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Law, Medicine, and Social Justice

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BOOK REVIEW

LAW, MEDICINE, AND SOCIAL JUSTICE. By Larry I. Palmer. Westminister/John Knox Press. 1989. Pp. 137. $15.95

REVIEWED BY TODD D. VOLKER*

There is a dark room and a sick man. There is a deathbed and there are relatives, called together, from far away. Not much more is needed. Tolstoy's description here is brief but full.

> Everyone knew that he must inevitably die soon, that he was half dead already. Everyone wished for nothing but that he should die as soon as possible, and every one, concealing this, gave him medicines, tried to find remedies and doctors, and deceived him and themselves and each other. All this was falsehood, disgusting, irreverent deceit.[1]

Deceit and emotion aside, one truth that can be ascertained without question but with fresh sting, is that medical technology has considerably changed our relationship to the dying. At the same time, dying is made less simple every year because we sense an egalitarian commitment and entitlement to costly and complex forms of health care. Elaborate medical technologies, developed without delay or hesitation at countless research labs, all work to maintain the mechanical processes of life ever longer.

This is wonderful enough, to adjust medicine and technique, drugs and therapy, into an accord with the basic functionings of the human body. And "wonderful" is hardly enough word to describe this concord. To maintain and nourish the human body, to regulate and control the harmonies of metabolism, is surely something like a cloud-scraped miracle.

The benefits of new medical technologies are obvious; they allow physicians time enough to work on larger, more disastrous and systemic problems. The benefits are so immediately seen that no argument with sufficient force has appeared to dislodge their place in our lives. Arguments against new medical technologies often seem Luddite-inspired, and contrary to our appreciative attitude toward all

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1. L. TOLSTOY, ANNA KARENINA 56-57 (1946).

science. Any effort at controlling the direction of research founders because of public hesitancy at dealing with ethical questions.

A series of court cases has developed because of the successes of life-sustaining medical techniques, although no clear pattern of doctrine has developed that appears to completely answer our moral concerns. Courts dealing with these new techniques have pointed out that these procedures often have a great difficulty that only later becomes apparent. Where most difficult medical cases, medical hard cases, have relied upon these techniques as intermediaries and allies in a broader program of treatment, some cases have appeared in which these life-sustaining treatments have become ends-in-themselves. Rather than deny death to a curable patient, they sustain life in those without hope.

Larry I. Palmer, Vice President for Academic Programs and Professor of Law at Cornell University, has written a recent book which promises answers while looking through troublesome issues in law and medicine. In his *Law, Medicine, and Social Justice*, Professor Palmer teases out a broad new way of understanding these legally and medically complex controversies, through careful sorting of case law and medical practices. His book is an effort to conceptualize an "institutional approach" to solving medical hard cases; this is actually an effort to change the legal locus of responsibility in such medical hard cases. Professor Palmer believes that our general sentiments toward individual choice and responsibility, a laudable and cornerstone belief of liberalism, have foundered in these exceptional medical cases. A more socially-inclusive approach, one which is guided toward a reconciliation of the perspective of various participants, is one which Palmer favors—an institutional approach may allow for a coherent resolution of the sundry problems created by medical technologies. I believe Palmer's inclination is generally correct; it offers more than we have at present in a rights-based approach for dealing with morally difficult medical issues.

The purpose of this Review is to highlight the philosophical motivations of Palmer's institutional approach in *Law, Medicine, and Social Justice*. This is especially relevant because the work so clearly shows the conceptual shortfall of a rights-based approach to law. Palmer's institutional approach is without question an attempt to step away from a rights-oriented legal approach toward a more socially-inclusive approach to the legal and ethical problems caused by new medical technology. The institutional approach is an effort to find a morally distinctive basis for judgment in these tough cases, and it should hardly surprise lawyers that matters of philosophy are involved. Even in the Illinois Supreme Court's recent decision of *In Re Estate*

of Longeway,[2] justices invoked admittedly philosophical reasons in dealing with substantive judicial questions.

Professor Palmer says many eminently reasonable things in *Law, Medicine, and Social Justice*, and his book is worthwhile not only as a discussion of a new approach to the relationship between law and medicine, but it is valuable as well as an introduction to the present, troubled relationship between these institutions. There is a need to bring together a forceful, critical approach to the problems of modern medicine along with illustrative court cases. *Law, Medicine and Social Justice* is such a work.

Rather than provide a summary history of important court cases, Palmer has wisely organized *Law, Medicine, and Social Justice* in a way that gives his institutional approach a better voice. By dividing his chapters into distinct aspects of medical issues, Professor Palmer is able to sharpen the critical edge of his institutional approach to demonstrate its effective worth across a range of troublesome law-and-medicine questions. *Law, Medicine, and Social Justice* carries the investigative possibilities of the institutional approach into areas such as medical malpractice and liability, medical specialization, medical hospitals and organizations, pertinent and prominent court cases, and into difficult legal matters such as the care of children and terminally and critically ill patients. In the main, the institutional approach is gradually elucidated in this exercise. Of value is Palmer's criticism of present legal-medical cases, and his earnest call for sophisticated legal reform.[3]

There are plenty of hospital task forces, think tanks, and academics who have argued that difficult, medical hard cases must be made on a social basis, and not upon an often difficult and sometime impossible solitary basis. This idea has long had wide currency, yet it is worth a good deal more than a worn Confederate dollar. We frequently understand this argument to mean that anxious and profound decisions to pull the plug, to suspend life-sustaining treatment, should probably be made by the patient's family, his physicians and perhaps the officials of the hospital in which the patient is treated. However, the success of Palmer's institutional approach is that it is intended to reach beyond group decision making in individual cases. *Law, Medicine, and Social Justice* presents a socially inclusive approach which hopes to change legal doctrine and legislation as well.

But even more is intended by the institutional approach to handling difficult legal and medical cases and issues. The approach

2. *In re* Estate of Longeway, 133 Ill. 2d 33, 549 N.E.2d 292 (1989).

3. L. PALMER, LAW, MEDICINE, AND SOCIAL JUSTICE 125-37 (1989).

in *Law, Medicine, and Social Justice* is largely premised upon theoretical considerations; Palmer's approach relies upon considerations of social relationships and even of social philosophy. The institutional approach has a pervasive effect upon the *philosophic* structure of the law. It is important to note here exactly what he means:

> The institutional approach builds upon some of the more profound scholarly critiques of law and medicine, which argue that the current reliance upon 'informed consent' as the moral and ethical basis of legal decision-making in the medical arena is misplaced. There are two reasons underlying these criticisms. First, granting to an individual the power to be a sole decision-maker in such situations as a severe physical or mental illness has destructive social and psychological consequences. When law delegates exclusive decision-making power to patients, their decisions lead to their psychological isolation. The perception of exclusive decision-making power is thus 'anti-communal,' because law is used to fracture the sense of social connections to the person most in need of societal care. To avoid these adverse consequences, law must acknowledge its own uncertainty when it intervenes in medical decisions and must therefore leave ultimate decision-making authority uncertain.[4]

These are the beginnings of an argument with significant ramifications for legislation and law. Palmer's communitarian argument is quite persuasive, made especially so by the moral troubles caused by biomedical research and technology. Not only do we have a vague definition of death, but incomplete understandings of what exactly constitutes good health and appropriate medical care. Uncertainties also arise from the very explosive quality of medical research; there is an ill-defined border between what may be considered a medical practice and what counts as a medical experiment. In essence, the medical techniques that we read of in newspapers or hear about from television have been so accomplished as to alter our moral perceptions, challenging our moral universe by subtly altering our moral conceptions. The locus of moral authority, and of moral responsibility, has been affected. This Palmer recognizes. The problem remains in law, however, that all legal discussion of medical hard cases has been stumbling in providing answers because it has been hobbled by the doctrine of informed consent. This, Professor Palmer believes, has a

4. *Id.* at 10.

substantive effect on proper medical hard case decision-making.

> A second problem is that the informed consent approach does not address the fact that physicians traditionally rely on silence rather than dialogue in their contacts with patients. Many physicians do not share their doubts with patients in the face of the inherent uncertainty of modern medical intervention, because such sharing is seen as contrary to the physician's basic image of what it means to be a professional. . . . [T]he current reliance on informed consent masks assumptions about professionalism, expertise, patient knowledge, and patient capacity to understand, assumptions that need to be examined critically before being incorporated into legal doctrine.[5]

This caveat gives Palmer breathing room to explore the ways law has grappled with problems posed by extreme advances of medical technology. By setting aside the doctrine of informed consent, Palmer can begin to seriously analyze these matters.

Palmer's institutional approach leads to a view of health as a "relational or social concept" rather than a pure and single objective state. As he notes, this institutional approach is more apt than an approach based on individual rights and informed consent, because broad social goals and rare social goods, as well as questions of individual liberties, have always been considered within the province of the courts.[6]

Given the vehicle of the institutional approach, we can travel quite a length in considering the relationship between law and medicine. More is involved in the relationship than a patient's rights, although we enjoy arguing over them. It makes little sense to posit an equal and undeniable right to the very best medical treatment without recognizing that medical resources are not only expensive, but are often enough in short supply and long demand. It makes little sense to talk of what needs rights fulfill, when one is irrecoverably comatose.

Legal means of dealing with question raising medical cases have traditionally meant liability rules and malpractice suits. These have often been straitjackets in handling such cases. Professor Palmer adroitly questions the value of liability rules in these instances, and he decides that they too strongly follow the path suggested by a rights-based approach and the doctrine of informed consent. More-

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5. *Id.*
6. *Id.* at 34.

over, they generally have a bad effect upon the practice of medicine because they inhibit physicians from suggesting difficult, risky procedures, and finally serve to demand an "objective" determination of one's medical possibilities and potential outcomes.[7] Liability rules hinder mutual trust, squashing the free flow of dialogue between patient and physician.

The institutional approach is made more credible by this criticism. Palmer convincingly demonstrates that its strength is subtle, its effect enormous, for the institutional approach he offers in *Law, Medicine, and Social Justice* better follows the social context of human decision making. I tend to believe, with Palmer, that one's most difficult questions are most wisely solved through consultation with other people involved in the same, or in a similar, project. Consultation is of real importance in indeterminate situations such as medical hard cases, where few roadmaps exist and few landmarks guide our path. The institutional approach radically reforms our notions about the doctor-patient relationship, and finally affirms a more significant role for the patient than that of silent and passive consenter or consumer of medical services. Palmer's wisdom is to look to the social context when considering tough decisions in difficult medical questions; this perspective is increasingly relevant, given that medical science threatens to become wildly amoral.

Dominating recent inquiry into the relationship of law and medicine has been discussion over treating the terminally ill patient. No other aspect is so sensational. No other element quite so vividly displays the differences between vocal adherents of a "right to die" and those equally voluable advocates of a "right to life." The paradigm case, pointed to as often as the full moon in August, is *In re Quinlan*.[8]

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7. *Id.* at 26. Many commentators have observed that liberalism requires "objective" knowledge. A forceful argument can be made that there *is* objective knowledge—an argument with a great deal of implication for public policy. The question is a haunting one. It can be demonstrated capably that just about everyone knows what is meant when one says "coat" or "nose" or "toes." The same easy consensus cannot be reached when words with a qualitative connotation, such as "strident" or "dignified," are used. In instances which are novel, sudden and unique, words and concepts become less apt. Medical hard cases are cases which defy ready practices, and, for this reason, they seem to defy ready rules and terms. *See* H. PUTNAM, REASON, TRUTH AND HISTORY (1981). "With the rise of science has come the realization that many questions cannot be settled by the methods of the exact sciences, ideological and ethical questions being the most obvious examples." *Id.* at 150. Some interesting constitutional implications of this can be found in M. PERRY, MORALITY, POLITICS, AND LAW (1988).

8. 70 N.J. 10, 355 A.2d 647 (1976).

Palmer discusses the implications of *Quinlan*, using the critical powers of his institutional approach, as well as the cases of Brother Fox, John Storar, and Claire Conroy.[9] Each of these cases has caused a stir among political commentators. In different ways, each underscores the failure of a rights-based legal approach in providing complete answers to medical hard cases. Each of these cases points to one grand fact. Much more is involved in the practice of medicine than manipulating a body to preserve the biological essentials of living. I believe Palmer is correct when he suggests:

> [D]eath, as part of the much larger concept of health, must be viewed primarily as a social rather than biological state that law simply confirms. By viewing death as social as well as relational, we will begin to see that caring for critically ill patients involves personal involvement—emotional, spiritual, and psychological—rather than the objective distance implied in our present use of the term 'health care.'[10]

The examples of Storar and Brother Fox both provide Palmer with critical targets; both demonstrate the legal difficulties involved with the popular "living will." Living wills are only infrequently prepared, but frequently unspecific and unsound. The confusion that has resulted stems from courts seeking to uphold "rational and unequivocal decision-making in the face of impending death."[11] The principle adversely affects those deeply involved with a critically or terminally ill patient: at the very time when those most concerned about an ill relative or friend feel the greatest urge to speak on his behalf, their honest concerns are shut from the legal and medical system. This radically affects the care that can be provided to patients. For Professor Palmer, the real problem of living wills is "conceptual, rather than procedural." Social isolation is the final result of such a legal pathway.[12]

Law, Medicine, and Social Justice is the start of a larger argument about the point and purpose of human life. While for centuries religious injunction caused a profound reverence for life; while since the Enlightenment, liberal, individualistic theories have strengthened a "preserve life at all cost" perspective, it is much less clear whether these values will continue to hold their effect. Ironically, this is a

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9. *In re Storar*, 52 N.Y.2d 363, 420 N.E.2d 64, 438 N.Y.S.2d 266 (1981); *In re Conroy*, 188 N.J. Super. 523, 457 A.2d 1232 (1983).

10. L. PALMER, LAW, MEDICINE, AND SOCIAL JUSTICE 73 (1989).

11. *Id.* at 80.

12. *Id.* at 90.

result of our very success with medical technique and with saving life.

In a fine recent work on ethics, moral philosopher James D. Wallace argues that a redefinition of death is necessitated by modern medical technology: a "wedge" has been driven "between permanent cessation of 'vital signs' and permanent loss of the capacity for doings and experiences."[13] This fractures our idea of death. Wallace presents an appealing contextualist reason for allowing the suspension of life preserving methods to the irreversibly damaged and irrecoverably comatose patients.

> The form of life characteristic of human beings is a complicated form of social life. A survey of our kind reveals that everywhere human life involves community, language, art, morality, politics, and cumulative knowledge, among other things. The capacities, physical and physiological, for living this form of life are many. Human beings learn the ways of their community, absorb whatever store of wisdom the community has, learn to adapt this store to their own particular circumstances and projects, and attempt to conduct their lives in accordance with all these things. A human being's participating in this form of life, the exercise of those capacities the possession of which is living, consists of episodes of doing and experiencing. One's life is a drama in which one is the protagonist. When the doings and experiences which make the drama end finally, one's life is over.[14]

Such a contextualist perspective resonates in *Law, Medicine, and Social Justice*. Without much self-examination in his book, it informs Palmer's analysis of nursing homes and hospices, malpractice and the legal care of children, medical specialization and medical hard cases. Palmer's book goes for a long, impressive stride across the fields of law and medicine, and it is to his credit that he manages to begin exploring so many issues in these areas. The institutional approach permits this analytical rapprochement.

It is fair to note that Palmer's *Law, Medicine, and Social Justice* must be considered only the first few steps at presenting a contextualist approach to these problems. Professor Palmer only develops the outlines of a general theory. This, however, is a bit of meringue in the face. A complete theory along these lines would have to include significant work in political and moral philosophy. Yet what is

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13. J. WALLACE, MORAL RELEVANCE AND MORAL CONFLICT 145 (1988).
14. *Id.* at 140-41.

troublesome about *Law, Medicine, and Social Justice*, is that no complete definition is ever finally provided for this institutional approach. Palmer is calling for a radical reformulation of our understandings of life, death, care and health. This is necessary prior to a larger change in our understanding of the justice of these matters. But without a firm definition, the institutional approach seems to be too much of a good thing, offering only positive returns. This oversight is serious; James Wallace's above quote well illustrates its significance.

Ironically, it is the need for a rethinking of our concepts of health, life and care that points the reader toward a more profound criticism of Palmer's institutional approach. Redefinition of these concepts necessarily involves moral philosophy. The way we understand ourselves, our actions and our relations, the way we conceive of others, is not only morally relevant but legally relevant as well. There is a tight practical and conceptual connection between morality and law. When Palmer argues in *Law, Medicine, and Social Justice* that his institutional approach relies upon law itself to contain sufficient resources to radically reform itself, the task of general redefinition of these terms—life, care, health and justice—point instead to ethics and ethical theory as the source of conceptual change. To a great degree, it is a matter of philosophy, of moral ontology, and not of law. Law cannot parthenogenically remake itself.[15]

Palmer suggests otherwise. The way Palmer speaks of the "formal institution of law" and of the "institution" of medicine highlights this criticism. Too often Palmer writes as if law and medicine were purely functional and formal institutions. He presents a positivist's sociology; his work suggests a positivist's view of society as a formal, rational, functional grouping of functional and mutually supportive institutions. Such institutions may be fully manipulated and changed under the auspices of law. According to Palmer:

> Adopting an institutional perspective would change the role of legal intervention in health care decisions dramatically. Judges, lawyers, legislators, and administrative officials would first seek to understand the social and organizational context of

15. The most popular discussion of this argument is found in Dworkins' criticism of legal positivism throughout his collections of essays. *See* R. DWORKIN, TAKING RIGHTS SERIOUSLY (1977). For more lucid discussions see J. FINNIS, NATURAL LAW AND NATURAL RIGHTS (1980); D. LYONS, ETHICS AND THE RULE OF LAW (1984). A study of the history of abolitionism is a fine way to begin doubting the easy idea that law has sufficient internal resources for grand structural change.

> the controversy before making any decisions regarding medicine. As legal decision-makers came to understand the larger social context, they would recognize that law's influence upon medicine as *practiced* is necessarily limited, but law's influence upon our *conception* of medicine's social role is potentially very great. Rather than seeking to regulate the individual doctor-patient relationship, law would aim to influence and direct the institutional structure of modern medicine.[16]

Although there are real problems in the sociology presented in *Law, Medicine, and Social Justice*, I believe Professor Palmer makes a convincing start in formulating a contextualist approach to law and medicine. Philosophers, worried metaphysicians, and "intellectual" politicians have endlessly considered the philosophical problems involved in reconciling a recalcitrant rights-philosophy to human reality. Yet for all the talk and bustle, pages inked and voices raised, there are rarely suggestions made which are both practical and illumined with a sense of justice. This is the true worth of Palmer's book: it should be considered a success simply for providing this roll-up-the-sleeves sensibility.

No one reading Palmer's book will be struck by much original, speculative philosophy and this should be considered a genuine weakness. Innovation is difficult to achieve. But these matters have been thoroughly considered elsewhere, and one can bet tall money that publishers next year will be offering more of the same old stew. *Law, Medicine, and Social Justice*, however, is of worth because of Palmer's open willingness to discuss the mechanisms of change, and to point out the practical ways to bring about remedies that are sorely needed.

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16. L. PALMER, LAW, MEDICINE, AND SOCIAL JUSTICE 9 (1989) (emphasis in original).