The Devil's Advocate

The Karen Anne Quinlan case adjudicated a very narrow issue: should the New Jersey trial court order attending physicians to turn off the respirator as requested by Karen's parents? The court concluded that "there is a duty to continue the life-assisting apparatus if, within the treating physician's opinion, it should be done."

The trial court did not pass upon larger issues despite encouragement from the media. "Brain death" and its criteria, euthanasia and its implications, and the economic consequences of its narrow holding (an estimated $450 a day for maintaining Karen in a vegetative state) were outside the scope of the New Jersey decision. The court decided no more than was necessary to pass upon the Quinlans' request for an order to "pull the plug."

But the narrow issue that was decided and that may be determined upon appeal has several ramifications. No criteria were set forth to guide the medical decision. As distinguished from other medical situations, neither the patient nor next of kin were included in the decision-making process. On the surface at least, an autonomous discretion was committed to the attending physician, although if there are more than one attending physicians, no solution is suggested.

Psychiatrists are aware of the propensity of courts to find a "cop-out" for difficult moral issues and to "pass the buck" to the medical profession. Competency to stand trial and the insanity defense (moral responsibility) are familiar examples. So too the process provided under so-called "sex psychopath" laws. More recently, a committee of doctors and lawyers drafted the Uniform Anatomical Gift Act (enacted in all states except Massachusetts) and reached an unanimous conclusion that the time of death was a medical decision and that legal guidelines were unnecessary. However, the Uniform Act makes the decision to donate an organ for transplant purposes the decision of the donor, if 18 years or older, or that of his next of kin where no contrary intention was manifested by the donor.

A few states, including Kansas and Maryland, recently have enacted "brain death" statutes to supplement the Uniform Anatomical Gift Act. Such a statute has not been enacted in New Jersey, and in any event the Quinlan case did not involve the transplant situation. It should be noted, however, that a recent Virginia case ruled that the jury should be instructed in terms of alternative definitions of death, including that of "brain death," and that the jury accepted the "brain death" definition in reaching its verdict. [See *Tucker v. Lower*, unreported, case No. 2831, Law and Equity Court, Richmond, Va., May 23, 1972.]

The Quinlan case did not pass upon alternative definitions of death, nor upon acceptable criteria for its determination. Historically, the law has accepted the definition of death given by the medical profession, and for the legal definition to change, first the medical profession must establish a consensus as to replacing the orthodox definition of cessation of respiration, circulation, and brain functioning, with a definition solely in terms of the cessation of brain functioning.

If a redefinition in terms of "brain death" is forthcoming from the medical profession, the factual situation of the Quinlan case should be considered. Karen Quinlan had ceased to function as a human being, although all of the criteria for "brain death" had not been met. Some years ago, Justice Oliver Wendell Holmes said "To live is to function; that is all there is to living."

Although semanticists tell us that definitions are neither true nor false, but only helpful or not, there are common-sense limitations on definitions for all save those on the other side of the looking glass. The proponents of the concept of "brain death" may have been overly conservative in establishing criteria, but extreme caution is prudent. To quote from a well known Los Angeles lawyer, "There are two things which should

not be resorted to prematurely: embalming and divorce." The precedent for acting prematurely as to the latter should not set the style for the former. There is an ancient fear of being buried alive, and the ethical considerations of euthanasia are distressing for many. It is doubtful that the public would accept a medical or legal definition of death that was not conservative.

The "Catch-22" in the Quinlan decision is that although the buck was passed to the medical profession to determine the time of death, doctors may be held accountable for such decisions due to our tradition of judicial review. Such second-guessing by courts is nothing new; it has existed since Dr. Bonham's case was decided in 1610. What is new is the "Monday morning quarterback" syndrome and the blurring over of hindsight and foresight, as courts review medical and other judgments without according them the deference they are due. In our egalitarian age we rapidly are approaching the situation where all opinions are fungible.

The real issue, not passed upon in Quinlan, is the law's attitude towards "mercy killings." That attitude should be of great interest to psychiatrists who are concerned with ambivalence. More often than not, the law is adjusted to permit it to have its cake and eat it too. There also is the phenomenon of secondary gains. In effect, the law condemns euthanasia as technical homicide, but either district attorneys refuse to prosecute or juries fail to convict. The Mosaic code thus is vindicated but not at the expense of added suffering. From this the law derives reinforcement for its commitment to high moral principles, but at the same time the quality of mercy is not strained. It is well to remember that only a few months before the Quinlan case a New Jersey jury acquitted a defendant who shot and killed his paraplegic brother. The law thus is not only a principle but also that which is done in the resolution of human problems.

The larger issues by-passed by the Quinlan case will remain for some time as—we hope—a dialogue continues regarding the medical, legal, and ethical implications of life and death. No fully satisfactory resolution of the debate is likely, and perhaps we may end up with no better conclusion than that attributed to Sir Peter Medawar: "That man is truly dead who cannot rise up and litigate!"

HENRY H. FOSTER, ESQ.