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BOOK NOTE

FRAGMENTS ON THE DEATHWATCH

LOUISE HARMON
BEACON PRESS, 1998

In *Fragments on the Deathwatch*, Louise Harmon poses the question "Who is the plaintiff in an assisted suicide case?" The choices presented to the reader are either the patient, who is terminally ill or in a "persistent vegetative state," or the members of the "deathwatch," a group of intimate friends and family who keep a vigil over the patient during the illness. Harmon is concerned about this issue because courts use the doctrine of "substituted judgement," whereby the court makes the decision that the incompetent patient would have made were she competent. By using "substituted judgment," the court makes the incompetent patient the plaintiff in an effort to make certain that the outcome of the case is what the patient would have wanted. The court uses this doctrine in recognition of the seriousness of the outcome: the patient will either remain on life support or be taken off life support and subsequently die. Whichever decision the court reaches, there is the potential that it is not what the patient would have wanted. By using "substituted judgment," however, the court avoids the risks inherent in permitting someone other than the patient to decide if the patient should live or die. Harmon is bothered by the fact that this method of decision making ignores the pain and wishes of those involved in the deathwatch. *Fragments on the Deathwatch* works through all of the questions, problems, and issues involved in making the members of the deathwatch the plaintiffs in assisted suicide cases. The book also makes suggestions as to what lawyers can do to alleviate the pain felt by members of the deathwatch.

The basic premise of Harmon's work is that humans "attend" to their dying by keeping a vigil over the person's departure from earth. This vigil kept over the dying is known as the "deathwatch." This tradition of the deathwatch has evolved over time, with different roles to play at different times: these roles depend on the social, economic, and medical circumstances of the people involved. No matter who the other participants in the deathwatch are (including friends, family, spiritual leaders, and doctors, to name a few common ones), the dying person plays the most important role. A significant event in the history of the deathwatch involved the move from dying at home to going to the hospital. Historically, the doctor (if and when called) was not to stand in the way of nature;

instead, he was simply to "obviate such sufferings as admit of mitigation."¹ Starting in the 1930s, however, people began going to the hospital to die because there were growing expectations that doctors could and would do something that would allow the patient to survive. The result of this change in location is that the deathwatch has almost disappeared. This is because the hospital is not hospitable to the members of the deathwatch: hospital rules may limit or even prevent visitors from attending the dying, as well as other rules that exist.

Harmon addresses two famous cases: Karen Quinlan and Nancy Cruzan. Karen Quinlan's case was the first case in which the deathwatch reached the court system. Karen was in a "persistent vegetative state," and her family's request to have her taken off life support was refused by the hospital. Her family brought suit, seeking a court order to allow assisted suicide. During the trial, the court refused to allow evidence offered by Karen's mother that Karen had commented, both about others and in general, that she would not want to be kept alive by machines. As a result of the court's decision not to allow Mrs. Quinlan's evidence into the trial, the court refused to order the hospital to take Karen off life support. Without the evidence offered by Karen's mother, the court, using "substituted judgment," did not have enough information concerning what Karen herself would have wanted. Therefore, the doctrine of "substituted judgment" is not effective where the court does not allow in pertinent information. The Quinlans wanted the deathwatch to end, and Harmon asserts that it was not right for the doctors to force them to keep their daughter alive.

The second landmark case which Harmon discusses was that of Nancy Cruzan. As in Quinlan's case, Nancy's parents wanted the deathwatch to be brought to an end, especially in light of the fact that their daughter may very well have been kept alive so long that she'd outlive them and die alone. The court in Cruzan again used the doctrine of "substituted judgment" to rule that sufficient intent on Nancy's part had not been shown; therefore, the court would not order her life support to be terminated. The court relied on the fact that Nancy had neither executed a living will nor designated anyone to make health-care decisions for her in the event she became incompetent. In the absence of these things, the court did not think it had been proven that Nancy would not want to be kept alive. As in Quinlan, the court ignored the pain and wishes of Cruzan's family, the members of the deathwatch.

Harmon points out that, when determining whether a patient will be allowed to die, courts use the doctrine of "substituted judgment" in order to make the decision that the incompetent person would have made had she been competent. This focuses on the patient and pushes aside the feelings of the members of the deathwatch. Harmon now sets out to determine who the plaintiff is in cases like Quinlan and Cruzan; she refers to them as "plaintiffs," in recognition of the fact that they are "persons in pain." She proposes that the plaintiffs are not the patients who are in a vegetative state; instead, they are the members of the deathwatch. The legal problems Harmon sets out to address involve determining who

¹ LOUISE HARMON, FRAGMENTS ON THE DEATHWATCH 12 (1998).

are the members of the deathwatch, what right of theirs has been infringed upon, and what remedy is appropriate.

With respect to who would constitute the plaintiffs, the author begins by dismissing the idea that the plaintiffs could only be the patient's nuclear family (i.e. husband, wife, dependent offspring). Instead, she points out that people's chosen families (i.e. close friends, gay relationships . . .) may be just as important to them as their biological family. Harmon feels that to only include the nuclear family as plaintiffs is to "implicitly sanction one pattern of family life and punish all others." Of course, the problem that arises is that the biological family may be in conflict with the chosen family. Further, there are many incentives, most important of which are financial, for family members to harm one another; the fear here being that the members of the deathwatch may not have the patient's best interest at heart. Harmon proposes a functional test to determine what constitutes "family;" this test focuses on "content, directness, durability, intensity, and frequency of the interaction between the dying person and the member of the deathwatch."² This test may leave some blood relatives out of the plaintiff group while including some "relatives" with no biological relation. The problem with this test is that it would be a significant amount of work for judges, who may not be qualified to apply it.

Harmon next addresses what she refers to as the "Yazoo doctrine," which she defines as the limitation of judicial concern to the rights of litigants who suffered an infringement on their individual rights. In other words, a plaintiff can only bring his own pain to court, not the pain of another (or of a class of persons). Harmon quickly dispenses with this problem, however; she states that this doctrine does not apply so much in the present legal time; the plaintiff need only be "injured in fact," which the court interprets expansively. In the current legal culture, where class actions are commonplace, the issue of who can be a plaintiff is not as stringent as it was in times past.

Harmon suggests that we no longer employ the "legal fiction" of pretending the patient is filing the suit; instead, we should recognize that the members of the deathwatch who are in pain are the ones filing suit. Further, Harmon points out that it is not possible to fabricate "intent" for someone who no longer has intent. The author hypothesizes that without the use of this legal fiction, there is a greater likelihood that the petition to terminate life support will be granted. This is because there is an extremely high evidentiary burden involved in showing the justification for the fictional intent of the patient.

At this point, however, the reader is led to the conclusion that all of this talk of plaintiffs and dispensing with legal fictions is not going to come to anything: the author acknowledges that the "cost" of dispensing with the legal fiction is too high. To begin, there is a serious risk of potential abuse. She states, ". . . hidden biases against certain forms of illness, disability, indigency, unattractiveness, or any other difference may be tacitly plugged into a utilitarian calculation

² *Id.* at 61.

that results in discrimination, or worse yet, extermination."³ It seems extremely distasteful to refer to the "appropriate remedy" as the death of the patient. Harmon also worries about the limits to remedy seeking: she fears that people will try to move into the tort theory of "negligent infliction of emotional distress caused by plaintiff's witnessing harm to another," and therefore seek money. Putting a price on the deathwatch is extremely distasteful.

Abandoning the idea of the members of the deathwatch as the plaintiffs in cases involving the right to die, Harmon now looks at what the law can do indirectly to alleviate the pain of the members of the deathwatch. Her first suggestion is that the law can redefine death. Currently, in law, as in medicine, biological death is the key; in other words, "whole brain death" is looked for in declaring an individual dead. Harmon points out that those who believe that death involves moral and spiritual aspects would look to the death of a person as a whole, meaning the death of both the mind and the body. Harmon does not propose a new definition of death, *per se*; instead, she would like to see "whole brain death" discarded in favor of a definition that requires "cessation of higher brain functions only." Harmon then engages in an interesting, albeit legally irrelevant, discussion about the soul and its implications for people's perceptions of death.

Harmon hypothesizes that the predominant attitude toward death is one of fear; people rarely talk about death even in the abstract, and almost never talk about their own death. Death therefore evolved into a taboo. She suggests that confronting the taboo would alleviate some of the "horrors" of the late twentieth century deathwatch. The problem that arises, however, is that the people who run the deathwatch, the medical profession, experience a profound taboo toward the subject of death. While Harmon finds this understandable given the cultural obsession with "beating death," she says it is not forgivable. It is up to the medical profession, according to Harmon, to confront the taboo: words must be found to communicate the fact of death so that a proper deathwatch can take place.

Harmon envisions the law's role in confronting the taboo of death talk. She points out that in dealing with the legal fiction of the patient's intent, the court has imposed a high evidentiary standard. As seen in *In re Westchester County Medical Ctr. ex rel O'Connor*, a case Harmon uses as an example, this standard requires the trier of fact to be persuaded that the "patient held a firm and settled commitment to termination of life support under the circumstances presented."⁴ Harmon points out that given the taboo involved in discussing death in general and one's own in particular, the law should defer to the members of the deathwatch and give weight to their words concerning what the patient expressed as their wishes. Many people do not know the legal requirements of instruments like living wills, and given the taboo surrounding death talk, they should not be

³ *Id.* at 85.

⁴ *Id.* at 133.

expected to have made remarks regarding a "settled commitment to termination of life support."

Harmon proposes that the law can "help create an environment in which a meaningful deathwatch can take place."⁵ This is how the law can help alleviate the pain of the members of the deathwatch. Harmon further proposes that lawyers must talk to the medical professionals who care for the dying and the architects who create and build the spaces in which people die. She suggests that these three professions, working together, can alleviate the pain of the members of the deathwatch. Further, lawyers can help people gain the right to die in the home, since this is the most conducive space both for the dying patient and for the members of the deathwatch. Harmon says that the concept of dying at home already exists in the hospice care system; further, the pain of the members of the deathwatch is recognized and addressed in the sense that counseling is provided both before and after death.

Harmon's central proposal is that lawyers can help alleviate the pain of the deathwatch by lobbying for hospice care. Harmon proposes that the first thing lawyers could do is get involved in projects that would create more hospices. The second thing lawyers could do is be instrumental in developing a national system to make hospice care available to those who cannot afford to pay for it. Third, lawyers could help develop licensing standards for other professionals who work in hospices to ensure quality care and to avoid the risk of abuse by greedy individuals who might want to "get rich quick from the death racket." Finally, lawyers could help fashion creative solutions that combine some form of hospice care with already existing health care facilities. Harmon gives the example of the Mayo Clinic, which "discharges" terminal patients to a "hotel" across the street for a "home-like" experience. She states that these creative solutions require complicated negotiations, exchanges of promises and expectations, and therefore the skill and imagination of legal minds is required.

One of the most significant aspects of Harmon's books is that it helps lawyers sympathize and empathize with the members of the deathwatch. Harmon's personal stories of deathwatches are an effective way to make sure the reader understands the emotions and legal problems involved. The fact that most of the book is written in footnotes, however, makes for difficult and interrupted reading. The suggestions that Harmon makes for how lawyers can help create an environment in which a meaningful deathwatch can take place come late in the book; further, most of the book deals with psychological and sociological issues rather than focusing on the lawyer's role. When Harmon does make suggestions of how the lawyer can, in practice, be part of the deathwatch, the suggestions do not seem to be the job of lawyers. While it is true, for example, that there are "complicated negotiations" involved in the building of hospices, licensing of medical professionals, and obtaining care for those who cannot afford to pay for it, lawyers will only be involved in these cases if hired by specific individuals. In their every day practice, lawyers will most likely not have the time or re-

⁵ *Id.* at 147.

sources to independently lobby for these changes. Hopefully, Harmon's book will have the effect of encouraging lawyers to get more involved in community projects and committees which will help alleviate the pain associated with the deathwatch.

Christie M. Charles