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In re Storar: Euthanasia for Incompetent Patients, A Proposed Model

I. Introduction

Euthanasia,[1] or mercy killing, is a subject of increasing judicial concern.[2] The New York Court of Appeals recently addressed this concern when it decided *In re Storar*[3] and its companion case, *Eichner v. Dillon.*[4] Both *Storar* and *Eichner* presented the question of whether a surrogate decision to discontinue life-sustaining medical treatment can be made on behalf of an incompetent patient, diagnosed as fatally ill, with no reasonable chance of recovery.[5]

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1. The term "euthanasia," derived from the Greek meaning "painless death" (*eu* means painless, *thanatos* means death), is a broad term meaning mercy killing of all types. Euthanasia can refer to the positive action taken to end the life of an incurable patient (active euthanasia) or it can refer to the failure to take positive action to prolong the life of an incurable patient (passive euthanasia). Euthanasia may be performed with the patient's consent (voluntary euthanasia) or it can be performed without the patient's consent (nonvoluntary euthanasia). These distinctions are more than semantic. They underscore the difference between legally permissible action and murder in the first degree. *See* Note, *The Right to Die*, 7 HOUS. L. REV. 654, 659 (1970) [hereinafter cited as Note, *The Right to Die*]. *See infra* note 28 and accompanying text. As used in this note, "euthanasia" means nonvoluntary passive euthanasia. Kutner, *Euthanasia: Due Process for Death with Dignity: The Living Will*, 54 IND. L.J. 201 (1979) [hereinafter cited as Kutner].

2. *See, e.g.*, the celebrated case of *In re* Quinlan, 137 N.J. Super. 227 (1975), *rev'd*, 70 N.J. 10, 335 A.2d 647, *cert. denied sub nom.* Garger v. New Jersey, 429 U.S. 922 (1976) (parents of 19-year-old girl requested that hospital authorities remove a respirator after the girl had entered a vegetative coma).

3. 52 N.Y.2d 363, 420 N.E.2d 64, 438 N.Y.S.2d 266 (1981).

4. *Id.*

5. Throughout this paper, this question is referred to as the "surrogate issue." The courts are divided on how to decide the surrogate issue. *See* Ufford, *Brain Death/Termination of Heroic Efforts to Save Life-Who Decides?*, 19 WASHBURN L. J. 225, 255 (1980). *In re* Quinlan, 70 N.J. 10, 54, 335 A.2d 647, 671, *cert. denied sub nom.* Garger v. New Jersey, 429 U.S. 922 (1976), held that a surrogate decision to terminate life-sustaining treatment can be made without court approval if it is agreed to by a hospital ethics committee, a guardian *ad litem*, parents, and an attending physician. Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 756, 370 N.E.2d 417, 433 (1977), however, held that a probate court had to determine the choice of treatment for an incompetent 67-year-old man with an I.Q. of ten. In both *Quinlan* and *Saikewicz*, the court relied upon the constitutionally protected right of privacy which, they said, pro-

Part II of this note details the facts of *Storar* and *Eichner*. Part III explores the legal principles governing these cases, including the doctrines of informed consent and the right of privacy. Part IV examines how the court of appeals applied these principles and Part V analyzes the court's decisions. After concluding that neither informed consent nor the right of privacy are adequate doctrines with which to decide euthanasia cases, Part VI proposes a model which provides constructive guidance to those upon whom the burden of making a surrogate decision is placed.

II. Facts[6]

Eichner concerned Brother Joseph Fox, an 83-year-old member of a Catholic religious order, whose life was being maintained on a respirator in a permanent vegetative state.[7] He entered this state following a hernia operation during which he suffered cardiac arrest, with resulting loss of oxygen to the brain and substantial brain damage.[8] Before the operation rendered him incompetent, Brother Fox had indicated that he would not wish to be placed on a respirator if he ever entered a vegetative state. He had first expressed his desire in 1976, when his religious order, the Society of Mary, discussed the implications of the *Quinlan* case; and later, after the Pope had announced that Catholicism permitted the termination of extraordinary life-support systems.[9]

Father Phillip Eichner, the director of the Society, asked the hospital to remove the respirator on the ground that continuing it was against the patient's wishes expressed prior to be-

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tects individuals from an unwarranted infringement of bodily integrity. *In re* Quinlan, 70 N.J. 10, 41, 335 A.2d 647, 664, *cert. denied sub nom.* Garger v. New Jersey, 429 U.S. 922 (1976); Superintendent of Belchertown State School v. Saikewicz, 373 Mass. at 738-39, 370 N.E.2d at 424.

See infra text accompanying notes 42-51. *See also In re* Dinnerstein, 6 Mass. App. Ct. 466, 380 N.E.2d 134 (1978), which further limits Saikewicz.

6. The facts presented are from the two consolidated cases which are cited together as *In re* Storar, 52 N.Y.2d 363, 420 N.E.2d 64, 438 N.Y.S.2d 266 (1981).

7. *Id.* at 371, 420 N.E.2d at 67, 438 N.Y.S.2d at 269.

8. *Id.*

9. *Id.* at 371-72, 420 N.E.2d at 68, 438 N.Y.S.2d at 270. Brother Fox's desires were expressed during formal discussions prompted by the concern of his religious order to teach and promulgate Catholic moral principles.

coming incompetent. He made this request after consulting physicians regarding the hopelessness of Brother Fox's condition.[10] The hospital refused to discontinue the respirator without a court order.[11]

In re Storar concerned John Storar, a profoundly retarded 52-year-old man with terminal cancer of the bladder.[12] He had been a member of a state facility, the Newark Development Center, since he was five, and had the mental age of about eighteen months.[13] In 1979, physicians at the Center noticed blood in his urine and, after diagnostic tests, determined that he had cancer of the bladder.[14] After a period of remission, physicians again noticed blood in his urine and concluded that the cancer was terminal.[15] In an effort to compensate for the loss of blood, the physicians recommended that he undergo blood transfusions which, while painful, were needed to sustain the patient's life.[16]

John Storar's mother was his legal guardian and closest relative.[17] She resided near the facility and had visited him daily from the time he was institutionalized.[18] Upon learning of the need for transfusions, she consented but later withdrew her consent believing that it would only prolong his discomfort and be against his wishes were he able to express them.[19] A state official then brought a proceeding, pursuant to section 33.03 of the Mental Hygiene Law,[20] seeking permission to continue transfusions.[21]

In each case, the trial courts and appellate divisions held that treatment should be discontinued.[22] The orders of the lower

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10. *Id.* at 371, 420 N.E.2d at 67, 438 N.Y.S.2d at 269-70. Father Eichner consulted two neurosurgeons who confirmed the attending physicians' diagnosis that Brother Fox had lost the ability to breathe spontaneously and would require a respirator to maintain him in a permanent vegetative state.

11. *Id.* at 371, 420 N.E.2d at 67, 438 N.Y.S.2d at 269.

12. *Id.* at 373, 420 N.E.2d at 68, 438 N.Y.S.2d at 270-71.

13. *Id.* at 373, 420 N.E.2d at 68, 438 N.Y.S.2d at 270.

14. *Id.* at 373, 420 N.E.2d at 68-69, 438 N.Y.S.2d at 270-71.

15. *Id.*

16. *Id.* at 373-74, 420 N.E.2d at 69, 438 N.Y.S.2d at 271.

17. *Id.* at 373, 420 N.E.2d at 68, 438 N.Y.S.2d at 270.

18. *Id.*

19. *Id.* at 375, 420 N.E.2d at 69-70, 438 N.Y.S.2d at 272.

20. *See* N.Y. MENTAL HYG. LAW § 33.03 (McKinney 1978).

21. *In re* Storar, 52 N.Y.2d at 373-74, 420 N.E.2d at 69, 438 N.Y.S.2d at 271.

22. *Id.* at 369, 420 N.E.2d at 66, 438 N.Y.S.2d at 268. In *In re* Eichner, 73 A.D.2d

courts were stayed, however, and treatment continued pending appeal. In the interim, both patients died. The court of appeals reviewed the cases despite the mootness of their issues, reversing *Storar* and modifying *Eichner*.[23]

In *Eichner*, the court of appeals held that the removal of Brother Fox's respirator was supported by the common law right of a competent adult to refuse medical treatment, even if necessary to sustain life.[24] The court reasoned that since, prior to becoming incompetent, Brother Fox had manifestly refused to be placed on a respirator, removal was authorized at Father Eichner's request.[25] In *Storar*, by contrast, the court declined to apply this common law theory since at no time in his life had John Storar been competent. Instead, the court ruled that John Storar was functionally an infant, and held that while the parent of an infant has the right to consent to medical treatment on an infant's behalf, he may not deprive the infant of lifesaving treatment.[26] The court also invoked the principle of *parens patriae*, reasoning that the state's interest in protecting the welfare of the child outweighs a parent's interest in refusing medical treatment.[27]

431, 460-61, 426 N.Y.S.2d 517, 536 (1980), the trial court based its decision on the common law right of bodily self-determination and the constitutionally protected right of privacy. In *In re* Storar, 106 Misc. 2d 880, 433 N.Y.S.2d 388 (Sup. Ct. Monroe County 1980), the trial court based its decision on an individual's right to decide what will be done to his own body and held that when a patient is incompetent, this right can be exercised by another on his behalf.

23. *In re* Storar, 52 N.Y.2d at 370, 420 N.E.2d at 67, 438 N.Y.S.2d at 269.

24. *Id.* at 376, 420 N.E.2d at 70, 438 N.Y.S.2d at 272. *See* Kutner, *supra* note 1, at 207: "Every man has the right . . . to forego treatment or even a cure if it involves what, to *him*, seem intolerable consequences or risks."

25. The court of appeals found the evidence on this point to be clear and convincing. They agreed that this was the appropriate burden and that it had been met. *In re* Storar, 52 N.Y.2d at 379-80, 420 N.E.2d at 72, 438 N.Y.S.2d at 274. *See* Addington v. Texas, 441 U.S. 418, 424 (1979) (Where particularly important personal interests are at stake, clear and convincing evidence should be required.).

26. *In re* Storar, 52 N.Y.2d at 380-81, 420 N.E.2d at 72-73, 438 N.Y.S.2d at 274-75. The court relied upon N.Y. PUB. HEALTH LAW § 2504(2) (McKinney 1977), which provides: "Any person who has been married or who has borne a child may give effective consent for medical, dental, health and hospital services for his or her child."

27. The state's interest, as *parens patriae*, is to protect the health and welfare of the child. Jehovah's Witnesses v. King County Hosp. Unit No. 1, 390 U.S. 598 (1968), *aff'd*, 278 F. Supp. 488, 504 (N.D. Wash. 1967); People *ex rel.* Wallace v. Labrenz, 411 Ill. 618, 623-24, 104 N.E.2d 769, 773, *cert. denied*, 344 U.S. 824 (1952); Annot., 30 A.L.R.2d 1138 (1953). *See also* Note, *The Right to Die, supra* note 1, at 664:

III. Governing Principles

A. *Common Law Principles*

The law treats mercy killing no differently than other cases involving the taking of human life.[28] What distinguishes euthanasia from homicide or suicide is not so much the law as it is written, but rather the law as it is applied.[29] For example, those who take life out of mercy are frequently not indicted. If the killer is indicted, he is often acquitted or convicted of a lesser offense.[30] These disparities in the application of the law have alerted the judiciary to the need for a consistent doctrine with which to decide euthanasia cases.[31]

> The state's power to protect children and incompetent adults under the doctrine of *parens patriae* has been invoked on numerous occasions to require medical treatment for children over the objections of their parents. Such intervention by the courts has been justified on the premise that the lives of "youth, who constitute the hope of racial survival and progress, [are] of vital concern to the very life of the nation."

Id. (citing Morrison v. State, 252 S.W.2d 97, 103 (Mo. Ct. App. 1952)); *cf.* Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

28. *See* Kamisar, *Some Non-Religious Views Against Proposed "Mercy-Killing" Legislation*, 42 MINN. L. REV. 969, 970 n.9 (1958) [hereinafter cited as Kamisar]: "In Anglo-American jurisprudence a 'mercy-killing' is murder. In theory, neither good motive nor consent of the victim is relevant." *See id.* at 970-71 n.9 (citing PERKINS, CRIMINAL LAW 721 (1957); 1 WHARTON, CRIMINAL LAW AND PROCEDURE § 194 (Anderson 1957); Orth, *Legal Aspects Relating to Euthanasia*, 2 MD. MED. J. 120 (1953) (symposium on euthanasia)). *See also* 2 W. BURDICK, LAW OF CRIME §§ 422, 447 (1946); J. MILLER, CRIMINAL LAW 55, 172 (1934); 48 MICH. L. REV. 1199 (1950); Annot., 25 A.L.R. 1007 (1923).

29. 13 RULING CASE LAW *Homicide* § 36 (1916).

30. *See, e.g.*, Repouille v. United States, 165 F.2d 152 (2d Cir. 1947); *cf.* Kutner, *supra* note 1, at 209 n.53 (citing People v. Werner, Crm. No. 58-3636 (Cook Co. Ct., Ill. 1958), where a 69-year-old defendant had suffocated his wife, a hopeless cripple bedridden by arthritis. "In arraignment proceedings, the state waived the murder charge and permitted the defendant to enter a guilty plea to the charge of manslaughter. The court then found the defendant guilty of this charge on his stipulated admission of killing. After hearing testimony of the defendant's . . ." care and devotion for his wife, the court allowed the defendant to withdraw his plea and entertained a plea of not guilty). *Id. But see* People v. Roberts, 211 Mich. 187, 178 N.W. 690 (1920), which represents one of the few cases where a mercy killer has been convicted for murder. In *Roberts*, the defendant-husband gave his dying wife poison at her request. The husband was found guilty of murder in the first degree because he had assisted his wife, who wished to die, by providing a means for her to commit suicide.

31. Legal commentary has also struggled to provide a viable rationale with which to decide euthanasia cases. *See, e.g.*, Sharpe & Hargest, *Lifesaving Treatment for Unwilling Patients*, 36 FORDHAM L. REV. 695 (1968); Note, *Unauthorized Rendition of Lifesaving Medical Treatment*, 53 CALIF. L. REV. 860 (1965); Note, *The Right to Die*, 7 HOUS. L.

One doctrine which the courts have frequently employed is that of informed consent.[32] Originally articulated by Judge Cardozo in *Schloendorff v. Society of New York Hospital,*[33] and more recently affirmed in *Natanson v. Kline,*[34] the crux of the doctrine provides that "every human being of adult years and sound mind has a right to determine what shall be done to his own body."[35] From this, the courts have deduced that if a patient has control over any decision affecting medical treatment, his right to consent implies his right to refuse as well.[36]

The doctrine of informed consent stems from a premise of Anglo-American law that each individual has the inalienable right to self-determination.[37] According to this premise, there are certain decisions an individual must be permitted to make even if he decides them irrationally or incorrectly.[38] As Justice Burger wrote, sitting as a district judge, in a dissenting opinion to *In re President and Directors of Georgetown College, Inc.,*[39] "some matters of essentially private concern and others of enormous public concern . . . are beyond the reach of judges."[40]

The doctrine of informed consent also furthers one of the objectives of tort law. To the extent that tort law seeks to achieve an efficient allocation of resources, it aspires to place the responsibility for particular decisions upon those best able to

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REV. 654 (1970); Note, *Compulsory Medical Treatment and the Free Exercise of Religion,* 42 IND. L.J. 386 (1967); Note, *The Dying Patient: A Qualified Right to Refuse Medical Treatment,* 7 J. FAM. L. 644 (1968); Note, *Compulsory Medical Treatment: The State's Interest Re-evaluated,* 51 MINN. L. REV. 293 (1966).

32. The doctrine of informed consent emerged out of medical malpractice suits as courts heard cases involving doctors treating patients without their consent. *See* Pratt v. Davis, 118 Ill. App. 161, 168 (1950), *aff'd,* 224 Ill. 300, 79 N.E. 562 (1906).

33. 211 N.Y. 125, 105 N.E. 92 (1914).

34. 186 Kan. 393, 350 P.2d 1093, *reh'g denied,* 187 Kan. 186, 354 P.2d 670 (1960).

35. Schloendorff v. Soc'y of N.Y. Hosp., 211 N.Y. 125, 129, 105 N.E. 92, 93 (1914).

36. *See* Erickson v. Dilgard, 44 Misc. 2d 27, 252 N.Y.S.2d 705 (Sup. Ct. 1962) (which held that an adult has the right to refuse medical treatment); Kutner, *supra* note 1, at 207. *But cf. In re* Collins, 44 Misc. 2d 622, 254 N.Y.S.2d 666 (Sup. Ct. 1964) (where the patient was compelled to accept treatment).

37. The underpinnings of the doctrine of informed consent can be traced to John Stuart Mill. *See* Mill, *On Liberty,* in THE PHILOSOPHY OF JOHN STUART MILL 185 (M. Cohen ed. 1961).

38. *See* 2 F. HARPER & F. JAMES, THE LAW OF TORTS 61 (Supp. 1968).

39. 331 F.2d 1010, 1015 (D.C. Cir. 1964) (Burger, J., dissenting), *cert. denied sub nom.* Jones v. President and Directors of Georgetown College, Inc., 377 U.S. 978 (1964).

40. *Id.* at 1018.

avoid the costs arising from those decisions.[41] Thus, while the physician can best determine a patient's medical needs, the patient can best determine his nonmedical needs. The cost to the physician of discovering the patient's psychological, social and business needs is simply too great. Only the patient sufficiently knows his own value preferences so as to determine the desirability of a particular course of treatment.

B. *Constitutional Considerations*

Another doctrine the courts have employed in an effort to decide euthanasia cases involves the constitutionally protected right of privacy. Originally articulated by Justice Douglas in *Griswold v. Connecticut*,[42] and later expanded in *Roe v. Wade*,[43] the right of privacy protects certain decisions which are so private that they are beyond the reach of the state. In *Griswold*, for example, the Supreme Court invalidated a Connecticut statute proscribing the use of contraceptives by married couples.[44] And in *Roe*, the Supreme Court held that a woman has, within certain limits, the right to decide whether or not to have an abortion.[45]

The right of privacy as applied to medical treatment ap-

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41. *See* Note, *Informed Consent and the Dying Patient*, 83 YALE L.J. 1632, 1645-46 (1974) (citing G. CALABRESI, THE COSTS OF ACCIDENTS (1969)).

42. 381 U.S. 479 (1965).

43. 410 U.S. 113 (1973).

44. Griswold v. Connecticut, 381 U.S. 479 (1965). Justice Douglas, writing for the Court, viewed several amendments of the Bill of Rights as creating "zones of privacy." *Id.* at 485. Justice Goldberg, concurring, found the right of privacy in the ninth amendment and therefore required the states to demonstrate a compelling interest for restriction of the right. *Id.* at 486-87. Justices White and Harlan, while not referring to "privacy" *per se* in their concurrences, considered the Connecticut statute unconstitutional under the fourteenth amendment. *Id.* at 500, 502. In recognizing the right of privacy, the Court did not articulate a definition, but rather left it to be developed on a case by case basis. *See* Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (Court recognized the "right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child"); Stanley v. Georgia, 394 U.S. 557, 565 (1969) (individual has "the right to read or observe what he pleases" within his home).

45. Roe v. Wade, 410 U.S. 113 (1973). Justice Blackmun, writing for the majority, found only compelling state interests can justify governmental interference with this choice. *Id.* at 155. This decision rested on fourteenth amendment grounds. *But see* Doe v. Bolton, 410 U.S. 179 (1973) (Court relied on the right of privacy to invalidate a Georgia anti-abortion statute without commenting on its origin).

pears to have been inspired by Justice Brandeis in a dissenting opinion to *Olmstead v. United States.*[46] There, he spoke of a "right to be let alone."[47] Relying upon this rationale, Justice Burger later averred that "such privacy includes the right to refuse medical treatment."[48] Utilizing this rationale, a Pennsylvania district court in *In re Yetter*[49] later held that the constitutional right of privacy includes the right of a mature competent adult to refuse medical treatment that may prolong his life.[50] And it was this theory which the New Jersey Supreme Court principally employed in deciding the celebrated case of *In re Quinlan.*[51]

IV. The Court of Appeals' Decisions in *In re Storar*

Although *Eichner*[52] and *Storar*[53] are facially similar in that both give rise to the surrogate issue, each was decided upon different principles. In *Eichner,* the court of appeals invoked the doctrine of informed consent in holding that approval for the discontinuance of Brother Fox's respirator was supported by the common law right of a competent adult to refuse medical treatment.[54] The court reasoned that since, prior to becoming incompetent, Brother Fox manifestly refused to be placed on a respirator,[55] removal was authorized at Father Eichner's request.[56]

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46. 277 U.S. 438, 469 (1928) (Brandeis, J., dissenting).

47. *Id.* at 478.

48. *In re* President and Directors of Georgetown College, Inc., 331 F.2d 1010, 1015 (D.C. Cir.) (Burger, J., dissenting), *cert. denied sub nom.* Jones v. President and Directors of Georgetown College, Inc., 377 U.S. 978 (1964).

49. Annot., 93 A.L.R.3d 67, 74 (1979) (citing *In re* Yetter, 62 Pa. D. & C.2d 619 (1973)).

50. *Id.* at 4. The lower court in *Yetter* said:

> In our opinion the constitutional right of privacy includes the right of a mature competent adult to refuse to accept medical recommendations that may prolong one's life and which, to a third person at least, appear to be in his best interests, in short, that the right of privacy includes the right to die with which the state should not interfere.

Id.

51. 70 N.J. 10, 355 A.2d 647 (1976), *cert. denied sub nom.* Garger v. New Jersey, 429 U.S. 922 (1976).

52. *In re* Storar, 52 N.Y.2d 363, 420 N.E.2d 64, 438 N.Y.S.2d 266 (1981).

53. *Id.*

54. *In re* Storar, 52 N.Y.2d at 376, 420 N.E.2d at 70, 438 N.Y.S.2d at 272.

55. *See supra* note 9 and accompanying text.

56. *In re* Storar, 52 N.Y.2d at 371-72, 420 N.E.2d at 68, 438 N.Y.S.2d at 270. The

The court declined to reach the constitutional issue since common law principles supported its decision.[57]

In *Storar*, the court of appeals refused to invoke the doctrine of informed consent since at no time in his life had John Storar been competent.[58] The court reasoned that it would be futile to speculate whether he would want such treatment since he was never able to make reasoned decisions.[59] Accordingly, the court ruled that the patient was functionally an infant and subject to the state's interest as *parens patriae*.[60] Since New York Public Health Law section 2504(2)[61] permits a parent to consent to medical treatment on an infant's behalf, but not to deprive him of lifesaving treatment, the mother's request was denied.[62]

V. Analysis of the Court's Reasoning

A. *Failing To Decide the Surrogate Issue*

In both *Storar* and *Eichner*, the court of appeals was asked to decide whether a surrogate decision to discontinue life-sustaining medical treatment could be made on behalf of a dying incompetent patient. In neither case, did the court comply. In *Eichner*, the court sidestepped the issue by relying upon the pa-

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District Attorney urged that a patient's right to refuse medical treatment conflicts with the state's interest in prohibiting one person from causing the death of another. *Id.* at 377, 420 N.E.2d at 71, 438 N.Y.S.2d at 273. According to the court of appeals, however, "a state which imposes civil liability on a doctor if he violates the patient's right cannot also hold him criminally responsible if he respects that right." *Id.*

Unless "cannot" means "should not" in the court's statement, this reasoning is not entirely correct. It is true that existing statutory law supports the right of a competent adult to make his own decision by imposing civil liability on those who perform medical treatment without consent. It is not true that the state will not impose criminal liability if the doctor respects that right. Indeed, under New York law, this arguably constitutes aiding and abetting suicide which is manslaughter in the second degree. N.Y. PENAL LAW § 125.25(3) (McKinney 1975). *See* Note, *The Right to Die, supra* note 1, at 654-57; Note, *Informed Consent and the Dying Patient*, 83 YALE L.J. 1632, 1635 (1974).

57. *In re* Storar, 52 N.Y.2d at 376-77, 420 N.E.2d at 70, 438 N.Y.S.2d at 272-73. "Neither do we reach that question in this case because the relief granted to the petition, Eichner, is adequately supported by common-law principles." *Id.* at 377, 420 N.E.2d at 70, 438 N.Y.S.2d at 273. *See also* Byrn, *Compulsory Lifesaving Treatment for the Competent Adult*, 44 FORDHAM L. REV. 1, 15 n.64 (1975) [hereinafter cited as Byrn].

58. *See supra* notes 12-13 and accompanying text.

59. *In re* Storar, 52 N.Y.2d at 380, 420 N.E.2d at 72-73, 438 N.Y.S.2d at 274-75.

60. *Id.* at 380-81, 420 N.E.2d at 73, 438 N.Y.S.2d at 275.

61. N.Y. PUB. HEALTH LAW § 2504(2) (McKinney 1977). *See supra* note 26.

62. *In re* Storar, 52 N.Y.2d at 381-82, 420 N.E.2d at 73-74, 438 N.Y.S.2d at 276.

tient's prior informed consent rather than the surrogate's motives and desires. In *Storar,* the court evaded the issue by declaring the patient functionally an infant and then invoking public health laws and the doctrine of *parens patriae.*[63]

It is easy to see why the court was evasive. The surrogate issue, if answered affirmatively, may conflict with existing state laws against homicide and suicide. As previously mentioned, the law treats mercy killing no differently than other cases involving the taking of human life.[64] It is at least arguable that if a court were to sanction the termination of one's life at another's request, then the court as well as the requesting party would be a partner to the "crime."[65] On the other hand, if the surrogate issue were answered negatively, then the court would be faced with the moral dilemma of prolonging the agony of one who is presently incurable, suffering, and beyond the aid of potential respite.[66] It is for these reasons that courts resort to the doctrine of informed consent or, alternatively, to the constitutional right of privacy. Both doctrines shift the burden of making the life-death decision away from the court and on to the patient.

Despite the appeal of these two doctrines, each is highly problematic. The doctrine of informed consent is inapposite when applied to situations where a patient is irrevocably unconscious, and a surrogate decision is requested on his behalf. In this situation, either the patient is unconscious and informed consent cannot be obtained, or, the patient has failed to manifest his consent prior to becoming incompetent.[67] Unlike Brother Fox, many people, for psychological reasons, refuse to address

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63. *See supra* notes 26-27.

64. *See supra* notes 28-29 and accompanying text.

65. This reasoning would also apply to physicians and hospital authorities involved in the decision.

66. A very strong case for this moral dilemma is presented in Kamisar, *supra* note 28, at 975.

67. Despite this difficulty, the doctrine of informed consent is widely used to decide euthanasia cases. *See, e.g.,* Natanson v. Kline, 186 Kan. 393, 350 P.2d 1093, *reh'g denied,* 187 Kan. 186, 354 P.2d 670 (1960); Mohr v. Williams, 95 Minn. 261, 268-69, 104 N.W. 12, 14-15 (1905); Schloendorff v. Soc'y of N.Y. Hosp., 211 N.Y. 125, 105 N.E. 92 (1914); Note, *Suicide and the Compulsion of Life Saving Medical Procedures: An Analysis of the Refusal of Treatment Cases,* 44 BROOKLYN L. REV. 285, 293 (1978) (citing Palm Springs Gen. Hosp. v. Martinez, Civ. No. 71-12,687 (Dade County Cir. Ct., filed July 2, 1971)); Byrn, *supra* note 49, at 13 n.58 (citing Palm Springs Gen. Hosp. v. Martinez, Civ. No. 71-12,687 (Dade County Cir. Ct., filed July 2, 1971)).

the issue of euthanasia when they are healthy and competent.[68] And for those who do address the issue at a time when they are healthy and competent, it is arguable that their decisions would differ when faced with an actual life-death situation.

The right of privacy is similarly of questionable utility.[69] First, it is by no means settled that the right of privacy encompasses the right to die. *Quinlan*[70] notwithstanding, the Supreme Court has repeatedly declined to consider whether the right to die is an incident of the right of privacy.[71] Second, even if there

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68. *See Preface* to E. BECKER, THE DENIAL OF DEATH at ix (1973):

> [T]he idea of death, the fear of it, haunts the human animal like nothing else; it is a mainspring of human activity - activity designed largely to avoid the fatality of death, to overcome it by denying in some way that it is the final destiny of man.

Id.

Becker's thesis raises the possibility that under no conditions can a person make a rational decision about his own death, but rather he is always *in extremis* hence *non compos mentis* concerning his ultimate destiny. *See generally Hearings to Explore the Problems of Treating Terminally Ill Patients Before the Special Senate Committee on Aging*, 92d Cong., 2d Sess. 68-70 (1972) (statement of W. Reich, Sr. Research Scholar, Georgetown U.); N. BROWN, LIFE AGAINST DEATH: THE PSYCHOANALYTICAL MEANING OF HISTORY (1959); R. DUMONT & D. FOSS, THE AMERICAN VIEW OF DEATH: ACCEPTANCE OR DENIAL? (1972); S. GROF & J. HALIFAX, THE HUMAN ENCOUNTER WITH DEATH (1977); M. HEIDEGGER, BEING AND TIME (1962); R. KASTENBAUM & R. AISENBERG, THE PSYCHOLOGY OF DEATH (1972); S. KIERKEGAARD, THE SICKNESS UNTO DEATH (1954); E. KUBLER-ROSS, ON DEATH AND DYING (1969); J. MEYER, DEATH AND NEUROSIS (1975); A. WEISMAN, ON DYING AND DENYING (1972); Note, *Informed Consent and the Dying Patient*, 83 YALE L.J. 1632 (1974). This list is not exhaustive. *See also* Kamisar, *supra* note 28, at 989 n.56 (citing J. Walsh, *Life is Sacred*, 94 THE FORUM, 333, 333-34), which recalls the following Aesop's fable that illustrates Becker's thesis:

> It was a bitter-cold day in the wintertime, and an old man was gathering branches in the forest to make a fire at home. The branches were covered with ice, many of them were frozen and had to be pulled apart, and his discomfort was intense. Finally the poor old fellow became so thoroughly wrought up by his suffering that he called loudly upon death to come. To his surprise, Death came at once and asked what he wanted. Very hastily the old man replied, "Oh, nothing; nothing except to help me carry this bundle of sticks home so that I may make a fire."

Id.

69. For an interesting discussion concerning the relative merits of informed consent and the right of privacy, *see In re Storar: The Right to Die and Incompetent Patients*, 43 U. PITT. L. REV. 1087, 1097-98 (1982).

70. *In re* Quinlan, 70 N.J. 10, 355 A.2d 647, *cert. denied sub nom.* Garger v. New Jersey, 429 U.S. 922 (1976).

71. *In re* Storar, 52 N.Y.2d at 376, 420 N.E.2d at 70, 438 N.Y.S.2d at 272-73. Based on recent decisions, however, it would appear that if and when the Supreme Court does finally decide the issue, it will rule in favor of a patient's right to refuse ordinary medical treatment based on the right of privacy. The Court's decisive 7-2 margin in Roe v. Wade, 410 U.S. 113 (1972), is the clearest indicator. For legal commentary concerning

is a constitutionally protected right to die, it may not be exercizable by third parties since the law generally grants standing only to those parties whose own constitutional rights have been violated.[72]

By a careful ellipsis, the court of appeals refused to address the problems raised by these two doctrines. Of course, one could argue that for this very reason its decision is sound, since directly deciding the surrogate issue might raise greater problems than it would ostensibly solve. Opponents of third-party decisions frequently fear that allowing surrogate decisions in some cases, for example, where a patient is terminally ill, suffering, and has no reasonable chance of recovery, opens the door to allowing third party decisions in other cases, such as where a person has outgrown his usefulness to society, or where a person is prone to criminal activity and is "beyond rehabilitation."[73] Having entertained the surrogate issue however, the court of appeals should have addressed these subsidiary issues directly. As Judge Jones argued in dissent, the majority's decision fails to provide constructive guidance to the person on whom the burden of making a surrogate decision falls.[74]

B. *Departing From the Doctrine of Mootness*

The court's evasiveness is further compounded by the fact

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this issue, *see* Brant, *The Right to Die in Peace: Substituted Consent and the Mentally Incompetent*, 11 SUFFOLK U. L. REV. 959 (1977); Cantor, *Quinlan, Privacy, and the Handling of Incompetent Dying Patients*, 30 RUTGERS L. REV. 243 (1977); Delgado, *Euthanasia Reconsidered - The Choice of Death as an Aspect of the Right of Privacy*, 17 ARIZ. L. REV. 474 (1975).

72. *See* Collester, *Death, Dying and the Law: A Prosecutorial View of the Quinlan Case*, 30 RUTGERS L. REV. 304 (1977) [hereinafter cited as Collester].

73. *See infra* note 95 and accompanying text.

74. *In re* Storar, 52 N.Y.2d 363, 383, 420 N.E.2d 64, 74, 438 N.Y.S.2d 266, 276 (1981) (Jones, J., dissenting). Judge Fuchsberg argued that the majority went too far after incanting the need for judicial restraint. *Id.* at 391-92, 420 N.E.2d at 79, 438 N.Y.S.2d at 281.

At least one commentator has argued that since mercy killers are rarely indicted, the surrogate problem is more illusory than real. *See* Kamisar, *supra* note 28, at 971. Others have argued that public confidence in the administration of law requires consistency of judgment and guidance as to moral conduct, neither of which are provided by reliance upon prosecutorial discretion or jury nullification. *See* Collester, *supra* note 72, at 313 (citing Silving, *Euthanasia: A Study in Comparative Criminal Law*, 103 U. PA. L. REV. 350, 354 (1954)). This note sympathizes with the latter position.

that it decided moot issues. As a general rule, courts may not decide moot questions, only actual cases or controversies.[75] An exception to this rule permits courts to review moot questions if there is a showing of: (1) significant questions not previously passed on; (2) a likelihood of repetition; and (3) phenomena typically evading review.[76]

The exception to the doctrine of mootness makes sense only on the assumption that a court's decision will provide constructive guidance in gray areas of law. Otherwise, the task is best reserved for the legislature. Thus, in those cases where the doctrine has been applied, courts have consistently held that only in exceptional cases, where the urgency of establishing a rule of future conduct is imperative and manifest, will a departure from mootness be justified.[77] Since *In re Storar* failed to decide the surrogate issue, but rather relied upon a set of uncontroversial doctrines,[78] the court's decision to decide moot questions was unjustified. Little is gained by throwing red herrings at academic questions.

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75. *See In re* Hearst Corp., 50 N.Y.2d 707, 707-08, 409 N.E.2d 876, 877-78, 431 N.Y.S.2d 400, 402 (1980); *In re* Westchester Rockland Newspapers, Inc., 48 N.Y.2d 430, 436-37, 399 N.E.2d 518, 521, 423 N.Y.S.2d 630, 633-34 (1979); People v. Smith, 44 N.Y.2d 613, 617, 378 N.E.2d 1032, 1033-34, 407 N.Y.S.2d 462, 464 (1978); Gannett v. De Pasquale, 43 N.Y.2d 370, 376, 372 N.E.2d 544, 547, 401 N.Y.S.2d 756, 759 (1977); *In re* Oliver, 30 N.Y.2d 171, 177-78, 282 N.E.2d 306, 308, 331 N.Y.S.2d 407, 411 (1972). *See generally* H. COHEN & A. KARGER, POWERS OF THE NEW YORK COURT OF APPEALS 420-421 (1952).

76. Although the appeal has become moot and academic, we refrain from dismissing it because of the importance of the issue presented. Affecting as it does the administration of the emergency housing legislation in the City of New York, the question is one of major importance and, because it will arise again and again, one that invites immediate decision.

In re Rosenbluth, 300 N.Y. 402, 404, 91 N.E.2d 581, 581 (1950).

77. *See In re* Glenram Wine & Liquor Corp., 295 N.Y. 336, 340, 67 N.E.2d 570, 571 (1946). The appeal in this case involved a determination of the State Liquor Authority revoking a liquor license. The appeal was entertained even though the licensing period had expired, on the grounds that "the questions presented on this appeal are of importance in the administration of the Alcoholic Beverage Control Law and in the future conduct of the business of respondent and other licensees under said law." *Id.*

78. *In re* Storar, 52 N.Y.2d 363, 383, 420 N.E.2d 64, 74, 438 N.Y.S.2d 266, 276 (1981). Judge Jones said in partial concurrence, "Judge Wachtler's opinion constitutes an accurate and clear statement of the highest common factors on which all members of the court are in agreement." *Id.*

VI. Constructive Guidance for Resolving the Surrogate Issue: A Proposed Model

A. *The Model of Substituted Judgment*

The court of appeals' decision in *In re Storar*[79] underscores the need for a model providing constructive guidance for deciding the surrogate issue.[80] Such a model should contain a body of operating principles which provide a defensible rationale for making life-death decisions, and should also be simple enough to be readily applicable. The following model strives to satisfy the foregoing criteria.

A vicarious decision to terminate life-sustaining medical treatment on behalf of a terminally ill incompetent patient should be authorized where, under the totality of the circumstances, the patient is a proper candidate for euthanasia, and the party requesting termination of treatment is sufficiently related to the patient so he can speak on the patient's behalf with respect to the patient's interests, desires, and beliefs.[81]

To satisfy the first requirement that the patient is a proper candidate for euthanasia, the surrogate would prove, *beyond a reasonable doubt*,[82] that the patient is terminally ill with no reasonable chance of recovery and that either (1) the patient is irreversibly comatose, or (2) the patient is suffering and sustaining his life would only prolong his suffering.[83] Having demonstrated this, he would next convince the court, by *clear and convincing* evidence,[84] that he is competent to speak on the patient's behalf.

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79. 52 N.Y.2d 363, 420 N.E.2d 64, 438 N.Y.S.2d 266 (1981).

80. *See* Clark, *When Doctors Play God*, NEWSWEEK, Aug. 31, 1981, at 52, col. 2: "New York's high court [in *In re* Storar] did little to clarify the issue of terminating treatment."

81. The surrogate issue is directly addressed by focusing on the nexus between the surrogate and the patient. Where the nexus is strong, the surrogate can justifiably assert that he has a legitimate interest in speaking on the patient's behalf, thus satisfying the requirement of standing. *See supra* note 72 and accompanying text.

82. *See infra* text following note 88.

83. In determining whether the surrogate has met his burden, the court would make, *sua sponte*, a motion to dismiss, and then determine whether the surrogate has presented enough evidence to withstand this motion.

84. In light of the court of appeals' discussion concerning the quantum of evidence in *In re* Storar, 52 N.Y.2d at 379, 420 N.E.2d at 71-72, 438 N.Y.S.2d at 274, this would appear to be the appropriate burden. *See supra* note 25. More than this may well be impossible to meet, thus defeating the model's utility. Less than this may not afford

Criteria to consider in determining the competency of the surrogate would include the following:

(1) The surrogate's relationship to the patient, including the quality of the relationship;
(2) The surrogate's past and present associations with the patient, including the quality of the associations;
(3) The extent to which the surrogate is acquainted with the patient's past moral and religious convictions (if any), including awareness of their strength and fortitude;
(4) The surrogate's ability to comprehend and appreciate the solemnity of the decision;
(5) The reasons and motives for the surrogate's request; and
(6) Any other factor(s) which would tend to establish the surrogate's competency to speak on behalf of the dying patient.[85]

This model, which might be labeled the model of substituted judgment, withstands the canonical arguments usually ad-

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adequate safeguards which the model is designed to provide.

85. There are two problems which are immediately apparent in determining the utility of this model. The first concerns the type of evidence the surrogate would bring in proving the relevant nexus. Presumably, the surrogate would summon live witnesses to testify to his relationship with the patient. This occurred in *Eichner* where Father Eichner demonstrated that Brother Fox's ten nieces and nephews concurred with his decision. *In re* Storar, 52 N.Y.2d at 371, 420 N.E.2d at 67, 438 N.Y.S.2d at 269-70. Documentary evidence may be brought in as well.

At right angles to this problem is the court's obvious interest in whether there are other parties who oppose the surrogate's decision. This can be handled in one of two ways. Either the court can appoint, *ad litem*, an attorney who would technically oppose the surrogate, or the court could presume that anyone opposing the surrogate's decision has constructive knowledge of the proceedings. The first alternative is frequently employed in family law actions to determine the best interests of a child who is the subject of a custody proceeding. Due to the delicate nature of euthanasia cases and due to the injustice to the patient which would result if the proceedings were unduly lengthy, the second alternative is preferred. It is submitted that anyone aware of a surrogate's interest in terminating the life of a particular patient has constructive knowledge of any proceeding that may be brought before a tribunal. If that person opposes the action, he will no doubt challenge the surrogate's request. In *In re* Quinlan, 70 N.J. 10, 355 A.2d 647, *cert. denied sub nom.* Garger v. New Jersey, 429 U.S. 922 (1976), all of Karen's immediate family members concurred in the decision to remove her from the respirator. The result may have been different if either parent had objected.

The second problem concerns the surrogate's necessity for relying upon hearsay evidence in proving his relationship with the patient. This problem could be met by invoking something akin to FED. R. EVID. 804(b)(6). This rule provides, as an exception to the general rule excluding hearsay evidence, that a statement which is otherwise hearsay may be admitted into evidence if "(C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence." *Id.*

vanced against the legalization of euthanasia.[86] Those opposed to euthanasia often claim that human life is inviolable and that it ought not to be taken under any circumstances.[87] The model answers this argument by requiring a threshold inquiry into whether a patient is a proper candidate for euthanasia, which assures the court that no reasonable man would choose to live under such circumstances. This threshold determination is met by requiring the surrogate to prove, beyond a reasonable doubt, that the patient is terminally ill with no reasonable chance of recovery and is either irreversibly comatose, or suffering and that sustaining his life would only prolong his suffering. In such states, dying persons see or would see themselves as stripped of their dignity and character.[88]

A second argument against euthanasia is that physicians often misdiagnose maladies or that new treatments are frequently discovered.[89] The model's initial inquiry, however, assures the court, beyond a reasonable doubt, that the patient has no reasonable chance of recovery and that a miraculous treatment is not foreseeable. This reply is similar to the rebuttal frequently made to opponents of capital punishment. The fact that capital punishment is irreversible is not, by itself, a compelling reason against its employment. As in all criminal cases, the defendant must be proved guilty beyond a reasonable doubt - the same burden suggested here.

A third argument is that giving wide discretion to interested parties, such as doctors and family members, concerning the conditions under which euthanasia is appropriate, creates a risk of abuse so serious that it far outweighs the benefits of terminating life. The model, however, provides adequate safeguards in applying the criteria under which a court will authorize a surro-

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86. For a summary of these arguments, *see generally* T. BEAUCHAMP & T. PINKARD, ETHICS AND PUBLIC POLICY 256-58 (1983) [hereinafter cited as BEAUCHAMP & PINKARD].

87. *Id.* at 257.

88. One could argue that entering such states should be a sufficient condition for authorizing euthanasia. While this might be true from a moral point of view, it is not sufficient in the eyes of the law, since even in such states, a third party cannot terminate the patient's life. *See supra* note 28 and accompanying text. According to the model, however, entering such states constitutes an initial condition for third party action, with the subsequent condition that the surrogate has demonstrated that he is competent to speak on the patient's behalf.

89. *See supra* note 86.

gate decision.

Criterion (1) requires the court to examine the relationship between the surrogate and the patient. The court would determine whether the surrogate is a relative, and if so, how closely related he is to the patient.[90] If, for example, the surrogate is the dying patient's spouse, and not estranged from the patient, this would weigh in favor of authorizing a surrogate decision.[91] If, on the other hand, the surrogate is a friend or distant relative who just recently expressed an interest in the patient's welfare, this would weigh against authorizing a surrogate decision. In any event, the court should look beyond facial sufficiency to determine the possibility of collusion.[92]

Criterion (2) requires the court to examine the surrogate's past and present associations with the patient. The court would determine to what extent the surrogate knew the patient so as to be able to make a substituted judgment on his behalf. Frequency of association and depth of association would weigh heavily in favor of the surrogate's authorization. Conversely, if the surrogate and the patient were only casually acquainted, this would weigh against his authorization.

Criterion (3) requires the court to examine the extent to which the surrogate is acquainted with the patient's past moral and religious convictions (if any), and his awareness of their strength and fortitude. The court would determine whether and to what extent the patient has previously manifested his views on euthanasia and the conditions under which they were re-

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90. Ordinarily, the Anglo-American legal system gives priority to family members over distant relatives and friends. For example, property is inherited by immediate family regardless of how close the heir is to the decedent. With respect to this criterion, the court may presumptively conclude that the patient's immediate family members have a prima facie claim to surrogate competency. This presumption, however, must be rebuttable.

91. The fact that the surrogate is a spouse or even a parent should not, in and of itself, establish surrogate competency since it is possible that a spouse or parent is incompetent to speak on behalf of a patient's interests, beliefs, and desires. Such a relationship, however, might entitle the potential surrogate to a rebuttable presumption. *See* discussion *supra* note 90.

92. The court must be particularly sensitive to the possibility of collusion where, for example, an estranged wife has appealed to the court for termination of treatment. The court must scrutinize the quality of the relationship which existed between the surrogate and the patient.

vealed.[93] The possibilities here are endless. If, for example, the patient was an avid anti-euthanasianist prior to becoming incompetent, this would weigh heavily against authorizing euthanasia. If he was silent on the issue, and the surrogate proves that the patient was fanatical about his religion, which included as one of its tenets the approval of euthanasia, this would weigh in favor of court authorization. And if the patient had indicated his approval of euthanasia, but did so casually and on just one occasion, this, without more, would weigh against authorization.

Criterion (4) requires the court to examine the surrogate's ability to comprehend and appreciate the seriousness of the decision. The surrogate must persuade the court by clear and convincing evidence, that he is of sufficient age and intelligence to make a decision on the patient's behalf. He must prove that he fully appreciates the patient's condition, the medical procedures that are presently available, and the solemnity of the occasion.

Criterion (5) requires the court to examine the reasons and motives for the surrogate's request. A surrogate may request euthanasia for a variety of reasons. The usual situation is where the surrogate observes the patient's suffering and pain and is motivated out of compassion to end that suffering.[94] It is conceivable, however, that the surrogate may be motivated by malice, personal profit, or the financial burden of providing health care that delays death through the use of expensive mechanical devices. The court would determine to what extent any of these motives are sufficiently meritorious so as to effect authorization. It should again look beyond facial sufficiency.[95]

Criterion (6) is a catch-all provision which enables the court to examine any additional factors which would tend to establish or negate the surrogate's competency to speak on behalf of the dying patient. The model and its six criteria provide a totality of the circumstances test which gives the court wide latitude in examining the surrogate.

A final argument opposing euthanasia is that any euthanasia proposals which permit the taking of human life, will erode

93. If, for example, the patient had executed a living will, this would weigh heavily in favor of court authorization.

94. *See* Kutner, *supra* note 1, at 201-02.

95. *See supra* note 92.

other strictures against the taking of human life.[96] The model with its above criteria, however, adequately safeguards the sanctity of human life. Not only must the surrogate prove, beyond a reasonable doubt, that the patient is a proper candidate for euthanasia, but he must also prove, by clear and convincing evidence, that he himself is competent to make a substitute judgment. Both standards are difficult to meet and adequately assure a just determination.[97]

The proposed model must also withstand application of the existing laws concerning homicide and suicide. The model assumes that there is a morally relevant distinction between "causing death" and "allowing a person to die" which should be incorporated into our legal system. There are many who argue that there is an important difference between standing aside and letting someone die and actively pushing that person toward death.[98] When a person is allowed to die it is his disease or condition that causes death; but if an individual administers a toxic drug, then that individual actively causes the patient's death. In the one case death seems to be natural, while in the other case it is artificially induced. Because of this distinction, the law should distinguish euthanasia and except it from the laws concerning homicide and suicide.[99] In this way, neither the surrogate nor the court would be parties to a "crime."[100]

The proposed model is also preferable to existing doctrines

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96. Nonvoluntary euthanasia proposals are said to be the "thin edge of a wedge" leading to euthanasia against one's consent, infanticide, etc. *See* BEAUCHAMP & PINKARD, *supra* note 86, at 258. Euthanasia proposals must always be resisted, it is argued, or society will ultimately be unable to draw the line ending practices that take human life. *Id.*

97. *See supra* notes 82 and 84 and accompanying text. *See also supra* note 88.

98. This is the so-called "doctrine of double effect." Beauchamp, *Introduction* to Ch. 6, ETHICS AND PUBLIC POLICY 306 (T. Beauchamp ed. 1975). For an interesting discussion concerning the merits of this doctrine *see* Beauchamp, *A Reply to Rachels on Active and Passive Euthanasia, id.* at 318; Rachels, *Active and Passive Euthanasia*, in ETHICS AND PUBLIC POLICY 312 (T. Beaucamp & T. Pinkard eds. 1983). *See also supra* note 1 for the distinction between active and passive euthanasia. For an interesting discussion arising in a slightly different context see Bennett, *Whatever the Consequences*, in ETHICS AND PUBLIC POLICY 328 (T. Beauchamp ed. 1975).

99. Because of this distinction, it is seriously questionable whether the *actus reus* requirement for homicide is met when an individual stands aside while letting nature take its course.

100. *See supra* note 65 and accompanying text.

which have been used to decide euthanasia cases. It is preferable to the right of privacy at least to the extent the Supreme Court maintains its silence on whether the right of privacy includes the right to die, and whether the right of privacy may be vicariously asserted. It is preferable to informed consent since it is not restricted to those cases in which a patient has manifestly demonstrated his consent prior to becoming incompetent. Although as previously indicated it is questionable to what extent an individual can ever make a reasoned decision concerning his own death, the proposed model makes prior consent one of several factors in determining surrogate competency. To this extent, it mitigates the argument so damaging to informed consent theory; that informed consent, an arguable fiction when applied to decisions to discontinue life-sustaining treatment, should not be the sole determinative factor.[101]

B. *The Model of Substituted Judgment as Applied to In re Storar and Eichner v. Dillon*

In *Eichner*,[102] the proposed model of substituted judgment could have been applied as follows. Father Eichner, having been refused his request that the hospital remove Brother Fox's respirator, would apply for a court order authorizing removal.[103] To prevail, he would have to establish, beyond a reasonable doubt, that Brother Fox was terminally ill with no reasonable chance of recovery, and that he was (1) irreversibly comatose, or (2) suffering and that sustaining his life would only prolong his suffering.

Father Eichner would arguably have met this burden since there was uncontroverted evidence that there was no reasonable chance of recovery, and that Brother Fox would never emerge from his vegetative coma or regain his cognitive ability.[104] The court would then determine whether Father Eichner was competent to substitute his judgment for that of Brother Fox by applying the six criteria. First, it would inquire into the relationship between Father Eichner and Brother Fox. Father Eichner was the director of a religious order of which Brother Fox was a

101. *See supra* notes 67-68 and accompanying text.
102. *In re* Storar, 52 N.Y.2d 363, 420 N.E.2d 64, 438 N.Y.S.2d 266 (1981).
103. Presumably, a surrogate court would be the proper court of jurisdiction.
104. *In re* Storar, 52 N.Y.2d at 371, 420 N.E.2d at 67, 438 N.Y.S.2d at 269.

member.[105] The fact that he, and not a family member, requested removal might be a factor which would weigh against court authorization, especially since the record was silent as to how long Father Eichner knew Brother Fox and whether or not he knew him well. While it is true that Father Eichner's request was supported by Brother Fox's ten nieces and nephews,[106] the court would be cognizant that these are distant relatives and weigh this accordingly.

The second inquiry the court would make concerns Father Eichner's associations with Brother Fox. Again, the record was silent as to what extent Father Eichner knew Brother Fox so as to enable him to make a substituted judgment on his behalf. The director of a religious order may or may not have frequent and substantial contact with members under its auspices. Father Eichner would be required to demonstrate the extent to which he knew Brother Fox.

The third inquiry the court would make concerns the extent to which Father Eichner was familiar with Brother Fox's moral and religious convictions. Since Brother Fox clearly manifested that he would not desire to be placed on a respirator, and that he expressed this desire after having given thoughtful consideration to the gravity of his decision,[107] this would weigh heavily in favor of court authorization.

The fourth inquiry the court would make is whether Father Eichner himself is sufficiently able to appreciate the solemnity of his decision. Presumably, Father Eichner is an intelligent and thoughtful person who fully understands the gravity of the situation. He had consulted two neurosurgeons who confirmed the diagnosis and fully appreciated the religious implications of his decision. The fact that both he and Brother Fox apparently shared the same religious beliefs would further weigh in favor of authorization.

The court would finally inquire into the motives and reasons for Father Eichner's request. Although once again the record was silent, Father Eichner apparently desired a merciful

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105. *Id.*

106. *Id.* at 371, 420 N.E.2d at 67, 438 N.Y.S.2d at 269-70.

107. *Id.* at 371-72, 420 N.E.2d at 68, 438 N.Y.S.2d at 270. *See supra* note 9 and accompanying text.

end to Brother Fox's existence. Furthermore, since the director of a religious order is likely to be free of moral turpitude, his own reputation would be hard to impeach.

Assuming the absence of any other factors which might influence this decision, the court would weigh and balance the relevant factors in arriving at its decision. It is submitted that, on balance, the court would authorize Father Eichner's request although a contrary decision could justifiably be reached. The decision would turn, arguably, on the weight assigned to Brother Fox's past convictions against the apparant absence of a substantial nexus between Father Eichner and Brother Fox.

Storar[108] presents other difficulties. It is highly questionable whether Mrs. Storar could prove that her son is a proper candidate for euthanasia. Although John Storar was terminally ill with no reasonable chance of recovery, he was neither irreversibly comatose nor was it beyond a reasonable doubt that he was suffering to the extent that blood transfusions would only prolong his suffering.

It was conceded that John Storar found the blood transfusions to be disagreeable.[109] His physicians observed, however, that after the transfusions, he had more energy and was able to resume most of his usual activities.[110] While his physicians did recognize that it was possible that the transfusions would eventually be ineffective, at the time of the hearing they were highly efficacious.[111] There thus appears to be a reasonable doubt as to whether sustaining John Storar's life would only serve to prolong his agony.

Assuming arguendo that Mrs. Storar could meet her burden, the court would conduct its second line of inquiry. Mrs. Storar was obviously the patient's mother and had an honorable mother-son relationship. From the time her son was institutionalized, Mrs. Storar had visited him daily and had taken up residence near the facility.[112] These considerations would adequately satisfy the first two of the proposed criteria.

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108. *In re* Storar, 52 N.Y.2d 363, 420 N.E.2d 64, 438 N.Y.S.2d 266 (1981).
109. *Id.* at 375, 420 N.E.2d at 69, 438 N.Y.S.2d at 271.
110. *Id.* at 374, 420 N.E.2d at 69, 438 N.Y.S.2d at 271.
111. *Id.* at 374 n.4, 420 N.E.2d at 69 n.4, 438 N.Y.S.2d at 271 n.4.
112. *Id.* at 373, 420 N.E.2d at 68, 438 N.Y.S.2d at 270.

The third criterion would present some difficulties since any convictions John Storar might have had would have been tempered by the fact that he had the mental capacity of an eighteen-month-old child.[113] The fourth criterion would present even further difficulties since it is by no means clear that Mrs. Storar fully comprehended the ramifications of her decision. Apparently, Mrs. Storar desired the termination of treatment because she wanted her son to be comfortable, and admitted that no one had explained to her the implications of administering blood transfusions.[114] She was also hesitant about whether she truly desired to terminate treatment.[115]

With respect to the fifth criterion, Mrs. Storar's motives were seemingly meritorious since she desired only to alleviate her son's suffering. The reasons for her request were less than sufficient, however, since she did not fully understand the implications of her decision.[116]

Finally, Mrs. Storar admitted that she was not quite certain whether John Storar truly desired to die.[117] In view of this fact, as well as the above considerations, it is submitted that a court would decide, under the totality of the circumstances, that Mrs. Storar was unable to speak on behalf of her son with respect to his interests, desires, and beliefs.[118] For this reason, authorization would be denied.

VII. Conclusion

Euthanasia is an extraordinarily complex issue. It involves

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113. *Id.*

114. *Id.* at 375, 420 N.E.2d at 70, 438 N.Y.S.2d at 272.

115. Mrs. Storar had on two occasions consented to treatment only to revoke her consent. In 1979, when John Storar's physicians first noticed blood in his urine and asked Mrs. Storar for permission to conduct diagnostic tests, she initially refused and gave her consent only after discussions with the institution's staff. In 1980, when blood again was observed in John Storar's urine, Mrs. Storar initially refused permission allowing physicians to administer blood transfusions, but withdrew her refusal the following day. *Id.* at 373, 420 N.E.2d at 68-69, 438 N.Y.S.2d at 270-71.

116. *Id.* at 375, 420 N.E.2d at 70, 438 N.Y.S.2d at 272.

117. *Id.*

118. *But cf.* the dissent's opinion that Mrs. Storar "had come to know and sense his wants and needs and was acutely sensitive to his best interests; that she had provided more love, personal care, and affection for John than any other person or institution, and was closer to feeling what John was feeling than anyone else . . . ." *Id.* at 391, 420 N.E.2d at 78-79, 438 N.Y.S.2d at 280-81 (Jones, J., dissenting).

such legal disciplines as criminal law, tort law, and contract law, as well as non-legal disciplines such as philosophy, theology, and psychology. By relying on two doctrines of only marginal utility, the New York Court of Appeals in *In re Storar* failed to squarely address the surrogate issue, thus providing little guidance to those who are faced with resolving life-death decisions on behalf of others.

The inconsistency of the New York courts in their treatment of euthanasia cases underscores the need for a rationally defensible and easily applicable model for making life-death decisions. Furthermore, with future cases likely to increase as medical technology becomes more advanced, it is imperative that the judiciary provide clear and controlling legal principles. This note proposes such a model, which perhaps will aid future courts in their determination of cases such as *In re Storar,* and which, if adopted, will provide guidance to those upon whom the burden of making a surrogate decision is placed.

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