

**PHILOSOPHICAL CRITICISM:
ESSAYS AND REVIEWS**

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CHAPTER NINE

COURTS, GENDER, AND THE RIGHT TO DIE: A SECOND LOOK

During the last five years or so a number of research results have purported to identify significant areas of medical bias against women. This bias is thought to relate both to withholding treatment that could beneficially be given and to giving treatment that (in some cases) might better be withheld. One such study was reported in the *New York Times*, November 13, 1991, under the headline “Study Finds a Gender Gap in the Treatment of Heart Attacks.” In a survey of nineteen hospitals in the greater Seattle region—a survey involving 3,232 men and 1,659 women who were treated for heart attacks—it was found that 26% of the men, vs. only 14% of the women, received the benefit of thrombolytic therapy; moreover, 27% of the men, vs. still only 14% of the women, underwent balloon angioplasty, though with equally beneficial outcomes. By contrast, coronary artery bypass graft was performed on a like proportion of women as men (“no gender gap”); yet, the surgical result was twice as lethal for the women. Medical decisions such as those reported in the Seattle study remain to be more fully analyzed. For, *prima facie*, it seems unlikely that the fact of someone's gender would accurately explain such treatment variations.

Accusations of gender-biased reasoning as it relates to medical treatment issues have also been brought against state-court justices. In a remarkable paper, “Courts, Gender and ‘The Right to Die,’ ” [*Law, Medicine and Health Care*, Vol. 18 (Spring/Summer 1990), 85-95] Steven H. Miles and Allison August examine (among other things)¹ the decisions reached by state appellate courts concerning the continuance or the discontinuance of medical treatment for newly incompetent persons having no advance directives. Where these cases involve more than

one appellate process, Miles and August focus upon the ruling made by the state appeals court that was the last to hear the respective case; and they concentrate upon the reasoning set forth by the court in its majority opinion. The authors of the study identify twenty-two right-to-die decisions made by appellate courts in fourteen states from 1976 to 1989. (This list is said to be exhaustive for this period.) Eight of these decisions (from six different states) have to do with men, whereas fourteen (from eleven different states) deal with women.² With respect to the courts' *authorizations* these authors report the following: (1) "The final state appellate court rulings ordered continuation of life-prolonging care in two of 14 cases about profoundly ill, previously competent women who had not authored living wills. No such order was made in eight similar cases involving men."³ (2) "In striking contrast to the routine use of constructed treatment preferences for men, only two of the 14 appellate level cases addressing previously competent women without living wills take this approach."⁴ With respect to the courts' *rationales* the authors find "four major differences in how courts speak of previously competent women's or men's moral preferences":

The first difference is the courts' view that a man's opinions are rational and a woman's remarks are unreflective, emotional, or immature. Second, women's moral agency in relation to medical decisions is often not recognized. Third, courts apply evidentiary standards differently to evidence about men's and women's preferences. Fourth, life-support dependent men are seen as subjected to medical assault; women are seen as vulnerable to medical neglect. Not all of these differences are present in any one case. Each difference (e.g. language describing a woman's reasoning as immature) is present in at least three cases of the gender to which it is attributed and none of the cases of the opposite gender (p. 87b).

These reported findings undergird the authors' overall conclusion: "Gender profoundly affects judicial analysis of right-to-die cases."⁵

In the ten points that follow, I will show that the rulings and the reasoning contained in the twenty-two appellate-court deci-

sions in question do not warrant Miles and August's overall conclusion and do not support their other explicit claims about gender-patterned judicial reasoning. Indeed, in their representation of the data these authors are guilty of oversimplification, overgeneralization, and special pleading.

1.1. To begin with, the authors oversimplify by grouping very different cases together under the rubric "newly incompetent persons without written advance directives." Some of these cases concern individuals who are in a persistent vegetative state, whereas other cases (e.g., *Mary O'Connor* or *Claire Conroy*)⁶ concern those who are not in a persistent vegetative state. Furthermore, some cases center on the discontinuance of a respirator, others on the discontinuance of tube feedings, and still others on the discontinuance of hemodialysis (*James Smith* and *Earle Spring*); one case involves only a petition for court approval of "Do Not Resuscitate" status (*Shirley Dinnerstein*). In some of the cases the patient's condition is regarded by the medical authorities and the courts as terminal (e.g., *Bertha Colyer*, *Shirley Dinnerstein*, *Joseph Fox*, *Carol McConnell*); in others, as not terminal (e.g., *Paul Brophy*, *Nancy Cruzan*, *Daniel Delio*, *Joseph Gardner*, *Thelma Morrison*). Likewise, there are cases where the appointed guardian is a member of the immediate family, cases where there is no living immediate family member (*Rudolfo Torres*), and cases where there is such a living member but where someone outside the family is nonetheless named to be guardian (*Mildred Rasmussen*). Finally, some courts point to preexisting statutes upon which their decision must be based (e.g., *James Smith*, NM 1983; *William Drabick*, CA 1988; *Nancy Cruzan*, MO 1988), whereas other courts call attention to the lack of legislative guidelines and to the desirability of legislative action (e.g., *Bertha Colyer*, WA 1983; *Claire Conroy*, NJ 1985; *Dorothy Longeway*, IL 1989). In the light of these situations, many of which differ from one another in complex ways, no simplified generalization can be extracted about why some appellate courts in some states authorize discontinuance of

medical treatment while other appellate courts in other states forbid such discontinuance—even though each court is deciding about a newly incompetent person with no written advance directive.

1.2. Even if important differences between some of the twenty-two cases were not present, nonetheless two of the authors' substantive claims about their findings could still readily be seen to be mistaken.

1.2.1. As we noted, the authors assert at the very outset that “final state appellate court rulings ordered continuation of life-prolonging care in two of 14 cases about profoundly ill, previously competent women [viz., Elbaum and McConnell] who had not authored living wills. No such order was made in eight similar cases involving men.”⁷ Yet, this claim about the men and the women is inaccurate, because in the cases of the women Elbaum and McConnell the courts authorized the *discontinuation* of life-prolonging care—in particular, the removal of a gastrostomy feeding tube in each case.⁸ And in the case of the man James Smith the New Mexico Supreme Court *refused* to authorize the cessation of hemodialysis.

1.2.2. Likewise, the authors report that whereas the courts constructed treatment preferences for six of the eight men, they did so for only two of the fourteen women.⁹ The authors then infer that this gender pattern “is not the result of chance.”¹⁰ For “there is less than one chance in 200 that the ratio of two of 14 constructed treatment preferences for women is equivalent to the six of eight constructed preferences for men. (Chi square #8.12, df 1, p. ff.005).”¹¹ Both the initial statement as to the data and the subsequent statistical analysis thereof are erroneous. Let us for the moment assume the accuracy of the database¹² and impugn only the inference therefrom. The inference is a *non sequitur* for two reasons. First, the court cases are not altogether independent of one another but are interlinked by a given court's interest in taking account of the precedents established by the other courts, so that the comparison with chance

is skewed. Secondly, even in a case of true independence a corrective factor would have to be entered into the Chi square formula as an adjustment for the very small number of cases (only twenty-two). When this corrective is introduced, the resulting ratio will be not one in two hundred but more like one in sixty. (In any event, these twenty-two cases are not a *sample* from any population of cases but, ostensibly, constitute all the cases that there were up to 1989, the *terminus ad quem* of the study.)

2. The authors of the study say of the courts' opinions regarding the men and the women: "men are depicted as subject to medical assault; women are depicted as vulnerable to medical neglect."¹³ In making such an assertion, the authors are guilty of special pleading: they disregard the courts' comments about women and the intrusiveness of their treatments. Comments from the following cases should have been mentioned:

2.1. *Bertha Colyer*: The court speaks of the common-law right to be free from bodily invasions (pp. 743a; 746b). "In *Quinlan*," it says,

the court balanced the degree of bodily invasion against the state's interest in preserving life For Karen Quinlan, the degree of bodily invasion was great, since she required a respirator, an intravenous feeding apparatus, a catheter, and intensive nursing care. The court concluded that Karen's privacy right outweighed the state's interest.

Similar intrusive care was required for Bertha Colyer. Therefore, applying the *Quinlan* balancing test, we conclude that Bertha Colyer's privacy right was greater than the state's interest in preserving her life (p. 743b).

2.2. *Shirley Dinnerstein*: The court states that "many of these procedures are obviously highly intrusive, and some are violent in nature. The defibrillator, for example, causes violent (and painful) muscle contractions which, in a patient suffering (as this patient is) from osteoporosis, may cause fracture of the vertebrae or other bones. Such fractures, in turn, cause pain, which may be extreme" (135b - 136a).

2.3. *Nancy Jobes*: Justice Alan Handler, concurring with the

majority opinion, writes: “Her prognosis is hopeless; she cannot live without massive, extraordinary medical and health care measures. One may fairly and reasonably ask whether these bodily intrusions and invasions upon a person in such dire condition and so close to death, undertaken for the best of motives, have not reached a point that it is not possible to perpetuate her life without destroying her dignity and denigrating her humanity” (p. 459a-b).

2.4. *Mildred Rasmussen*: The court acknowledges the common-law right to be free from nonconsensual bodily invasions and assigns to Rasmussen, through her surrogate and guardian, the right to refuse medical treatment (pp. 682b - 683a).¹⁴

3. On p. 90b of their study the authors allege of the courts’ reported rulings and opinions: “The judge’s sex is rarely identified, though a large majority are men.” The first part of this remark is incorrect, because the last names of the justices and their votes are reported with each decision. The full names of the members of the courts are given at the beginning of the volume that contains the respective published decision. The authors Miles and August convey the misimpression that the alleged bad thing that is happening to twelve out of the fourteen women (viz., that their preferences, while competent, are being ignored by the courts) has something to do with the fact that the majority of the justices are men. But even though the majority are, in fact, men, the authors are unable to show that the men’s involvement in the decisions about women is influenced, to a greater or a lesser extent, by the fact of their masculine gender. Instead, the authors are once again guilty of special pleading—this time by virtue of not having called to our attention a number of relevant details regarding the cases in question:

3. 1. *Paul Brophy*: Justice Ruth Abrams votes with the majority to authorize Brophy’s wife-guardian to arrange for discontinuance of the gastrostomy tube.

3.2. *Bertha Colyer*: Justice Carolyn Dimmick votes with the majority to affirm the trial court’s order “directing that the life

support systems be withdrawn” (p. 740a).

3.3. *Claire Conroy*: Justice Marie Garibaldi votes with the majority to establish three evidentiary tests, all of which would have resulted in the continuance of nasogastric feedings (had Conroy still been alive at the time of the final judicial decision).¹⁵

3.4. *Joseph Gardner*: Justice Caroline Glassman votes with the majority to authorize Gardner’s mother-guardian to halt nasogastric feedings, in conformity with Gardner’s previously stated wish.

3.5. *Nancy Jobes*: Justice Marie Garibaldi votes with the majority to allow Jobes’ husband and her family, as surrogates, to proceed with the discontinuance of jejunostomy feedings, in conformity with their judgment about the patient’s values and inclinations. Garibaldi writes the majority opinion.

3.6. *Carol McConnell*: Chief Justice Ellen Peters writes for the majority, approving the husband-conservator’s implementing discontinuance of the gastrostomy tube, in accordance with the patient’s clearly expressed wish.

3.7. *Mary O’Connor*: Justice Judith Kaye votes with the majority to authorize insertion of a nasogastric tube.

3.8. *Earle Spring*: Justice Ruth Abrams votes with the court to authorize discontinuance of hemodialysis.

In the light of the foregoing considerations the authors will be hard-pressed to maintain that the male justices are rendering decisions that are biased by their gender. For the authors will also have to argue that in cases where the female justices are party to the majority decision, they took on the (alleged) gender bias of their male colleagues. Were the authors to attempt to make such a claim without supporting evidence, they would be perpetuating a highly dubious stereotype of the lability of feminine reasoning. Moreover, in the absence of such evidence, the claim about the male justices begs the question.

4. Let us now return to examining a point that we temporarily postponed—viz., an exhibiting of the fact that in representing the data as they do, the authors mislead us. For in reporting

that the courts construct the preferences of only two of the fourteen women [viz., Elbaum and McConnell], the authors distort the facts. To assure proper perspective the authors need to adduce the following additional considerations:

4.1. The appellate court *favors* construction for Mary Severns; it instructs the lower court to hold an *evidentiary* hearing on the facts, including third-party evidence regarding Severns' treatment preferences and including the evidence afforded from her active membership in the Euthanasia Council of Delaware.

4.2. Likewise, the court favors construction for Mary O'Connor. But it says that evidence of her previous preferences with respect to refusing treatment is not clear and convincing.

4.3. The court favors construction for Nancy Jobes. It calls substituted judgment (i.e., construction)¹⁶ the ideal for patients in a persistent vegetative state; and in the absence of sufficient evidence about Jobes' preferences, it authorizes her petitioning husband and parents to decide for Mrs. Jobes on the basis of their knowledge of her values and their belief about what she would have wanted done. "Mrs. Jobes," says the court, "is blessed with warm, close, and loving family members. It is entirely proper to assume that they are best qualified to determine the medical decisions she would make. Moreover, there is some trustworthy evidence that supports their judgment of Mrs. Jobes' personal inclinations" (p. 447a-b).

4.4. In the case of Mildred Rasmussen the court discusses both the substituted-judgment standard and the best-interests standard. Regarding the former it says: "This standard best guides a guardian's decisionmaking when a patient has manifested his or her intent while competent." The court adds: "Unfortunately, the record in this case is barren of any evidence that Rasmussen expressed her medical desires in any form prior to becoming incompetent. Where no reliable evidence of a patient's intent exists, as here, the substituted judgment standard provides little, if any, guidance to the surrogate decisionmaker and should be abandoned in favor of the 'best interests' stan-

dard” (pp. 688b - 689a). So the court *is* seeking to determine Rasmussen’s previous preferences concerning refusal of treatment. And in the absence of reliable evidence as to that intent, the court seeks to establish what is in the patient’s best interests. After hearing the arguments and evaluating the testimony, it voted to allow the guardian to assert Rasmussen’s right to refuse treatment and to have her nasogastric tube removed.

4.5. Regarding Dorothy Longeway the higher court remanded the case to the lower court with instructions to help the guardian to determine Longeway’s intent. “We find,” writes the court, “that although actual, specific express intent would be helpful and compelling, the same is not necessary for the exercise of substituted judgment by a surrogate. In this case, Mrs. Longeway’s guardian must substitute her judgment for that of Longeway’s, based upon other clear and convincing evidence of Longeway’s intent” (pp. 50f.).

4.6. In the matter of *Claire Conroy* the Supreme Court of New Jersey espouses the ideal of constructed preference, and it weighs the evidence regarding Conroy’s treatment preference while she was competent. As the court declares: “the goal of decision-making for incompetent patients should be to determine and effectuate, insofar as possible, the decision that the patient would have made if competent. Ideally, both aspects of the patient’s right to bodily integrity—the right to consent to medical intervention and the right to refuse it—should be respected” (p. 1229b).

4.7. Even in the Karen Quinlan case, as the authors realize, the guardian, who is the father, is instructed by the court to use his best judgment to decide whether or not, in the given circumstances, Karen would exercise her right of privacy to refuse medical treatment (p. 664a-b).

In short, in many cases regarding women and the right to die, the court is not neglecting to ascertain their preferences insofar as it is possible to do so reliably. Yet, the authors Miles and August convey the impression that the courts have taken steps to construct the preferences of only two women.

5. Furthermore, the authors assert that the courts apply a “higher burden of proof” (p. 91a) to assessing testimony regarding women’s preferences than regarding men’s preferences. They also assert that in the cases of the women evidence of preferences “is tested more rigorously against a ‘clear and convincing [evidence] standard’ ” (p. 90b).

5.1. However, the foregoing accusations are not generally true. Where cases fall within the same jurisdiction (or even within different jurisdictions within the *same* state), the justices are seen to strive for consistency of court decision. For example, the New York Court of Appeals hears both the case of Joseph Fox and that of Mary O’Connor; and its decision in the latter case expressly takes account of its reasoning in the former case. Similarly, the California Court of Appeal, First District, in reaching its decision concerning Thelma Morrison, explicitly refers to the decision by the Sixth District Court of Appeal concerning William Drabick.

5.1.1. Just a moment ago we saw, in the case of Dorothy Longeway, that the Illinois Supreme Court rejected the tough requirement of having to establish that she actually expressed her specific intent regarding refusal of treatment (p. 50). Moreover, that court instructed the lower court, on remand, that it “should not hesitate to admit any reliable and relevant evidence if it will aid in judging Longeway’s intent” (p. 51).

5.1.2. The Minnesota Supreme Court did allow *wide latitude* in the probate court’s assessment of evidence regarding Rudolfo Torres and the construction of his preferences. The Supreme Court, compliantly, ruled that the probate court was not clearly in error in weighing evidence as to Torres’ intent to refuse treatment. The implication (because of the qualifier “clearly”) is that the probate court also did not clearly *establish* the fact of Torres’ preferences. Nonetheless, the Supreme Court allowed cessation of treatment on the basis of substituted judgment.

However, in the case of Bertha Colyer the Supreme Court of the state of Washington also allows *wide latitude*. There is no ev-

idence, it concedes, that Colyer “explicitly expressed her desire to refuse life sustaining treatment” (p. 748a). Nevertheless, it accepts her husband’s and her sisters’ testimony that Colyer was very independent, that she disliked going to doctors, and that she would have wanted treatment stopped. The Supreme Court gives so much latitude here that the dissenting opinion in this case refers to the daughters and the husband as having “speculated” about Colyer’s would-be decision (p. 753b).

5.2. Standards and evidence-requirements, when tightened, are tightened not only for some of the women but also for some of the men.

5.2.1. Regarding Joseph Fox (*In re Eichner*) the New York Court of Appeals declares that it is insisting on the highest standard applicable to civil cases. That is, instead of applying a “preponderance of evidence” standard, the court applies the standard of “clear and convincing proof.” [“We agree that this is the appropriate burden of proof and that the evidence in the record satisfies this standard” (p. 72a).]

5.2.2. In the case of Mary O’Connor the New York Court of Appeals also applies the “clear and convincing proof” standard—though, on the basis of the evidence, it comes to a different ruling (viz., the continuance of treatment—as opposed to the discontinuance of treatment for Fox). But, then, O’Connor was not in a persistent vegetative state,¹⁷ as was Fox. Moreover, the court was being asked by the hospital to authorize the insertion of a nasogastric tube. The daughters, who opposed insertion, conceded to the court that their mother, while competent, had not addressed this issue. But Fox *had* done so, while competent.

5.2.3. In several cases (e.g., *Dorothy Longeway* and *Mildred Rasmussen*¹⁸) the appellate court expresses awareness that it is deciding not just the case at hand for some given individual but, by precedent, the case of many individuals to come (without reference to gender). This awareness helps explain why the appellate courts agree to hear the cases of Claire Conroy, Helen Corbett, Joseph Fox, and Mildred Rasmussen even though *these*

patients were already deceased at the time of the respective final hearings. Sexism is not seen to be operative in these hearings.

5.2.4. It is true that the court does *not* insist on “clear and convincing proof” of the patient’s treatment preferences in the cases of the men Drabick, Spring, and Torres; but it is likewise true that the court does not insist on this standard for the women Colyer, Corbett, Dinnerstein, Jobes, and Morrison.

Or the other hand, the court *does* insist on “clear and convincing proof” of treatment preferences in the cases of the women Cruzan, Elbaum, Longeway, McConnell, and O’Connor; but, likewise, it demands this same standard in the cases of the men Delio, Fox, and Gardner.

5.2.5. The authors wrongly claim on p. 89a that “with women, the ‘clear and convincing’ standard is used to weigh evidence which is then *often* rejected as emotional, immature, remote, or nonspecific” (my emphasis). For there is no satisfactory evidence to show that the courts are often dismissive of testimony regarding the women’s opinions. Even when Justice Marie Garibaldi writes in the case of Nancy Jobes that “all of the statements about life-support that were attributed to Mrs. Jobes were remote, general, spontaneous, and made in casual circumstances” (p. 443a), she goes on to add: “We conclude that although there is some ‘trustworthy’ evidence that Mrs. Jobes, if competent, would want the j-tube withdrawn, it is not sufficiently ‘clear and convincing’ to satisfy the subjective test. Therefore, we must determine the guidelines and procedures under which life-sustaining medical treatment may be withdrawn from a patient like Mrs. Jobes when there is no clear and convincing proof of her attitude toward such treatment” (p. 443b). In the end, this court allows the husband, as surrogate decisionmaker, to have the tube feedings discontinued.

6. According to the authors, “information about women’s preferences or values may be less often brought to these courts and is less vigorously sought [by the court] as a way to resolve the treatment issue” (p. 90b).

6.1. This charge is unfounded—as instanced by the following considerations.

6.1.1. The Supreme Court of Delaware in the *Mary Severns* case instructs the lower court to hold an evidentiary hearing to *determine* the facts instead of entering into a *stipulation* as to the facts. This instruction constitutes a vigorous pursuit of the facts. The Supreme Court agrees that the trial court may (as it did do regarding Severns) recognize “the right of a guardian of the person to vicariously assert the constitutional right of a comatose ward to accept medical care or to refuse it” (p. 1347a). The trial court may grant this recognition “if the evidence warrants it” (p. 1350a). Part of this evidence has to do with establishing the (previously stipulated) fact that Severns was an “active member of the Euthanasia Council of Delaware” and that “she had made statements to the effect that she ... did not want to be kept alive as a ‘vegetable’ or by extraordinary means” (p. 1338, n.2).

6.1.2. The lower court in the case of Dorothy Longeway is instructed by the Supreme Court of Illinois to review the evidence in the light of the Supreme Court’s guidelines—i.e., to review the evidence concerning Longeway’s intent to refuse treatment. If the ascertainment of actually expressed intention is not possible, then the lower court is permitted, in establishing Longeway’s intent, to consider evidence of her values, in accordance with the “clear and convincing evidence” standard. Here again the judiciary is ferreting out the evidence.

6.1.3. In the matter of Claire Conroy the Supreme Court of New Jersey also vigorously pursues the evidence. It summarizes *three* different standards that may be used: the subjective standard, the limited-objective standard, the pure-objective standard. The court concludes that by any of these standards the evidence in favor of halting nasogastric feeding falls short.¹⁹

6.2. Furthermore, the authors’ *procedure* is suspect. For, on the one hand, they complain that the courts do not pursue vigorously the evidence in the cases of the women. But, on the

other hand, when they find instances in which the courts do indeed press for this evidence, they tend to complain that the courts are requiring a higher burden of evidence for the women than for the men.

7. “Appellate courts,” state the authors, “empowered three women’s families to use their own judgment (rather than imagining the patient’s preference) as to life-support” (p. 89b). These women are identified as Severns, Corbett, and Morrison.

The foregoing way of putting the matter is highly tendentious, for it suggests that the courts deliberately discounted the patients’ own preferences or deliberately refused to seek them out. Yet, a different picture emerges when we examine the three cases themselves.

7.1. In the matter of Mary Severns (see 6.1.1. above) the Delaware Supreme Court maintains that the husband (who is also the guardian) may have the patient removed from the respirator if the lower court establishes that the evidence warrants removal. The lower court, on remand, is to consider both first-person statements and third-party reports of the patient’s views while she was competent—views related to halting life-sustaining measures. The attempt here is to get at what the patient would want.

7.2. In the matter of Helen Corbett the Florida Second District Court of Appeal recognizes that a guardian or other designated person, “together with the attending physician, may act on behalf of an incompetent patient . . . when the express or implied intent of the patient can be established” (p. 370b, my emphasis). This court rules that Corbett has the right to have her nasogastric tube removed. Since the evidence is not in dispute, the Court of Appeal is not called upon to provide standards of evidence or to test how well they are met. Rather, it is supposed to decide on a technical point concerning one of the Florida legislative statutes—a statute that seems to the lower court to exclude feeding tubes from the “extraordinary life-prolonging procedures” that may legally be withheld (p. 370b). (Corbett is

already dead at the time of the Court of Appeal's hearing.)

7.3. In the matter of Thelma Morrison the California Court of Appeal, First District, Division 5 agrees with the trial court that Morrison, if she were able to, "would probably concur in the request" to withdraw her nasogastric feeding tube (p. 532b). Had the Court of Appeal imposed a stricter test or a higher standard of evidence, it could not have complied with the daughter's petition to have the feeding tube removed from this ninety-year-old mother in a persistent vegetative state, with heart disease and with two broken legs as a result of osteoporosis. Morrison's preferences and values are assuredly *not* being discounted by either of the two California courts.

8. On p. 90b the authors find remarkable the fact that the Appeals Court of Massachusetts at Norfolk in its review of the case of sixty-seven-year-old Shirley Dinnerstein "did not mention her values," whereas the Supreme Judicial Court of Massachusetts in the earlier case of sixty-seven-year-old Joseph Saikewicz, as well as in the later cases of Earle Spring and Paul Brophy, did construct a treatment preference. However, this articulation of the matter is quite misleading, since the cases are not comparable.

8.1. The Appeals Court did not mention Dinnerstein's values because it ruled that its approval was not required for the DNR (Do Not Resuscitate) order that was being sought by the petitioners, viz., the attending physician, the son, the daughter, and the hospital. The court agreed that Dinnerstein was in an "essentially vegetative state," and it implied that it would be cruel to prolong the act of dying, when the time came. "Attempts to apply resuscitation, if successful, will do nothing to cure or relieve the illnesses which will have brought the patient to the threshold of death. The case does not, therefore, present the type of significant treatment choice or election which, in light of sound medical advice, is to be made by the patient, if competent to do so" (p. 139a).

8.2. In discussing the Dinnerstein case, the Appeals Court

refers to the earlier case of Saikewicz and indicates that the two cases are appreciably different.

This case [of Dinnerstein] does not offer a life-saving or life-prolonging treatment alternative within the meaning of the *Saikewicz* case. It presents a question peculiarly within the competence of the medical profession of what measures are appropriate to ease the imminent passing of an irreversibly, terminally ill patient in light of the patient's history and condition and the wishes of her family. The question is not one for judicial decision, but one for the attending physician, in keeping with the highest traditions of his profession, and subject to court review only to the extent that it may be contended that he has failed to exercise "the degree of care and skill of the average qualified practitioner, taking into account the advances in the profession" (p. 139a-b).

So the court takes account of the Saikewicz case and of the differences between it and the Dinnerstein case. The court does not discuss the values of Dinnerstein herself because these are irrelevant to the physician's judgment of medical futility, in combination with the court's respect for the family's wishes. Far from dealing with Dinnerstein in a high-handed manner (by not inquiring into her values), the court (by not meddling) shows sensitivity to her situation.

9. The authors assert on p. 88a that in the matter of Claire Conroy the same court that decided *Quinlan* later "apologized for failing to accept evidence about Ms. Quinlan's views." They add: "The seriousness of this apology, given this same court's rejection of a constructed preference for the comatose Ms. Jobes, . . . is open to question."

9.1. However, the court does not *apologize*: it says that it was *in error* for disregarding "evidence of statements that Ms. Quinlan made to friends concerning artificial prolongation of the lives of others who were terminally ill" (p. 1230a-b). Yet, in acknowledging that it made an error, it does not apologize for having made an error. Nor *could* it have apologized. (Here the point is *grammatical*, in Wittgenstein's sense). For although the Supreme Court of New Jersey heard both the *Quinlan* (1976) and the *Conroy* (1985) cases, five of the seven justices were dif-

ferent. And the five new justices could not *apologize* for the earlier justices' reasoning. (Only the earlier justices themselves could do *that*.) Nor could the two carry-over justices properly be said to apologize in the name of the majority of the court. Nor do they actually apologize in their own names. This last point, which may seem quibbling, is really very important. For the use of the verb "apologize" fosters the impression that the court not only acknowledged a mistake but also indicated that the mistake was of the sort that was subject to moral blameworthiness because it was prejudicial or slighting or careless or negligent or arrogant or insensitive, etc. In apologizing, the court would be admitting that it did something that it should have foreseen ought not to be done. In fact, however, the court is not judging itself to be morally blameworthy or morally reproachable. In admitting to an error, Justice Sidney Schreiber is displaying his hindsight, not admitting that he should have had foresight.

9.2. In their accusation the authors also mislead us about the Jobes case, in that they speak of the court's *rejection* of a constructed preference for Nancy Jobes. The reasons why this statement is misleading are presented in 5.2.5 above.

10. The study published by Miles and August is filled with innuendo; it insinuates the pervasiveness of prejudice, thereby misrepresenting the data. We have just witnessed an instance of such innuendo in the use of the word "apologize". Other examples are easily locatable.

10. 1. On p. 89a-b we find that in reference to the matter of Dorothy Longeway the authors write: "In Longeway (IL, 1989), the possibility that 'greed may taint the [family's] judgment ... to the point of fatal attraction' rationalizes the need for court approval of every decision to forgo nourishment." This comment is tendentious because it fails to include mention of the court's open disavowal that there is any inkling of greed in the particular case of Longeway. Thus, we are left with the authors' insinuation of the presence of greed in that case. In truth, though, the court is simply setting forth general reasons as to

why it has jurisdiction over cases such as *Longeway*.

10.2. With tacit disapproval the authors bring to our attention that the New York Court of Appeals refers to the two daughters of Mary O'Connor by their first names alone as "Helen" and "Joan"—"a form of appellation used to [*sic*] no other family of incompetent persons" (p. 90a). Here there is the insinuation that the court is showing disrespect, since judicial custom is such that in reference to patients, family members, petitioners, and the like, either last names alone are used or first names together with last names are used.

I do not detect any disrespect in the court's use of the appellations "Helen" and "Joan". As the authors themselves realize, the courts do occasionally refer to individuals by their given names: Karen (Quinlan), Bertha (Colyer), Daniel (Delio), William (Drabick), and Nancy (Cruzan).²⁰ In *Longeway* Justice William Clark, dissenting, adduces a case from the Washington State Supreme Court; and in doing so, he alludes to the involved patient as "Barbara" rather than as "Barbara Grant" or "Ms. Grant" (pp. 88f.). Miles and August are reaching very far indeed in their contrived attempt to insinuate bias and gender-patterned reasoning. And, to be sure, their claim that no other court refers to a family member by the first name is erroneous. For in *Daniel Delio* the court refers to Delio's wife, and conservator, as "Julianne" (pp. 6ff.), thereby showing no disrespect either for her or for her comatose husband, whom it refers to as "Daniel". Likewise, the court calls Delio's sister-in-law "Janet" and calls his brother-in-law "Robert": "Daniel told Janet and Robert of his father's ordeal . . ." (p. 9). So it is not simply female family members—nor family members of females—who are occasionally indicated by their first names alone.

10.3. At times, the authors' innuendo becomes offensive, as when they remark (p. 86a) that the New York Court of Appeals "in a ruling steeped in a 'hypermasculine' and uniquely entitled language of 'Brother' and 'Father,' " constructs a preference for Joseph Fox. Here the authors take umbrage at the court's use of

customary religious titles for Brother Fox and Father Eichner, two Roman Catholic religious who belonged to the Society of Mary. Would the authors also object to the Appellate Division of the New York Supreme Court when it refers to Andrew Varga, SJ, as “Father Varga”? (*Delio*, p. 9). Have they any more basis for objecting to the use of “Father” than they would have for objecting (as they do not) to the New Jersey Supreme Court’s allusion to Joseph Kukura, Roman Catholic priest, as “The Rev. Joseph Kukura”? (*Conroy*, p. 1218b). And, anyway, why do they gratuitously suppose that in the case of a nun the court would not likewise use the religious title “Sister”? In short, the titles “Brother” and “Father” are not “hypermasculine” but are traditional forms of address that antedate, in Latin religious usage (“*frater*,” “*pater*”), even the beginning of the Middle Ages.

10.4. The authors further object (p. 88a): “Though it was not asserted that Mr. Brophy or Mr. Gardner had heard of it, John Stuart Mill’s essay, *On Liberty*, was cited in affirming the construction of their decisions. Such extra-legal philosophical gloss is not present in the cases involving women.”

10.4.1. Once again the authors are guilty of special pleading. We need look only at the court’s reasoning in *Claire Conroy* to detect the introduction of “extra-legal philosophical gloss” that the authors assert not to be present in cases involving women and the desirability of constructing their treatment preferences, if possible. *There* Justice Sidney Schreiber, writing for the majority, introduces a consideration from Anselm of Canterbury (dates: 1033-1109)—in particular, from Anselm’s incomplete (and untitled) philosophical work. “Saint Anselm of Canterbury,” notes Schreiber, quoting from philosophy professor Douglas Walton as a secondary source, “was fond of citing the trickiness of the distinction between ‘to do’ (*facere*) and ‘not to do’ (*non facere*). In answer to the question ‘What’s he doing?’ we say ‘He’s just sitting there’ (positive), really meaning something negative: ‘He’s not doing anything at all’ ” (p.

1234a of the court opinion). The context in which this citation from St. Anselm is introduced has to do with the issue of patient preferences:

We emphasize that in making decisions whether to administer life-sustaining treatment to patients such as Claire Conroy, the primary focus should be the patient's desires and experience of pain and enjoyment—not the type of treatment involved. Thus, we reject the distinction that some have made between actively hastening death by terminating treatment and passively allowing a person to die of a disease as one of limited use in legal analysis of such a decision-making situation (pp. 1233b - 1234a).

10.4.2. But why shouldn't the court introduce such an "extra-legal philosophical gloss," so-called? Oftentimes such a gloss has to do with ethical concepts, as in the case of Mill's *On Liberty*, from which is quoted the passage: "The only purpose for which power can be rightfully exercised over any member of a civilised community against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinion of others, to do so would be wise, or even right." (*Brophy*, p. 633b). Citations of this sort can be helpful in modifying our perspective. It does not matter (though somehow Miles and August suppose it does) that Brophy or Gardner may never have heard of Mill's work—or that Conroy had never at any time read St. Anselm's remarks on the varieties of *facere*. After all, these passages are not used in order to reconstruct these patients' decisions but in order to justify the attempt to reconstruct them.

10.4.3. In *Thelma Morrison* the court refers to passages in Jonsen, Siegler, and Winslade's *Clinical Ethics* (2nd edition) and to passages in the *Hastings Center Report*. Aren't these, too, extra-legal documents? Does it matter that Morrison probably had never heard of them? Aren't the passages quoted by the court relevant to the court's reasoning, whether about preferences or

about related matters?²¹ Indeed, the appeal to the ethics text occurs in the context of questions about vicarious decisionmaking and the right to refuse medical treatment—a right not lost through incompetency, the court agrees (p. 533a-b).

10.4.4. Similarly, in *Eichner* (the case of Brother Fox) the court refers to Professor Yale Kamisar's philosophical views on euthanasia. Regarding such court opinions Miles and August maintain: "Decisions affirming a man's choice allude to philosophical moralism. Much was made of Brother Fox's formal discussions of Catholic moral principles" (p. 88a). Yet, the authors neglect to mention that in the case of Karen Quinlan the court both introduces considerations from Roman Catholic moral theology regarding euthanasia and refers to the philosophical doctrine of double effect. True, the evidence shows that Joseph Fox actually discussed philosophical doctrines, whereas no such evidence exists regarding Karen Quinlan. (In fact, Brother Fox, while competent, actually discussed the Quinlan case.) Nonetheless, the *Quinlan* court itself does cite certain philosophical doctrines within the Roman Catholic tradition, to which Quinlan belonged. If the term "philosophical moralism" is applicable with respect to the court's reasoning about Fox, it is also applicable to the court's reasoning about Quinlan. And if the court treats Quinlan's remarks as less reflective than Fox's, this fact is not surprising, given the two's different ages, educational backgrounds, and ways of life.

10.5. The authors deem it noteworthy that the legal familial relationship of '*parens patriae*' is only asserted in relation to women" (Quinlan, Conroy, Cruzan, Longeway).²² Hereby they insinuate that the courts are viewing the women differently from the men, viz., as being less adult than the men. They reinforce this insinuation when they write: "A jargon of childlikeness is used to discount the maturity of persons when a preference is not constructed. Only women are described as being in 'fetal' postures . . . or an 'infantile state' " (p. 88b). In so judging, the authors are, again, proceeding by pointing out differences that make no difference.

10.5.1. Though it is true that only the women are spoken of by the *appellate* courts in terms of *parens patriae*, there is reason to believe that this fact is coincidental rather than indicative of a general discrepancy of attitude taken by the courts toward women vs. men. One point in favor of the outcomes' being merely coincidental manifests itself when we look beyond the appellate court to the original trial court. For in the case of James Smith, when we examine (besides the New Mexico Supreme Court's one-page decision) the District Court of Eddy County's "conclusions of law," we see that one of these conclusions reads: "The duly appointed guardian has the same powers, rights and duties respecting his ward that a parent has respecting his unemancipated minor child . . ." (pp. 4f.). Though the Supreme Court reverses the decision of the District Court, it does not challenge this lower court's understanding of the guardian's paternalistic role in the case of this male. In fact, with one possible exception, none of the final state appellate courts in the cases of the eight men challenge the doctrine of *parens patriae* as it relates to incompetents. The ostensible exception has to do with the Massachusetts Supreme Judicial Court in *In re Brophy*: "It is in recognition of these fundamental principles of individual autonomy that we sought, in *Saikewicz*, to shift the emphasis away from a paternalistic view of what is 'best' for a patient toward a reaffirmation that the basic question is what decision will comport with the will of the person involved, whether that person be competent or incompetent" (p. 633b; Miles and August refer to this passage on their p. 88b). But even here the Brophy court does not suggest that the doctrine of *parens patriae* is necessarily incompatible with the doctrine of substituted judgment. And, in the cases of the women, some of the other courts that expressly mention *parens patriae* also endorse the principle of substituted judgment *where there is sufficient evidence to construct the patient's previous intent*. In *Quinlan* the Supreme Court of New Jersey notes: "Courts in the exercise of their *parens patriae* responsibility to protect those under disability

have sometimes implemented medical decisions and authorized their carrying out under the doctrine of ‘substituted judgment’ ” (p. 666a).

Under *parens patriae* the court may protect the incompetent patient not only by authorizing continued medical treatment but also by ordering cessation of medical procedures that the patient would regard as invasive, death-prolonging, or unwanted. Attesting to this latter fact is another statement by the Supreme Court of New Jersey: “An incompetent, like a minor child, is a ward of the state, and the state’s *parens patriae* power supports the authority of its courts to allow decisions to be made for an incompetent that serve the incompetent’s best interests, even if the person’s wishes cannot be clearly established.²³ This authority permits the state to authorize guardians to withhold or withdraw life-sustaining treatment from an incompetent patient if it is manifest that such action would further the patient’s best interests in a narrow sense of the phrase, even though the subjective test that we articulated above may not be satisfied” (*Conroy*, p. 1231b).²⁴ By contrast, however, the Missouri Supreme Court regards the application of the principle of *parens patriae* as in conflict with the application of substituted judgment: “As applied in right-to-terminate-treatment decisions, the doctrine of substituted judgment is applied in abrogation of the state’s *parens patriae* power, not in furtherance of it” (*Cruzan*, p. 426a). So among the several courts there is no uniformity of opinion concerning the relationship between *parens patriae* and substituted judgment. Thus, in the end, Miles and August further oversimplify—and they do so in the face of no substantial indication that the courts ever mean *parens patriae* to apply more to women than to men or that they routinely apply it to women as a way of overruling the use of substituted judgment in the presence of substantial evidence of a woman’s intent.

10.5.2. The authors make a conceptual mistake when they speak of the courts as discounting the maturity of female patients by using “a jargon of childlikeness”—i.e., using ex-

pressions such as “infantile state” or “fetal postures.” For the patients in question are not only actually in fetal positions: they are also clearly *incompetent*. Qua incompetent the issue of their maturity or immaturity cannot arise, for it makes no sense to call an incompetent human being either mature or immature. Nor do the courts subscribe to the *non sequitur* that the fact of these newly incompetent women’s being presently in fetal states implies in some way that they were previously (i.e., when competent) immature. Miles and August are unfairly denigrating the courts.²⁵

10.5.3. How far Miles and August are willing to extend their innuendo against the courts is evident from their further claim that the courts treat men’s utterances (in contrast to women’s) as “very serious” (*Gardner*), as “deeply held,” (*Delio*), as “solemn, intelligent determination” (*Delio*).²⁶ A similar expression is used of Joseph Fox, whose utterances the court terms “solemn pronouncements.” Nevertheless, Miles and August fail to point out that in *Jean Elbaum* the appellate court, in its headnotes, also calls this female patient’s statements “solemn pronouncements.” Moreover, the court deems Elbaum’s having extracted treatment promises from her husband to be a sign of “a serious and consistent purpose of mind . . .” (p. 253). Furthermore, the Supreme Court of Connecticut takes seriously the views of Carol McConnell when it writes: “The trial court found clear and convincing evidence that Mrs. McConnell had expressed ‘forcefully and without wavering’ that artificial means should not be employed to prolong her life. We conclude that the trial court did not err in this finding” (*McConnell*, pp. 604b - 605a).²⁷

10.5.4. A final instance of innuendo occurs when the authors tacitly complain that the court aggrandizes Daniel Delio’s credentials: “The 33 year old Daniel Delio (whose Ph.D. in exercise physiology, the court calls a ‘doctor of philosophy’) ...” (p. 88a). This insinuation is unfair. What the court writes is: “He earned a doctor of philosophy (hereafter PhD) degree in exercise physiology from Ohio State University” (p. 5). And,

of course, the court is perfectly right: Delio did hold the degree of doctor of philosophy in exercise physiology. And the court additionally informs us that his wife, too, “had received a PhD in exercise physiology” (p. 6). Miles and August’s attempt to intimate judicial bias is itself biased.

Conclusion. We have seen that the authors of the study “Courts, Gender and ‘The Right to Die’ “ are guilty of pervasive oversimplification, overgeneralization, and special pleading. In addition, they make factual errors, and they conjure up an inappropriate statistical analysis. When we scrutinize the courts’ rulings and rationales, we find no *tendency* toward gender-patterned reasoning. To be sure, there are differences in reasoning. And some of these differences may well reflect the judges’ own values. But, to an important extent, the differences have to do with variations in the cases themselves and with the presence or the absence of relevant statutes of law within the distinct states. Obviously, the legislative statutes and the judicial precedents vis-à-vis the right to die differ in Minnesota and in Missouri, so that cases within these jurisdictions may not all have similar outcomes—whether for women or for men. But neither in regard to these two states nor in regard to the others does the evidence show that where the rulings vary, they do so because of gender bias on the part of the judiciary.

The cause of scholarship—and *a fortiori* the cause of Feminist Studies—is not advanced by contrived efforts to force the data into the Procrustean bed of Political Correctness.

NOTES TO THE RIGHT TO DIE

1. Their study also deals with (1) previously competent persons who did leave advance directives and (2) individuals who were at no time competent.

2. All together there are twenty-two decisions from fourteen states. The cases of the eight men are the following: (1) *In re Brophy*, 497 N.E.2d 626 (Mass. 1986); (2) *In re Delio*, 129 AD2d 1 (App. Div. Supr. Ct. N.Y. 1987); (3) *In re Drabick*, 245 Cal. Rptr. 840 (Cal. App.6 Dist. 1988); (4) *In re Gardner*, 534 A.2d 947 (Me. 1987); (5) *In re James Robert Smith* (Docket #14,768), Supr. Ct. (N.M. 1983); (6) *In re Spring*, Mass. [1980], 405 N.E.2d 115; (7) *In rebus Storar et Eichner*, N.Y. [1981], 420 N.E.2d 64 [*Eichner* contains the case of Fox]; (8) *In re Torres*, 357 N.W.2d 332 (Minn. 1984).

The cases of the fourteen women are the following: (1) *In re Colyer*, 660 P.2d 738 (Wash. 1983); (2) *In re Conroy*, 486 A.2d 1209 (N.J. 1985); (3) *In re Corbett*, 487 So.2d 368 (Fla. App.2 Dist. 1986); (4) *In re Cruzan*, 760 S.W.2d 408 (Mo.banc 1988); (5) *In re Dinnerstein*, Mass. App. [1978], 380 N.E.2d 134; (6) *In re Elbaum*, 148 AD2d (App. Div. Supr. Ct. N.Y. 1989); (7) *In re Jobes*, 529 A.2d 434 (N.J. 1987); (8) *In re Longeway* (Docket #67318), 133 Ill.2d 33 (Supr. Ct. Ill. 1989); (9) *In re McConnell*, 553 A.2d 596 (Conn. 1989); (10) *In re Morrison*, 253 Cal. Rptr. 530 (Cal.App.1 Dist. 1988); (11) *In re O'Connor*, 531 N.E.2d 607 (N.Y. 1988); (12) *In re Quinlan* [N.J. 1976], 355 A.2d 647; (13) *In re Rasmussen*, 741 P.2d 674 (Ariz. 1987); (14) *In re Severns*, Del. Supr. [1980], 421 A.2d 1334.

See n. 5 below.

3. Miles and August, p. 85a. Their footnote identifies these two women as Elbaum and McConnell. (In my page references, 'a' and 'b' will indicate *column 1* and *column 2* respectively.)

4. Miles and August, p. 87b. The women are identified as Elbaum and McConnell.

5. P. 91b. "Gender," write Miles and August, "is the social understanding of sexual difference, not simply social roles or biological differences" (p. 93a, n. 1).

6. I follow the convention of italicizing names when I am referring not to the individuals but to the court cases that deal with them (in the absence of the word "cases"). In alluding to the cases, I use the names of the patients, even though these names sometimes deviate from the official designation by reference to plaintiffs' or defendants' names. (The one exception is *Fox*, a case I refer to as *Eichner*.)

7. Miles and August, p. 85a. See n. 3 above.

8. The courts ordered the continuation of treatment in the cases of Nancy

Cruzan and Mary O'Connor. Unlike Cruzan, O'Connor was not in a persistent vegetative state but rather was conscious. In the case of Claire Conroy, who was already dead at the time of the Supreme Court hearing, the Court allowed that in such cases as Conroy's the guardian should make the treatment decision in accordance with one of three tests: subjective test, limited-objective test, pure-objective test. The Court stated explicitly that by any of these three tests the evidence that was presented would have been insufficient for the nephew-guardian of Conroy to order discontinuance of treatment (*Conroy*, p. 1243b; on this point there is agreement even by the dissenting opinion, at 1246a). Had Conroy still been alive, the Supreme Court would have required the guardian to explore the evidentiary issues further before reaching his decision.

9. Miles and August, p. 87b.

10. Miles and August, p. 90b.

11. Miles and August, p. 94b, n. 21.

12. See Section 4 below, where the accuracy of this initial statement is challenged.

13. Miles and August, p. 89a.

14. In the case of Nancy Cruzan the court decides that although the initial insertion of her gastric tube was invasive, its continuance in place is not invasive. The treatments of Paul Brophy, Joseph Gardner, Earle Spring, and Rudolfo Torres are termed invasive or intrusive by the respective courts (p. 636a; pp. 953b & 954b; pp. 115a & 119b; pp. 333a & 339b respectively).

15. See n. 8 above.

16. Regarding substituted judgment the *Jobes* court says: "This approach is intended to ensure that the surrogate decisionmaker effectuates as much as possible the decision that the incompetent patient would make if he or she were competent. Under the substituted judgment doctrine, where an incompetent's wishes are not clearly expressed, a surrogate decisionmaker considers the patient's personal value system for guidance" (p. 444b; cf. p. 457a). See also *Longeway*, pp. 50f., *Rasmussen*, p. 688b, *Spring*, p. 119b, and *Saikewicz*, p. 431b [*In re Saikewicz*, Mass., 370 N.E.2d 417]. At times, a court misunderstands the doctrine of substituted judgment, as in *O'Connor*, p. 613a-b.

17. According to court testimony by Mrs. O'Connor's treating physician she was "conscious, and capable of responding to simple questions or requests sometimes by squeezing the questioner's hand and sometimes verbally. She was also able to respond to noxious stimuli, such as a needle prick, and in fact was sensitive to 'even minimal discomfort' although she was not experiencing pain in her present condition" (p. 609b). The treating physician "also testified that her mental awareness had improved at the hospital and that she might become more alert in the future" (p. 610a). The consulting neurologist testified that "during his examination, which occurred just before the close of the hearing, the patient exhibited further improvement in her condition. He

found that she was generally able to respond to simple commands, such as a request to move her arm or foot. He also noted that she was able to state her name, seemed to be aware of where she was, and responded to questions about 50 or 60% of the time, although her speech was slow and halting and her responses were not always appropriate” (p. 610b). (The minority opinion presents a more negative picture.)

18. “The case under immediate consideration concerns only Mildred Rasmussen. Yet, the principles and procedures articulated herein undoubtedly will govern future similar cases” (*Rasmussen*, p. 691b; see also p. 680b). See *Conroy*, p. 1219b.

19. See n. 8 above.

20. Miles and August, p. 88b. John Storar, who was never competent, is referred to, in a dissenting opinion, as “John” (*Storar*, p. 78).

21. Judge Jacob Fuchsberg, writing a dissenting opinion in *Storar et Eichner*, notes the relevance of extra-legal considerations in right-to-die cases: “True, on rare occasions, we entertain causes that are abstract. But, never ones so deeply affected [as is the presently entertained case] by so many nonlegal disciplines—theology, philosophy, sociology, psychology, biology, to name but a few” (p. 79a).

22. Miles and August, p. 88b. To this list may be added *Colyer*.

23. The implication is that *parens patriae* can also be invoked in circumstances where the patient’s wishes *can be* clearly established.

24. See also *Longeway*, p. 52.

25. Of Mary Severns the court says: “Her body assumes a decerebrate position” (p. 1336b). Similarly, the court speaks of Claire Conroy not only as “unable to move from a semi-fetal position” (p. 1217a) but also as having “contractures of her legs” (p. 1243b). The New Jersey Supreme Court enters into the record Dr. Morse’s quondam finding of “decortication” (p. 654a). How the court describes the condition of the patient may well have to do with how the attending physician described the patient’s condition to the court—an alternative not mentioned by Miles and August. At a public lecture at the College of St. Catherine, St. Paul, MN, on April 28, 1992 Dr. Miles maintained that the courts tended to use the nontechnical language of “fetal position” regarding the women and the technical, medical language of “contractures” (and the like) regarding the men.

26. Miles and August, pp. 87b - 88a.

27. See also the discussion in Section 5.2.5 above.