

LEGISLATING MEDICAL ETHICS

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LEGISLATING MEDICAL ETHICS

*A Study of the New York State
Do-Not-Resuscitate Law*

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In Memory of

Freda Baker
and
Irving Strosberg MD

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PREFACE

The present volume would never have come into being had not the editors of the Philosophy and Medicine series, H. Tristram Engelhardt, Jr. and Stuart F. Spicker, enthusiastically endorsed our vision of taking the disparate papers on the New York DNR law and transforming them into a comprehensive case study. Nor would there have been a volume had not the contributors willingly come to Union College to share their research, and graciously consented to revise their findings to fit into the case study format we envisioned. Working side-by-side with us to assist with the transformation process has been our former student, Jonathan Bynum, whose editorial and philosophical insights proved so invaluable over the course of the year that we felt that he had earned the right to be recognized as associate editor.

The success of the conference itself must be credited to the organizational skills of Marianne Snowden, who – with the assistance of Deborah Atwood, Elizabeth Cole, Sean Hornbeck, Philip Oates, Rhonda Sheehan and Eugene Spanguolo – kept everything and everyone wonderfully on track.

We would also like to express our gratitude to the Union College administration and staff, particularly former President John Morris and Deans James Underwood and Terry Weiner, for their generous support of the conference. The conference was also supported by the Critical Care Education Foundation of the Albany Medical College, the Dana Foundation, and the Union College Humanities Faculty Development and College Research Funds.

We owe a particular debt of gratitude to Dr. David Axelrod, former Commissioner of Health of the State of New York and Chairman of the New York State Task Force on Life and the Law. Dr. Axelrod welcomed public debate of the DNR law and contributed greatly, not only to shaping the Task Force and the DNR law, but also to the DNR assessment conference upon which this volume is based. Tragically, during the time the volume was being prepared, Dr. Axelrod fell victim to a stroke. Peter Millock of the Department of Health was kind enough to act as Dr. Axelrod's surrogate, for purposes of this volume, and to

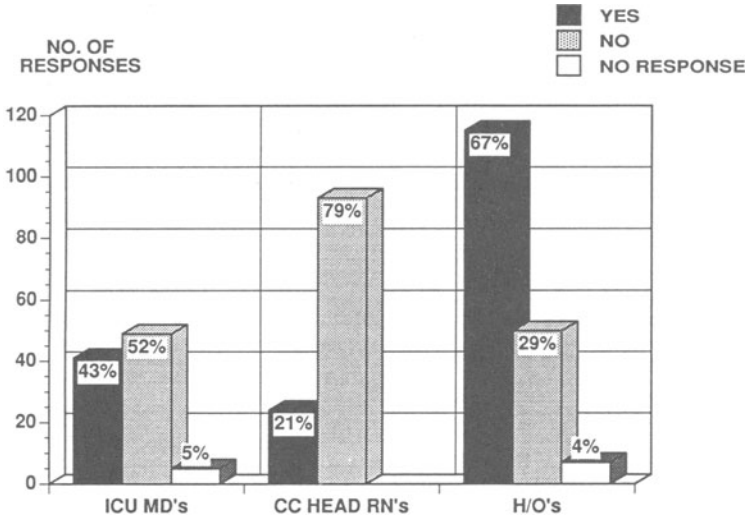
R. Baker & M.A. Strosberg (eds.), Legislating Medical Ethics: A Study of the New York Do-Not-Resuscitate Law, xi–xiii.

review the transcript of Dr. Axelrod's remarks at the conference in his stead.

In closing we again extend our gratitude for the generous cooperation of everyone who made this study of DNR policy and the New York DNR law possible – editors, contributors, the Department of Health, the Task Force, and our colleagues and associates at Union College – most of all, we thank everyone who worked with us on the manuscript, Rita Badami, Dominick Bizzarro, and, once again, Marianne Snowden.

Schenectady, New York
January, 1995

Robert Baker
Martin Strosberg



**Would clinicians be better off had the
NYS Legislature
not passed the DNR Law?**

Fig. 1.

INTRODUCTION

From the moment the New York Task Force on Life and the Law published its proposals for a law regulating Do-Not-Resuscitate orders in May 1986, the proposals excited public and scholarly interest. Not unexpectedly, when Governor Mario Cuomo signed the statute into law, on August 7, 1987, several research teams began to initiate studies of the law's impact. As members (with our colleague I. Alan Fein, Chief of the Surgical ICU of Albany Medical Center) of a long-standing research team which focused on critical care medicine, we too were curious about the impact of the new law. With the assistance of the Task Force counsel, Robert Swidler, we assessed the nature of the other research projects under way: the empirical studies of the impact of the law on the writing of DNR orders being conducted by Kamer and McClung; the study of the law's impact on the demographics of the populations for whom DNR orders are written by Ahronheim, Maheswaran, and Rosenberg; and the extensive survey of physicians' attitudes towards the law conducted by the American College of Physicians.

We decided to study the law's impact on the less readily detectable aspects of clinical practice: slow and show-coding; undocumented DNR orders; and, most importantly, clinician-patient discussion of the CPR/DNR decision. To measure these elusive effects, we knew we needed a non-conventional tool, and so we turned to an expert in moral psychology, Lawrence Ponemon. Together we developed a questionnaire which allowed us to compare clinicians' estimates of the likelihood that certain practices (ranging from discussions with patients, to slow/show coding) would occur on their ICU prior to, and after, the passage of the DNR law. The questionnaire was also adaptable for use outside of New York State, allowing us to compare the 1988 New York DNR reforms with comparable reforms implemented in the same year at hospitals in the rest of the nation as a response to changes in the Joint Commission on the Accreditation of Health Care Organizations (JCAHO) accreditation requirements.

On completing our study, we – along with other research teams – began to disseminate our findings at meetings, in publications, and to the Task

Force. Normally, the research cycle ends with the publication of articles. In this particular instance, however, the various research teams felt that more was needed. A complete assessment of the impact of New York's DNR law would require a comprehensive analysis of the various studies. So the different research teams agreed to meet with the Task Force and with other interested parties (administrators, doctors, lawyers, legislators, nurses) on September 10 and 11, 1990, for an assessment conference at Union College (which lies in the state's Capital District and is strategically located equidistant from the state's major population centers). The papers presented at that conference not only led to a revision of New York's DNR law, they also constitute a detailed case study of the effects of legislating medical ethics. In this volume we attempt to present to readers, not only most of the papers delivered at the conference, but a documentary history of the DNR debate, so that they can view New York's experiment with a DNR law as the outcome of decades of debate and policy initiatives aimed at the bioethical reform of CPR/DNR practices.

Section One provides the reader with the background to the law and introduces the reader to the controversies surrounding it. Prefacing the section is executive summary of the law, as it was proposed by the Taskforce (but most of the documents referred to in this section will be found in the appendix, including the New York Medical Society policy on DNR, and the President's Commission's findings on DNR). Martin Strosberg then reviews the process by which the Taskforce's proposed statute was altered first by the legislature, and then through implementation process, and ultimately by amendment. Robert Baker follows with a paper that reviews the evolution of DNR orders themselves from their initial incarnation as slow codes on the clinic floor – in effect, a form of clinician civil disobedience – to their institutional legitimation as “no code” policy statements, to their endorsement by the American Medical Association and other professional organizations, to the legitimation of those DNR orders which were based on patient or surrogate consent – but not those based solely on the futility of CPR – by such bioethical bodies as the President's Commission on Ethical Problems in Medicine and Biomedical and Behavioral Research and the Hastings Center. Baker also reviews the New York Courts' unique (some might even suggest, *recondite*) rulings on surrogacy and explains why they led New York to become the first and one of only a few States to pass a statute regulating DNR orders. He then summarizes the controversies the law

generated, reviews the empirical studies of its impact, and reflects on the lessons to be learned from New York's bold experiment with legislating medical ethics – its implications for bioethical policy-making in general and for DNR orders in particular.

Section Two is designed to represent the controversy provoked by the DNR law. It opens with a paper by Tracy Miller, Executive Director of the Taskforce, who challenges Baker's interpretation of the law and its impact. We have also reprinted one of Jane Greenlaw's early critiques of the law, as well as critique by another lawyer, George Annas. Their position is responded to by Taskforce Chairman David Axelrod's who rejects their assessment as premature and suggests that the methods used in New York to deal with the DNR issue have "really set the standard for dealing with some of those major...ethical issues within the entire U.S."

Yet, it is evident from the case studies in Section Three, that a variety of problems marred the implementation of the law. Hospital attorneys, like Carolyn Antonelli, had to devise forms to implement the complexities of the documentation requirements. Moreover, as is clear from the tragic events related by Deborah O'Brien and Timothy Quill, there were initially gaps in the law's coverage. Perhaps most awkward of all, as Carol Clay points out, was the writing of DNR order for developmentally disabled patients (which is also discussed by Lawrence Faulkner). Yet for many physicians, represented here by David Finley, the law had an immediate and positive effect on medical practice.

Section Four contains consists of five empirical studies of DNR in New York, prior to and after the implementation of the law. It opens with Robert Zussman's compelling and detailed study of written DNR orders, which emphasizes the symbolic character of the DNR order. The next two studies, by Russell Kamer and John McClung, and by Judith Ahronheim and her associates, analyze the impact of the law on hospital practice. Timothy Quill provides us with a comparative analysis of the impact of the law at a hospital which had voluntarily opted to comply with a consent-based DNR policy prior to the law's implementation. Norton Spritz's study for the American College of Physicians, and the study we ourselves conducted with Virginia Dersch, I. Alan Fein, *et al.* explores clinicians' assessments of the law's impact. Spritz's study surveys *internists'* attitudes towards the law, ours analyzes *critical care directors'* estimates of the likelihood of discussion, documentation and consent to DNR before and after mandatory bioethical reform both in New York and nationally.

In Section Five, *Retrospection and Reflection*, there is a spirited exchange

between Tracy Miller, Executive Director of the Task Force on Life and the Law, and co-editor Robert Baker. Miller again challenges Baker's interpretation of the impact of the DNR law and the methodology used in the Union College Study; Baker replies, analyzing all five empirical studies and offering a comprehensive interpretation of the impact of the New York DNR law.

The editors are grateful to everyone who contributed to this volume and to the conference on which it is based, including the staff of the Task Force, who, at every level, from Commissioner David Axelrod, to various Task Force members, to Director Tracy Miller, to Counsel Robert Swidler, were open to discussion, willing to engage in debate, and eager to suggest interpretations.

Robert Baker
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