Correspondence

ABORTING AMERICA

Dear Editors:

I was extremely disappointed by the quality of Ms. Scharf's review of the book, ABORTING AMERICA by Dr. Bernard Nathanson.

The critic completely ignores the author's main message, *i.e.*, that legalized abortion has unwittingly led to infanticide. The author supports that proposition by citing the same conclusions of Dr. Everett Koop, a nationally prominent pediatric surgeon.

Dr. Nathanson's proposition is particularly relevant because, as an early pioneer for abortions (co-founder of the National Association For Repeal of Abortion Laws) and after actually performing 60,000 abortions, he has come to this conclusion.

The reviewer's total disregard of the main message of the book regardless of her obvious personal bias is destructive to the book review process, and detrimental to the quality of your journal.

Can we get a more objective review of this important book in the near future.

William P. Polito, Esq.
Solin, Polito and Anderson
Rochester, New York

Ms. Scharf responds:

I find it difficult to agree with Mr. Polito that Dr. Nathanson's "main point" is that "legalized abortion has unwittingly led to infanticide." Nathanson quotes writers who believe that some arguments in favor of legal abortion can be advanced in favor of infanticide as well, and warns that "when the myth and magic have finally disappeared from the birth line," infanticide will become acceptable. This is not to argue that legalization *has led* to infanticide. Dr. Koop's statement, "that disability and unhappiness do not necessarily go together," is adduced in support of Nathanson's arguments against the use of abortion to prevent the *birth* of compromised infants. In fact, Nathanson criticizes the article from which the Koop quote is drawn as "a typical example of 'slippery slope' thinking." Nathanson's central argument is that legal and moral formulae which balance a woman's rights against the viability of a fetus are based on a mutable technological frontier, so that ending a pregnancy need not end the life of a technically viable fetus. The infanticide argument seems to me subsidiary to Nathanson's examination of the conflict between the rights of the pregnant woman and the fetus.

Kathleen Rudd Scharf, M.A.
Boston University School of Medicine

M.D.s and Lethal Injections

Dear Editors:

In reply to George Annas' editorial on *Doctors and the Death Penalty*, MEDICOLEGAL NEWS, 8(2): 17, I must say it is not a position with which I agree. I suspect it is because you are dealing exclusively with the justice of the death penalty — which, while certainly one issue, is not the only one. Whether there is a death penalty or not is a subject for the law and the state. The role of the physician, however, is something that exists within many states and in many systems, and has its own right to protection.

A physician is indeed the proper person to pronounce someone dead; he is not the proper person to *make* someone dead. The setting is irrelevant, although he — as anybody — may express his moral conscience by refusing to participate in the system. In other words, in analogy, a doctor serving in the Army should still not suborn his medical skills to the war. I do not think he should execute prisoners by injection. Injection is no more difficult than shooting a rifle. But he should inject people to cure or prevent gangrene. I presume there are some doctors who are sufficient pacifists that they would not serve in the Army at all. There may, in the same sense, be some doctors who are opposed to the prison system and would not serve in the prisons at all; there are those of good will who could take a compromise position and say that they will serve the prisoners, if not the prison; and there are those who will serve both the prisoners *and* society (the prisons) — but not as executioners, since this would compromise their identity as physicians. I don't see any of this as at all either contradictory, illogical or, for that matter, immoral.

Willard Gaylin, M.D.
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The Hastings Center
Hastings-on-Hudson, New York

Mr. Annas responds:

You are, of course, correct that justice is not the only issue worth discussing concerning the death penalty. We could also discuss equality in a system that often executes blacks who kill whites, but rarely executes whites who kill blacks; or deterrence and the lack of evidence to support this goal; or the concept of retribution. These issues all seem to me to be critical and central to the death penalty debate. The role of physicians, on the other hand, seems to be an irrelevant side-show; certainly physicians have the right, both moral and legal, to refuse to participate in any way in executions — this may make them "feel better," but it does not address the real issues that society must face.

Withholding Treatment

To the Editors:

It may be a bit late but I would like to comment on the conference report on withholding care from a newborn that appeared in the summer 1979 issue (vol. 7 no. 2). I was extraordinarily surprised by the hypothetical decision and even more surprised by the extraordinarily presumptious oversight engaged in by Ms. Rice in her appeal to a "best interests" standard. As attorney for the parents she presumably believed that the proposed test would coincide with the parents' desires to refuse life-saving medical care. To the extent that this is true a preposterous result emerges. Under the most minimally acceptable standards of constitutional and common law jurisprudence a proposal such as hers ought to apply to all those similarly situated. Failing that, we have carved a "class out of a class" in direct contravention of what any attorney ought to know about the fourteenth amendment.

But I seriously doubt whether Ms. Rice would ever wish to see her supposed test applied to the several hundred thousand severely handicapped and/or retarded persons already alive in this country. Does she really wish to endorse the proposition that for most of these individuals the "best interest" is death with the consent of parents or legal guardians? Would it therefore be best if parents signed such a document upon admitting the child to an institution so that when he needed care or treatment the institution could let him die instead, even though his life could be saved as was the possibility in this case? Finally, should parents with a severely handicapped youngster be legally entitled to petition for withholding care in potentially fatal but eminently treatable conditions, and should they be given the right to withhold such care merely because they believe it to be in the supposed "best interest" of the child? It is because I cannot conceive that Ms. Rice would accept any of these things that I am suggesting that her position in the case is entirely indefensible.

As for Judge Podolski, I think he may have misunderstood the medical testimony or the *Saikewicz* decision or both. From what was printed it seems that this infant's chances for prolonged

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survival are excellent. He is not a terminal case, though he will die without proper attention. It seems therefore, that the only conceivable approach to the case is to look at the potential "quality of life" of the child. This involves us in the problems inherent in Ms. Rice's position but more to the point I think such questions were clearly (and in my view correctly) ruled out by *Saikewicz*. To point out these errors in a hypothetical case may help avoid them when reality strikes.

Richard Sherlock, Ph.D.
Program on Human Values
and Ethics
University of Tennessee
Center for the Health Sciences

Attorney Rice responds:

I would like to share with you a few observations on the comments by Richard Sherlock, Ph.D. on the Conference Report on *Withholding Treatment From A Defective Newborn,* MEDICOLEGAL NEWS, 7(2):10 (Summer 1979).

1. Dr. Sherlock errs in assuming that arguments presented on behalf of litigants are the personal views of their attorneys. In the mock trial described in the Conference Report, as in actual proceedings, each attorney argues that the evidence (in this case controverted medical testimony), viewed in light of the applicable rules of law, requires a particular result. An attorney's personal views are not relevant and are rarely revealed.

2. The legal standard expressed as the "best interests of the child" was used in this presentation by the attorneys because it is the most frequently applied legal standard in matters affecting the vital interests of minors. Moreover, in Massachusetts, which was considered to be the jurisdiction of this hypothetical case, the "best interests of the child" is the current legal standard for medical treatment decisions affecting minors. In *Custody of a Minor,* 393 N.E.2d 836, 844 (1979), the Massachusetts Supreme Judicial Court states:

> In the case of a child, however, the substituted judgment doctrine, described in *Superintendent of Belchertown State School v. Saikewicz,* 370 N.E.2d 417 (1977), and the "best interests of the child" test are essentially coextensive, involving examination of the same criteria and application of the same basic reasoning.

The mock trial presentation by each attorney began with the legal premise that the child had a constitutional right to refuse certain medical treatments, which right would be exercised in accordance with the court's conclusions. The individual presentations addressed the following issues:

i) Which treatments, if any, could be refused on behalf of the child;

ii) Which treatment plan was in the "best interests of the child;" and

iii) Who should exercise the treatment decision which the court ultimately finds to be in the child's best interests.

The physicians' testimony during the presentation and the audience's participation thereafter demonstrated that treatment decisions *are* made for newborns, usually without recourse to formal process. If Dr. Sherlock is advocating a protective process on behalf of seriously afflicted newborns, his criticisms are misdirected. It is the court's findings in this particular case with which he disagrees, and not the process or the legal standard. The advocates of vigorous treatment of even the most severely affected newborns generally endorse the judicial process as a means of insuring an independent advocacy of the child's interests, as distinguished from parental or other possibly conflicting concerns.

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More on Smoking and Regulation

To the Editors:

At a time of supposed national malaise, it is refreshing to be identified as a zealot. And it is nice to see that the Winter 1979 article on smoking[1] has sparked some interest and commentary. Although there seems to be considerable agreement amongst the participants in this dialogue, there are at least two important areas of disagreement. One of Daryl Matthews' main points seems to be that intervention has proven to be ineffective in altering health behavior.[2] I disagree. Richard Gilbert[3] and Matthews both deny that the tobacco industry's political clout plays the major role in the continuation of cigarette smoking as a major health problem in the United States. Again I disagree.

Matthews refers, validly, I think, to "a rather bleak picture of health education's ability to alter behavior meaningfully." But he ignores completely the puniness of the *efforts* in this area, when compared to the undertakings that undercut them. For example, the Federal government spends several times more in aid to the tobacco industry than it does in anti-smoking campaigns and cigarette advertising expenditures dwarf those aimed at discouraging smoking.[4] At the same time, and despite such imbalances, some significant changes in health habits have been occurring; the number of smokers has dropped from 42 percent of the adult population in 1965 to a little more than one-third today; per capita consumption of dietary cholesterol and saturated fats has declined over the past decade; ever-growing numbers of Americans are engaged in regular exercise; and there are encouraging reports

about the success of intervention programs to reduce hypertension.[5] Thus, while there are admittedly many difficulties involved in health education, it is a serious error to write such efforts off as hopeless.

Gilbert makes a great deal of the "free choice" argument with regard to smoking; but it seems to me to misstate the issue. Tobacco prohibition is not really the issue; yet most anti-smoking efforts, no matter how non-intrusive to the individual, have been countered aggressively by the tobacco industry, which continues to mislead people into smoking. Advertising is the most important example. Cigarette advertising traditionally has been deceptive. In earlier days, cigarettes were explicitly promoted as healthy ("not a cough in a car-load," "more doctors smoke"); today the message is implicit, with attractive, healthy people in invigorating environments used to hype the product. Efforts to regulate this advertising by limiting ads to a tombstone format or solely to pictures of the product have been successfully blocked. The one exception, the banning of cigarette ads from radio and television, was supported by the industry when it became

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