faced with the decision whether to base its holding in *Eichner* on the well-established common-law right to refuse treatment or on a right to refuse treatment protected by a questionable extension of the constitutional right of privacy, the court chose the common-law right. This decision is defensible on two grounds. First, there was no need to decide whether the constitutional right of privacy extends to this area since the common-law right was an adequate basis for the court's decision and no compelling reasons exist for extending the constitutional right. Admittedly, finding that the right to refuse treatment is constitutionally protected would have the effect of preventing a legislature from revoking that right.[17] However, any concern that

14. *Id.* at 377, 420 N.E.2d at 70, 438 N.Y.S.2d at 276.

15. *Id.* at 380, 420 N.E.2d at 72, 438 N.Y.S.2d at 274.

16. *Id.* at 382-83, 420 N.E.2d at 74, 438 N.Y.S.2d at 276. Two judges dissented. Judge Jones would have upheld the order to discontinue treatment in *Storar;* he maintained that the facts of the case called for the exercise of the court's power to authorize withdrawal of the respirator. Judge Fuchsberg would have dismissed both cases as moot.

17. A constitutionally protected right of privacy would give way in any case before a compelling state interest in requiring treatment, *In re* Storar, 52 N.Y.2d 363, 377, 420 N.E.2d 64, 71, 438 N.Y.S.2d 266, 273, (1981), even though the nature of those interests

a legislature might act to revoke the right is unfounded. No state legislature has yet acted to restrict that right, and there is no reason to believe that any legislature will do so in the future. Moreover, if at some time in the future the legislature did restrict the right to refuse treatment, the court could at that juncture decide whether the legislature's action was constitutionally permissible.

Second, the court expressed legitimate concern over the uncertainty surrounding an extension of the constitutional right of privacy to the context of withdrawal of medical treatment.[18] This uncertainty arises partly because the consequences of finding a constitutionally protected right to refuse treatment are relatively unknown; only four states have had any experience with constitutional protection of this right.[19] In addition, some issues raised by the existence of constitutional protection for the right, such as its inapplicability to activities not involving the state, have not been adequately resolved.[20] Furthermore, it is not certain that the constitutional right of privacy enunciated in *Roe v. Wade*[21] can properly be extended to protect an incompentent's refusal of treatment. One commentator has suggested that the right of privacy is conditioned on the individual's competency to assert that right[22] and that any extension of the right to incompetent individuals who have not previously expressed a desire that treatment be withheld is untenable.[23] This scholar goes on to note that "to allow a guardian to assert the patient's right, regardless of the practical advantages, lacks a theoretical foundation."[24] The lack of a need to address the issue, together with the lack of certainty surrounding the extension of the right of

---

has not been well established. *See* 46 TENN. L. REV. 425 (1979).

18. Although there are arguments that the constitutional right of privacy from Roe v. Wade, 410 U.S. 113 (1973), can be extended to a general right to refuse treatment, *see, e.g.*, Delgado, *Euthanasia Reconsidered—The Choice of Death as an Aspect of the Right of Privacy*, 17 ARIZ. L. REV. 474 (1975), it is not clear that the constitutional right should be extended merely for the sake of the extension.

19. *See* Severns v. Wilmington Medical Center, 421 A.2d 1334 (Del. 1980); Satz v. Perlmutter, 379 So. 2d 359 (Fla. 1980); Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 370 N.E.2d 417 (1977); *In re* Quinlan, 70 N.J. 10, 355 A.2d 647, *cert. denied*, 429 U.S. 922 (1976).

20. *In re* Eichner, 102 Misc. 2d 184, 199, 423 N.Y.S.2d 581, 590-91 (Sup. Ct. 1979).

21. 410 U.S. 113 (1973).

22. Note, *The Tragic Choice: Termination of Care for Patients in a Permanent Vegetative State*, 51 N.Y.U. L. REV. 285, 293 (1976).

23. *Id.* at 294.

24. *Id.*

privacy to include a right to refuse treatment, justified the court in basing its decision on the common-law right instead of addressing the question of a constitutional right of privacy.

B. Substituted Judgment

At the outset of *Storar,* the court determined the validity of the use of substituted judgment. The court noted that because Storar "was always totally incapable of understanding or making a reasoned decision about medical treatment . . . it is unrealistic to attempt to determine whether he would want to continue potentially life prolonging treatment if he were competent."[25] The court seemed to reject the doctrine of substituted judgment because it does not represent reality.[26] Unfortunately, this is the extent of the court's analysis on the question. However, the conclusion to reject the use of substituted judgment is not only justifiable but laudable because it removes an unnecessary fiction that obscures what actually transpires when a decision is made whether to withhold medical treatment from an incompetent.

Application of substituted judgment requires the guardian to pretend that he is deciding what the incompetent would choose to do in the given situation. In actuality, however, the guardian is deciding what he wants to do with the incompetent individual.[27] When reality is misrepresented, the responsibility for the decision to withhold or withdraw treatment is seemingly shifted away from those who actually make it (the court, the parent, the guardian) to the incompetent (who is legally incapable of making the decision) by encouraging the decisionmaker to think that it is the incompetent's own decision to die. Thus, instead of forcing those involved to admit that they are allowing

---

25. *In re* Storar, 52 N.Y.2d 363, 380, 420 N.E.2d 64, 72, 438 N.Y.S.2d 266, 274 (1981).

26. *Id.* at 380, 420 N.E.2d at 72-73, 438 N.Y.S.2d at 274-75. This was the view of substituted judgment taken by the trial court in *Eichner.* The court noted that although there seems to be a desire "to treat incompetents and competents alike . . . the inescapable problem is that they are in fact unlike in respect of the capacity relevant to the right—the physicial ability to make an informed choice." 102 Misc. 2d at 209, 423 N.Y.S.2d at 596.

27. Thus, the court observed that *Saikewicz* "obviously was a case in which the court permitted one person to decide what should be done for another" because Saikewicz never had "any informed attitudes toward life in general from which an opinion might be inferred." 102 Misc. 2d at 209, 423 N.Y.S.2d at 597. *See also* Annas, *Quality of Life in the Courts: Earle Spring in Fantasyland,* HASTINGS CENTER REP., Aug. 1980, at 9.

another person to die,[28] the doctrine of substituted judgment permits them to imagine that the incompetent is allowing himself to die.

In addition to ostensibly shifting responsibility for the decision, the doctrine of substituted judgment causes confusion regarding the basis on which the decision is made. Since the basis of all decisions to terminate treatment is an evaluation that the life of the particular individual is not as pleasant as the prospect of death, the only difference between cases dealing with competents and those dealing with incompetents is who makes the "quality of life" evaluation.[29] Under the doctrine of substituted judgment, a guardian decides that the incompetent does not want to live. However, the decisionmaker arrives at that assessment by placing himself in the position of the incompetent and then using his own standards to judge the incompetent's quality of life.[30] Thus, because of substituted judgment, the guardian may confuse a quality of life evaluation based on his own standard with a quality of life evaluation based on the incompetent's standard. The confusion is dangerous. If the decisionmaker is not aware of the basis on which he is actually making the decision, he can take no precautions to limit his evaluation of the incompetent's quality of life to influences with which he might be familiar—pain, for example—and to disregard factors with which he has no experience, such as severe retardation. In other words, if the decisionmaker knows that he is judging the quality of the incompetent's life on the decisionmaker's own terms, the decisionmaker can attempt to avoid allowing the incompetent to die simply for being incompetent.[31]

---

28. *See* Collester, *Death, Dying and the Law; A Prosecutorial View of the* Quinlan *Case,* 30 RUTGERS L. REV. 304, 309 (1977). Collester argues that no matter what terminology is used, allowing someone to die is taking another's life within the meaning of the criminal law.

29. *See* Annas, *supra* note 27; Shultz, Swartz & Appelbaum, *Deciding Right-to-Die Cases Involving Incompetent Patients: Jones v. Saikewicz,* 11 SUFFOLK U.L. REV. 936 (1977) [hereinafter cited as *Deciding Right-to-Die Cases*].

30. This is the only way that a competent person can make such a decision about an incompetent since the competent person arguably has no reference point (or at the most very few reference points) in common with an incompetent person. *See Deciding Right-to-Die Cases, supra* note 29.

31. Arguably, *In re* Spring, Mass. Adv. Sh. 1209, 405 N.E.2d 115 (1980), is an example of just such an occurrence. Annas, *supra* note 27, at 10. Interestingly, one writer arguing for the use of substituted judgment for permission to transplant organs contended that substituted judgment is "unlikely to support decisions in favor of passive euthanasia of . . . the chronically vegitative" except when the incompetent is in incessant unstoppable pain, because such a decision would not be in the patient's interest

In addition to the confusion caused by the doctrine, it is questionable whether the doctrine is necessary at all. Substituted judgment does not fulfill the need for which it was created; furthermore, it allows a right to be exercised which arguably does not exist for incompetents. The need for the fiction of substituted judgment seems to arise out of a desire to accord the incompetent the dignity to which society believes every human being is entitled.[32] However, the use of the doctrine is certainly a hollow victory for those concerned with maintaining the incompetent's dignity. The form of substituted judgment may be pleasing in this respect, appearing as it does to place competent and incompetent individuals on the same level with the same right. However, the substance cannot live up to the promise of the form because in reality a competent individual decides whether to take away the life of an incompetent, and the incompentent's rights of self-determination or of privacy are not involved. Thus, substituted judgment lends little dignity to the incompetent.

Indeed, there is some question whether an incompetent even possesses the common-law right to refuse treatment.[33] The court in *Eichner* quoted Judge Cardozo, who characterizes this right as the right of every person " 'of adult years and sound mind . . . to determine what should be done with his own body.' "[34] It makes sense to limit this right to persons of sound mind because a right to make a decision given to a person who is legally incapable of deciding is no right at all.[35] And one who has

---

under the substituted judgment doctrine. Robertson, *Organ Donations by Incompetents and the Substituted Judgment Doctrine*, 76 COLUM. L. REV. 48, 77 (1976).

32. *See* Robertson, *supra* note 31, at 63, 64. The *Saikewicz* court also recognized this. In arguing for the use of substituted judgment, the court observed that "[t]o presume that the incompetent person must always be subjected to what many rational and intelligent persons may decline is to downgrade the status of the incompetent person by placing a lesser value on his intrinsic human worth and vitality." 373 Mass. 728, 747, 370 N.E.2d 417, 428 (1977).

The doctrine of substituted judgment is also seen as necessary to preserve the constitutional right of privacy that would otherwise be destroyed if it could not be exercised. *See In re* Quinlan, 70 N.J. 10, 41, 355 A.2d 647, 664, *cert. denied*, 429 U.S. 922 (1976), and Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 748-49, 370 N.E.2d 417, 429 (1977).

33. It is also questionable whether the constitutional right of privacy may be extended to incompetents. *See supra* text accompanying notes 21-24.

34. *In re* Storar, 52 N.Y.2d 363, 376, 420 N.E.2d 64, 70, 438 N.Y.S.2d 266, 272 (1981).

35. The alternative analysis is that the right persists even in the face of the incompetent's inability to exercise it, and the capacity to exercise the right is transferred to

no right to decide to refuse treatment needs no mechanism such as substituted judgment to allow him to exercise it. Thus, because it causes confusion and because it is unnecessary, the court was correct in rejecting the doctrine of substituted judgment.

C. An Alternative Analysis

Although the court rejected substituted judgment as a fiction, there are other, more realistic ways of approaching the problem that will yield the desired result. The court proceeded to one such alternative and looked at the case in terms of the right of one person to withhold medical treatment from another.[36] In this regard, the court concluded that "[a] parent or guardian has a right to consent to medical treatment on behalf of an infant" but "may not deprive a child of life saving treatment, however well intentioned."[37] The court then cited cases in support of these propositions[38] and concluded that the treatment of Storar should have been continued. The court's lack of explicit reasoning at this point is troublesome because the facts in *Storar* taken together with the cases cited do not compel the conclusion reached by the court. A more complete analysis could lead to a different conclusion.

Courts deciding whether to compel a minor to receive medi-

---

another person, the guardian. Clarke, *The Choice to Refuse or Withhold Medical Treatment: The Emerging Technology and Medical-Ethical Consensus*, 13 CREIGHTON L. REV. 795, 808-11 (1980). This, however, is inaccurate. The guardian is exercising state-given power over the incompetent.

36. *In re* Storar, 52 N.Y.2d 363, 380-81, 420 N.E.2d 64, 72-73, 438 N.Y.S.2d 266, 275. *See also* Application of the President and Directors of Georgetown College, 331 F.2d 1000, 1007-08 (D.C. Cir.) (court analogized the situation of a husband refusing to authorize transfusions for his wife, who was incompetent at the time, to cases involving parental refusal of treatment for a child), *cert. denied*, 377 U.S. 978 (1964).

37. 52 N.Y.2d 263, 280, 420 N.E.2d 64, 73, 438 N.Y.S.2d 266, 275 (1981) (citations omitted).

38. *E.g.*, Jehovah's Witnesses v. King County Hosp. Unit No. 1 (Harborview), 390 U.S. 598 (1968), *aff'g* 278 F. Supp. 488 (W.D. Wash. 1967) (state statute authorizing state custody of a child when it is necessary for his welfare is not unconstitutional simply because it could be used to compel blood transfusions over religious objections); Prince v. Massachusetts, 321 U.S. 158 (1944) (state statute prohibiting children from selling magazines is constitutional even if the activity is religious in nature and required by the child's parent); People *ex rel.* Wallace v. Labrenz, 411 Ill. 618, 104 N.E.2d 769 (*parens patriae* power of state is sufficient to require transfusion for child whose life was endangered without it), *cert. denied*, 344 U.S. 824 (1952); *In re* Sampson, 278 N.Y.2d 918, 29 N.E.2d 900, 328 N.Y.S.2d 686 (1972) (court authorized operation on a fifteen-year-old child over the religious objections of his mother).

cal treatment analyze the issue by comparing the state's interest in compelling treatment with the right of the parent to control the destiny of the child.[39] The principal state interest in this area is the state's duty to act as *parens patriae.*[40] Acting as *parens patriae,* the state may compel a minor to receive medical treatment if it is clearly for the minor's welfare.[41] Balanced against the state's interest is the deference given to the parent's or guardian's will regarding what should happen to the minor. In this regard the Supreme Court of the United States has declared that "[i]t is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."[42] Echoing this statement, the New York Court of Appeals has acknowledged that it "cannot be disputed that every parent has a fundamental right to rear its child" and that "great deference must be accorded a parent's choice as to the mode of medical treatment to be undertaken."[43] If the state, then, is to interfere with the parent-child relationship by forcing a child to undergo treatment over the parent's refusal, the state must show that treatment is in the child's welfare.[44] If it is unclear whether the treatment is in the child's welfare[45] and the state has no other compelling interest in the treatment of the minor, the parents are free to make the decision they deem appropriate.[46]

---

39. *See, e.g., In re* Hofbauer, 47 N.Y.2d 648, 654-55, 393 N.E.2d 1009, 1013-14, 419 N.Y.S.2d 936, 939-40 (1979).

40. *See In re* Weberlist, 79 Misc. 2d 753, 755, 360 N.Y.S.2d 783, 786 (Sup. Ct. 1974).

41. *See In re* Vasko, 238 A.D. 128, 263 N.Y.S. 552 (1933) (state power to act for a child's welfare is sufficient to compel removal of a tumor from child's eye when death is almost certain without removal); Santos v. Goldstein, 16 A.D.2d 755, 227 N.Y.S.2d 450 (parent's refusal to consent to potentially necessary transfusions sufficient to invoke state power to consent to transfusion), *motion for leave to appeal dismissed,* 12 N.Y.2d 672, 185 N.E.2d 904, 233 N.Y.S.2d 465 (1962); *In re* Hofbauer, 47 N.Y.2d 648, 656, 393 N.E.2d 1009, 1014, 419 N.Y.S.2d 936, 941 (1979) (court must not substitute its judgment for that of the parents, but rather determine whether treatment has been recommended by a physician and has not been totally rejected by all responsible medical authorities).

42. Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

43. *In re* Hofbauer, 47 N.Y.2d 648, 655, 393 N.E.2d 1009, 1013, 419 N.Y.S.2d 936, 940 (1979) (citation omitted).

44. *See* Clarke, *supra* note 35, at 814; Application of Brooklyn Hospital, 45 Misc. 2d 914, 258 N.Y.S.2d 621 (Sup. Ct. 1965); *In re* Hudson, 13 Wash. 2d 673, 126 P.2d 765 (1942).

45. The state must act when the best interest of the ward is manifest. *See, e.g., In re* Weberlist, 79 Misc. 2d 753, 360 N.Y.S.2d 783 (Sup. Ct. 1974) and Clarke, *supra* note 35, at 825.

46. *In re* Hofbauer, 47 N.Y.2d 648, 393 N.E.2d 1009, 419 N.Y.S.2d 936 (1979); *In re*

Had the court evaluated the situation in terms of Storar's welfare and the state's other interests in continuing the transfusions, it could well have concluded that it was unclear whether the treatment was in Storar's welfare and that there was no other state interest sufficient to override the parent's right to control what happened to Storar. Although the court's analysis was incomplete, its approach to the problem is very helpful. The court stripped away the fiction of substituted judgment and clearly set out the interests of each party, thereby providing a clear view of the issue involved.

It was clear that Storar's mother wanted her son's blood transfusions to cease. It was also clear that the court wanted Storar's mother to act within the bounds circumscribing actions that society will tolerate. Given these interests, the issue properly stated is: Under what conditions will society tolerate allowing an incompetent to die? Although this is the key issue common to all cases involving a decision to withhold or withdraw treatment from an incompetent,[47] courts have not acknowledged its importance.[48] Recognizing the interests of each party while making such decisions allows this issue to be addressed directly and removes the confusion surrounding the basis on which the decisions are made. Identifying the actual interests of each party, therefore, is a superior way of approaching the decision to withdraw or withhold treatment from an incompetent.

The present difficulty with this approach is that there are no clear standards against which courts can measure the facts of a particular case in order to determine whether the action taken is acceptable to society. Since traditional state interests[49] are not

---

Hudson, 13 Wash. 2d 673, 126 P.2d 765 (1942); Clarke, *supra* note 35, at 810 n.69.

47. For example, the court in *Saikewicz* expressed this idea in terms of "seeking the collective guidance of those in health care, moral ethics, philosophy and other disciplines." 373 Mass. 728, 736, 370 N.E.2d 417, 422 (1977). By assuming that its decision would be "accepted by society and by the courts," the *Quinlan* court seemed to recognize the importance of basing its decision on societal values. 70 N.J. 10, 51, 355 A.2d 647, 669 (1976).

48. The courts in *Quinlan* and *Saikewicz*, for example, concentrated on whether an incompetent had a right to refuse treatment and how that right would be exercised if it existed.

49. The trial court in *Eichner* mentioned as state interests the protection of third parties, maintenance of latitude for physicians and hospitals to fulfill their ethical obligations, and the preservation of life. 102 Misc. 2d at 203, 423 N.Y.S.2d at 593. The court in *Saikewicz* included the prevention of suicide in this list. 373 Mass. at 741, 370 N.E.2d at 425. These interests, however, do not address questions relevant to deciding whether to withdraw treatment, such as what medical condition and prognosis will be required and what treatments may be withdrawn.

adequate to determine whether a decision to terminate or withhold treatment is acceptable to society, new standards must be developed.[50] These standards should be formulated by the legislature, not the courts, because the legislature is better able to reflect societal values.[51] This approach will allow a court reviewing a decision withdrawing treatment from an incompetent to determine whether that decision can be made in harmony with the sensibilities of the community.[52]

D. The Living Will

By deciding *Eichner* on the grounds that Fox "made the decision for himself before he became incompetent,"[53] the court firmly established that in New York the wish of a competent person to be treated (or not to be treated) a certain way, a so-called "living will," must be honored even if he is incompetent when the treatment is administered.[54] The court's pronouncement is intuitively sound even though the reasoning behind the conclusion is unstated.[55] However, the court did not intend to

---

50. Such a standard should be much more comprehensive than the traditional state interests standard and should include such considerations as the importance of the individual's prognosis, the importance of the type of treatment being given (extensive, painful, etc.), and the good faith of the guardian requesting the relief.

51. The judicial process is too principle-prone and principle-bound—it has to be, there is no other justification or explanation for the role it plays. It is also too remote from conditions, and deals, case by case, with too narrow a slice of reality. . . . For all these reasons, it is, in a vast, complex, changeable society, a most unsuitable instrument for the formation of policy.

A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 175 (1978). Although the legislature would be more suited to developing this standard, the task may still fall to the courts if the legislature refuses to act or acts too slowly.

52. Under this analysis, the result reached after determining whether the facts of the case met the standard would be presumed to be in the best interests of the incompetent. Thus, the *parens patriae* power of the state would provide the basis for the court's order.

53. *In re* Storar, 52 N.Y.2d 363, 378-80, 420 N.E.2d 64, 72, 438 N.Y.S.2d 266, 274 (1981).

54. Annas, *Help from the Dead: The Cases of Brother Fox and John Storar*, HASTINGS CENTER REP., June 1981, at 19.

55. Presumably the soundness of the conclusion is dependent on viewing the competent individual who made the decision and the incompetent individual as one and the same "person." If one identifies "person" with body there is no problem—the body is the same. If one views "person" as something more than the body, the reasoning is less clear, but might run something like this: The cause of the incompetency does not change the person but merely traps him in his body, so to speak, by denying him the ability to communicate. The desires that he expressed before he became incompetent are, therefore, in a very real sense his desires even though he is at the moment unable to communicate them. They, being the desires of a competent person, should be carried out just as

give a carte blanche, allowing anything to constitute a valid "living will." Though it need not be in writing, the evidence of the intent of the individual to discontinue or forgo treatment must be clear and convincing,[56] and that evidence must show an intent to deal with the particular treatment involved under the specific circumstances actually encountered.[57]

E. Judicial Review

The court decided that it would not require judicial review of decisions to withdraw or withhold treatment from an incompetent, but neither would it preclude courts from deciding the issue if it is presented.[58] Although the court intended this statement to apply to both *Eichner* and *Storar*, it is clear that because of the factual differences between the cases the effect of the statement on *Eichner* type cases will be different from its effect on *Storar* type cases.

Since the court set some guidelines in *Eichner* regarding the nature of an acceptable statement of intent not to be treated, persons wishing either to make or to implement such a statement can look to these guidelines to determine its efficacy. Only when the statement does not measure up to the court's guidelines will the parties involved feel the need to seek judicial approval. In an *Eichner* situation, therefore, the court's pronouncement that judicial approval is not required in all cases makes sense. However, in a *Storar* situation, it does not.

Since the court gave few reasons for its conclusion that Storar's treatment should have been continued, there are no guidelines for the proper procedure in a similar situation. Thus, the court's statement that prior court approval need not be obtained is rather deceiving; if faced with a decision to withhold or withdraw treatment from an incompetent who has not while

---

the desires of any other competent person. *See* Shelling, *Strategic Relationships in Dying*, in DEATH AND DECISION 63, 68 (E. McMullin ed. 1978).

56. *In re* Storar, 52 N.Y.2d 363, 379, 420 N.E.2d 64, 72, 438 N.Y.S.2d 266, 274 (1981).

57. The court found that "[t]here was . . . no need to speculate as to whether he would want this particular medical procedure to be discontinued under these circumstances. . . . In sum, the evidence shows that Brother Fox did not want to be maintained in a vegetative coma by use of a respirator." *Id.* at 380, 420 N.E.2d at 72, 438 N.Y.S.2d at 274.

58. "Neither the common law nor existing statutes require persons generally to seek prior court assessment of conduct which may subject them to civil and criminal liability." 52 N.Y.2d 363, 382, 420 N.E.2d 64, 74, 438 N.Y.S.2d 266, 276 (1981).

competent expressed a desire one way or another, the parties involved must either obtain court approval or face the distinct possibility of proceeding illegally.

III. Conclusion

In deciding the *Eichner* and *Storar* cases, the New York Court of Appeals was confronted with a number of important issues. Among those issues was the existence of a constitutionally protected right to refuse treatment, which the court justifiably refused to reach, and the extent to which the court should be involved in this area. The court made a significant contribution by providing for a living will and by rejecting the use of substituted judgment. By deciding that Fox should have been removed from the respirator, the court firmly established that in New York a competent person's expressed desire that treatment be withheld should, in certain circumstances, be honored. This decision also constitutes persuasive precedent for this proposition in other states.

The court refused to adopt the fiction of substituted judgment as a mode of analyzing the question of withdrawal of treatment from an incompetent. Instead, it approached the problem by determining the actual interests of the parties involved. This analysis provides a clear view of the issues involved in the withdrawal of treatment and should be used by other courts when confronted with the question of an incompetent's "right to die."

Kevin W. Bates