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6. 420 N.E.2d 64 (N.Y. 1981).

Mr. Rothenberg responds:

I appreciate Professor Brant's thoughtful comments about my recent editorial. Although I found a few of his remarks to be excessively defensive, I will limit my reply to three points.

First, contrary to Professor Brant's assertion in his letter, I never said that "only a few diehards (particularly in Massachusetts) favor judicial involvement." My words were: "a few diehards . . . particularly in Massachusetts, who believe that wisdom cannot be found in any setting other than a probate courtroom." Professor Brant's letter is unclear as to whether he personally subscribes to the philosophy I was describing, but I suspect that he doth protest too much.

Second, if Professor Brant believes that probate judges must make all medical treatment decisions for incompetent patients (or simply those involving the withholding or withdrawal of treatment), I would suggest that he and others begin developing programs to educate probate judges in Massachusetts and elsewhere on the legal, medical, and ethical aspects they must understand to adequately decide these cases. Once the educational function is completed, we will then face the problem of making such judges available 24 hours a day to decide emergency matters, but I assume that the citizens of Massachusetts and other states will understand this need and be happy to fund it with their tax dollars.

Finally, I think no worse example of seemingly benevolent court intervention can be cited than the Storar *decision of the New York Court of Appeals. As Lee Dunn made so clear in his companion article in the June issue, the court in its majority opinion made statements about the patient's medical status that were totally unsupported by the record and ignored much of the expert medical testimony given at trial. Furthermore, the hospital had no legal standing to challenge the decisions of Mr. Storar's mother-guardian. I concur with Lee Dunn that the court seems to have been unwilling to approve the withholding of blood transfusions "and, therefore, ruled against the manifest weight of the evidence." If this is an example of what Professor Brant calls "great wisdom in the marbled chambers," God help us all.*

More on the Role of Judges

Dear Editors:

The articles by Mr. Rothenberg, Mr. Dunn, and Father Paris in the June 1982 issue make several good points in advancing the societal dialogue concerning the withholding of treatment from incompetent individuals. I agree with Mr. Rothenberg's goal of minimizing judicial involvement in such cases and with the desire of Father Paris for a societal re-analysis and re-invigoration of religious traditions.

I do not believe, however, that the judiciary should be excluded from this area. It seems to me that, in some situations, the courts are clearly the institution best situated to make such decisions. Society has traditionally entrusted decisions of this magnitude to courts — not because judges are wiser than the rest of us, but because the judicial system has been developed precisely for the purpose of rendering objective decisions, in situations

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where important and possibly conflicting interests are at stake.

I acknowledge that courts are sometimes inconsistent and frequently wrong. What human institution is not? Courts, however, already possess the means for factoring into their decisions the relevant wisdom of society, through the testimony of expert witnesses, as well as information about the particular incompetent individual and his or her personal situation. And, the judiciary's reliance on precedent, combined with its appeals process and reporter systems, gives it a tendency towards consistency over time. I do not believe that the broadly-based committee decisionmaking mechanism which Father Paris appears to support could do better or, in the long run, even as well.

Father Paris refers to the case of *Powell v. Columbia Presbyterian Hospital*[1] to illustrate the point that judges' personal beliefs and value systems frequently enter into their decisionmaking. Certainly, this is a valid point but, I think, a poor illustration. Father Paris suggests that the *Powell* judge's ordering of a blood transfusion for a Jehovah's Witness, against her wishes, would, by the patient's religious beliefs, condemn her to hell. Being neither a theologian or a Jehovah's Witness (at least in the formal sense), I hesitate to question this. But isn't volition still considered a requisite element of sin? Without making any judgment about the wisdom, ethics, or legality of ordering a transfusion in such a case, I suggest that there is merit in the rationale offered by Judge Skelly Wright after ordering a transfusion in a similar case, *Application of the President and Directors of Georgetown College*.[2] At Georgetown Hospital, Judge Skelly Wright asked the Jehovah's Witness patient,

> whether she would oppose the blood transfusion if the court allowed it. She indicated, as best I could make out, that it would not then be her responsibility.... Thus, the effect of the order was to preserve for Mrs. Jones the life she wanted without the sacrifice of her religious beliefs.[3]

It should be noted that the judge in the *Powell* case was fully aware of the *Georgetown* case. In fact, the *Powell* judge states that he "read [the *Georgetown* opinion] and was convinced of the proper course from a legal standpoint."[4]

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Non-Treatment of Defective Infants: A Critical Note

Dear Editors:

In recent months several cases have pushed the question of withholding care from "defective" newborns to the front pages of national concern. This journal has recently published several articles on this topic, all of which seem to support some policy of selective non-treatment for some newborns whose lives could be saved but who will nevertheless be severely handicapped. Since I regard any such policy as impossible to justify, I would like to respond briefly to the sorts of positions taken by those who want to adopt such laws or policies. To this end, I make three points that I believe to be decisive in the case against selective non-treatment of some newborns. Until these points are answered, any policy of this sort fails minimal standards of acceptable law and policy.

1) *Age.* Why do most writers want to stop at newborns? If the newborn is