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

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

Attorney Rice responds:

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

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

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

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

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

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

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

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

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

Nancy R. Rice, Esq.
Widett, Slater & Goldman, P.C.
Boston, Massachusetts

More on Smoking and Regulation

To the Editors:

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

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

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

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

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clear that the anti-smoking ads run under the FCC's Fairness Doctrine were stemming the sales tide.

A major problem with the "free choice" argument is that smoking is a social, not individual, problem. A federal court in Massachusetts explained this point quite clearly in a ruling regarding mandatory helmet laws and the "freedom" of motorcyclists:

> From the moment of the injury, society picks the person up off the highway; delivers him to a municipal hospital and municipal doctors; provides him with unemployment compensation if, after recovery, he cannot replace his lost job; and, if the injury causes permanent disability, may assume the responsibility for his and his family's continued subsistence. We do not understand a state of mind that permits plaintiff to think that only he himself is concerned.[6]

If a campaign to reduce smoking is not necessarily doomed to failure, and if society can be said to have a legitimate interest in intervening to this end,[6] we are left with the conclusion that the power of the industry is primarily responsible for the government's consistent refusal to intervene in any meaningful way to discourage smoking. Matthews describes efforts to enact legislation protecting non-smokers from the consequences of other people smoking in their presence as "relatively easy" and "non-political". Gilbert, too, calls it an "easy matter," and certainly there is strong majority support for such measures. But a study prepared for the tobacco industry identified the nonsmokers' rights issue as "the most dangerous development to the viability of the tobacco industry that has yet occurred." And when such corporate interests are involved, fighting the good fight is not always easy (as Joseph Califano can testify). Thus, most attempts to enact state and local laws protecting the non-smoker have been successfully stymied, and even where they have been enacted, there has been little enforcement or commitment of funds. The tobacco companies spent $5.6 million to defeat a California referendum which would have required separate smoking and non-smoking areas in various facilities open to the public.

There are several other points in the Matthews and Gilbert commentaries with which I would disagree, but it would take another article to do the discussion justice. On the other hand, there are indeed weaknesses in the original article, most notably the insipid conclusion. What is perhaps more important is the fact that there seems to be considerable common ground. No one is denying that cigarette smoking is socially undesirable and destructive. And I suspect that neither Matthews nor Gilbert would deny that it is primarily an induced addiction (to the tune of $800 million a year for promotion), a fact which makes it equally inappropriate to blame the victim or to speak of "free choice." And certainly we are all agreed that reducing the number of Americans who smoke is not an easy task. This is not a trivial issue; 350,000 annual cigarette-related deaths is ten to fifteen times the death toll from violent crime. I agree with Matthews that any meaningful change here would require "a diminution of the political and economic power of large corporations," which is not going to happen regardless of the human cost. It seems useful to discuss why this is so.

Tom Christoffel, J.D.
Associate Professor
of Public Health
University of Illinois, Chicago

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