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The Courts, Futility, and the Ends of Medicine

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On August 13, 2010, the appellate division of the Superior Court of New Jersey declined to rule in the matter of *Betancourt v Trinitas Hospital*,¹ a case that raised questions about the limits of medicine in patients with advanced illness. In declining to rule, the judges wrote that resolving such issues in “the context of overheated rhetoric in the battlefield of active litigation” would not positively contribute to the policy debate around medical futility. These comments raise important questions about whether there is a role for the courts in helping to shape the boundaries of medical practice near the end of life.

One view is that courts should not provide guidance on medical futility disputes. Texas has formalized this belief into law. The Texas Advance Directives Act bars substantive judicial review when intractable conflict arises between clinicians and patients or their surrogate decision makers. It gives physicians and hospital committees authority to unilaterally withdraw life-sustaining treatment when they believe attempts to extend a patient’s life are inappropriate.² The state medical associations in California, Washington, and Wisconsin have considered resolutions supporting similar legislation. Another view is that the possibility of appeal to the courts should be preserved because courts have an important role in ensuring fair deliberations between parties (eg, families and physicians) of unequal power.³

Both perspectives neglect a complexity: although judicial intervention is undesirable for the vast majority of decisions in medicine, preserving the possibility of appeal to the courts in medical futility cases may have beneficial effects at the societal level that are distinct from the benefits sought in individual cases. This viewpoint presents a justification for a limited judicial role in intractable futility disputes and delineates 3 potential benefits of preserving this option.

Justification for a Limited Judicial Role

The point of controversy in most futility cases—including *Betancourt*—is not whether it is possible to extend the patient’s life but whether the life should be extended. Such disputes involve “moral conflicts concerning our most deeply held beliefs about the value of life,”⁴ about which there inevitably are diverse and incommensurable views within a pluralistic

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society. These cases also raise questions about the appropriate goals of medicine near the end of life, for which neither a medical nor a social consensus has been articulated.⁵

In this sense, patients, physicians, and society have important interests at stake. Patients have an interest in receiving care consistent with their values. Physicians have an interest in not being compelled to act against their beliefs about how to best respect human dignity near life's end. Society has important interests in protecting individual rights and ensuring the fair allocation of scarce medical resources. When the interests of each party are correctly understood, it is clear that such decisions are not purely "medical" decisions; thus, unilateral clinician decision making is problematic.

Courts have special expertise to adjudicate between parties in the face of conflicts about fundamental interests. Courts fulfill this social role in part by ensuring a fair process of decision making. Legitimate decisions must comport with notions of procedural due process, which include transparency, reason giving, and independence of the decision maker.

There are at least 3 potential benefits of preserving the possibility of appeal to the courts in futility disputes.

To Encourage Intensive Communication

Medical decisions for incapacitated patients near the end of life should ideally be made collaboratively by patients' surrogates and clinicians. Futility disputes commonly arise not from intractable value conflicts but from inadequate communication in the face of the emotional and psychological difficulty of facing death. In such cases, the best response is to intensify communication and negotiation. However, the emotional distress caused by such conflicts may lead one or both parties to avoid ongoing dialogue. Physicians may seek resolution by unilaterally imposing a decision; families may seek resolution by ceasing communication with clinicians, on the assumption that clinicians will not withdraw treatment without providing advance notice. Both responses are understandable but problematic and, if allowed, would undermine the welfare of all involved.

Paradoxically, preserving the option of appeal to the courts may increase the likelihood that intensive communication will occur and that consensus can be reached without court involvement. A fundamental principle of dispute resolution is that robust negotiations are more likely when neither party has complete decisional authority. Because clinicians and families generally want to avoid going to court, preserving this possibility may encourage genuine engagement and negotiation. In contrast policies giving unilateral authority to clinicians may create a disincentive for clinicians to fully engage in the time-consuming, emotionally challenging conversations often required to reach consensus. Similarly, policies giving all power to surrogates may create a disincentive for surrogates to genuinely consider clinicians' perspectives and to face the difficult emotions that arise near the end of life.

Although this approach will not resolve the rare conflicts that arise due to intractable value conflicts, it will avoid the undesirable prospect of creating a solution (ie, granting one party complete authority) that negatively impacts the resolution of the more common and less intractable cases.

To Cast a Shadow That Allows Extrajudicial Solutions

A second potentially beneficial effect of allowing appeal to the courts is to obtain guidance on how to balance the conflicting interests involved in futility cases. Courts could provide written opinions on several different "phenotypes" of futility cases to allow similar cases to be resolved extrajudicially. There is a strong tradition of courts providing guidance to the medical profession on complex issues near the end of life.

For example, patients' right to refuse life support was previously considered deeply uncertain. Many physicians regarded the act of foregoing life-sustaining treatment as unethical and inconsistent with professional integrity.⁶ The New Jersey Supreme Court's ruling in *In re Quinlan* helped⁷ establish that patients have a right to refuse treatment and that discontinuing life support is not inconsistent with the integrity of medicine. In doing so, the court helped clarify the boundaries of acceptable medical practice, which allowed similar disputes to be managed collaboratively by clinicians and families, but within the shadow of the courts.⁸ The possibility for such guidance is lost if substantive judicial review is disallowed.

To Shine a Spotlight on an Unresolved Social Issue

A third potentially beneficial effect of preserving the possibility of appeal to the courts is that such proceedings may focus attention on a topic that merits robust social debate. For example, in addressing physician assistance in dying, the US Supreme Court refused to establish new rights for patients in *Washington v Glucksberg*⁹ and *Vacco v Quill*.¹⁰ However, these cases catalyzed an important public discussion of physician assistance in the dying process. In a concurring opinion in *Vacco*, Justice O'Connor wrote: "the challenging task of crafting appropriate procedures for safeguarding ... liberty interests is entrusted to the 'laboratory' of the States." Since then, the public debate regarding physician aid in dying has continued, with subsequent changes in law and practice in several states.

Potential Criticisms

Some argue that courts simply cannot grasp the complexity of futility cases. However, it strains credulity to argue that these disputes are substantially more difficult to understand than those that courts confront in the fields of economics, computer science, and environmental science—especially with the availability of expert testimony and amicus curiae briefs.

Courts are not immune from making poor decisions. This is true, just as it is true for other potential decision makers—clinicians, ethics committees, and legislatures. Because there is no perfect solution, society should continue to rely on a diverse array of other strategies, one of which is allowing appeal to the courts in intractable cases.

State legislatures should create comprehensive solutions through legislation. However, the lack of legislative movement on this topic suggests that the futility debate is too charged for the political branch of government. When legislatures fail to act, courts have a legitimate role in providing input on contentious social debates.

In conclusion, there is no universal guidance for resolving questions surrounding the medical profession's duty to support life in patients with advanced illness. Preserving the possibility of appeal to the courts in the rare disputes that are intractable will encourage intensive communication between clinicians and families in individual cases, provide guidance to allow extrajudicial decision making, and foster a needed social debate about the ends of medicine near the end of life.

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