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Richard F. Duncan*

Dedication of the Medical Jurisprudence Symposium

> If facts are changing, law cannot be static. So-called immutable principles must accomodate themselves to facts of life, for facts are stubborn and will not yield.[1]

The human race is presently engaged in a technological revolution of unsurpassed proportions. At home, this revolution is marked by video cassette recorders, video disc players, video games, personal computers, microwave ovens, and the fear of nuclear devastation being brought on by the unthinkable war. In the legal profession, computers and word processors have made complex litigation, office practice, and research more manageable (if not less expensive), alchemized lawyers and law professors into typists, and replaced the venerable legal pad with raucous electronic printers.[2]

In the medical profession, the impact of technology on our society has been startling, and is threatening to outrun our ability to respond through legal institutions to the profound questions raised by the New Medicine. Perhaps one measure of the contemporary significance of the New Medicine and medicolegal issues is their coverage in the national news media. In this regard, simply reflect on recent press coverage of the late Barney Clark and his artificial heart, the plight of victims suffering from Acquired Immune Deficiency Syndrome (AIDS), the continuing saga of the abortion controversy in the courts, little Baby Jane Doe's struggle for life, and cerebral palsy victim Elizabeth Bouvia's attempt to obtain a court order requiring Riverside General Hospital to provide

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1. FRANKFURTER, *The Zeitgeist and the Judiciary*, in LAW AND POLITICS: OCCASIONAL PAPERS OF FELIX FRANKFURTER, 1913-1938, 6 (1939). Of course, traditional values with respect to the nature of man and his relationship to the institution of the family are deeply rooted in our society and are not easily displaced.
2. Indeed, a colleague of mine recently entertained us in the faculty lounge with a story of an associate of his who boasted that "not one piece of paper" was to be found in his computer-equipped office.

palliative care and recognize her right to starve herself to death.[3] This dedication will briefly describe only a few illustrative examples of the many complex medicolegal issues facing modern society.

The constitutionalization of the abortion ideology continues to be one of the most important and divisive legal and ethical issues of our times.[4] And recent developments in medical science lessening the medical risks to the gravida of various abortion procedures[5] and pushing backward toward conception the point of fetal viability[6] have made the abortion question all the more difficult. Justice O'Connor took note of these developments in her thoughtful dissenting opinion in *Akron v. Akron Center for Reproductive Health*,[7] and concluded that the trimester (or three-stage) approach, which was applied by the Court to the abortion liberty in *Roe v. Wade*[8]

3. *See, e.g., Death Agonies: Baby Doe and Bouvia (Cont'd.)*, TIME, Jan. 9, 1984, at 44; *Gay America: Sex, Politics and the Impact of AIDS*, NEWSWEEK, Aug. 8, 1983, at 30; *An Incredible Affair of the Heart*, NEWSWEEK, Dec. 13, 1982, at 70.

4. *See* Simopoulos v. Virginia, 103 S.Ct. 2532 (1983); Planned Parenthood Ass'n of Kansas City v. Ashcroft, 103 S.Ct. 2517 (1983); Akron v. Akron Center for Reproductive Health, Inc., 103 S. Ct. 2481 (1983); Noonan, *The Root and Branch of* Roe v. Wade, 63 NEB. L. REV. 668 (1984). The *Akron* case, which struck down a number of provisions of an Akron ordinance regulating the performance of abortions, seemed to signal the nearly absolute nature of the abortion liberty when it invalidated, as impermissibly vague under the due process clause of the fourteenth amendment, a provision of the Akron ordinance that required physicians performing abortions to "insure that the remains of the unborn child are disposed of in a humane and sanitary manner." 103 S.Ct. 2481, 2484 (1983).

5. Since *Roe v. Wade* was decided, the safety of abortions performed during the second-trimester of pregnancy has increased significantly. For example, in *Akron* the Court cited statistical evidence demonstrating that the death-to-case ratio for second-trimester abortions fell from 14.4 deaths per 100,000 in 1972 to 7.6 per 100,000 in 1977. 103 S.Ct. 2481, 2496 n.22 (1983). This and other medical evidence of the relative safety of second trimester abortions persuaded the *Akron* Court to invalidate, as an unreasonable interference with "a woman's constitutional right to obtain an abortion," a provision in the Akron ordinance requiring abortions to be performed in a hospital after the end of the first trimester. *Id.* at 2497.

6. Justice O'Connor, dissenting in *Akron*, pointed to medical evidence of increasingly early fetal viability and concluded that "[i]t is certainly reasonable to believe that fetal viability *in the first trimester of pregnancy* may be possible in the not too distant future." *Id.* at 2507 (emphasis added).

7. 103 S.Ct. 2481 (1983).

8. 410 U.S. 113 (1973). *Roe* held that the abortion liberty is a fundamental right that can be regulated only on the basis of a "compelling" state interest, *id.* at 153-56; that the state's interest in protecting the health of the gravida becomes "compelling" at approximately the end of the first trimester, because medical evidence existing in 1973 established that "until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth," *id.* at 162-63; and that the state's interest in protecting the "potential life" of the unborn child becomes "compelling" at viability, "because the fe-

and reaffirmed by the majority in *Akron*, is "clearly on a collision course with itself."[9] What does the future hold for the abortion issue? What should be the rights of the unborn as the point of viabil-

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tus then presumably has the capability of meaningful life outside the mother's womb." *Id.* at 163-64. Thus, after the end of the first trimester, the states may regulate abortion in ways that are reasonbably related to maternal health, and, after the point of fetal viability, the states may regulate or even prohibit abortion to protect the life of the unborn child, "except where [abortion] is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." *Id.* at 164-65. The Court's recognition of the state's interest in protecting the life of the viable unborn child is cruelly deceptive, however, because Justice Blackmun's view of the Constitution demands that the viable child's right to life must yield to his or her mother's interest in "health," a word that was defined in *Doe v. Bolton* in terms of maternal well-being "in the light of all factors—physical, emotional, psychological, familial, and the woman's age. . . ." 410 U.S. 179, 192 (1973). *See also* Colautti v. Franklin, 439 U.S. 379, 387-88, 400 (1979) (striking down on vagueness grounds a post-viability standard of care provision).

In his excellent book on abortion in America, Professor John T. Noonan, Jr., summarized succinctly the almost absolute nature of the liberty of abortion as constitutionalized in *Roe* and *Bolton*:

> For the nine months of life within the womb the child was at the gravida's disposal—with two restrictions: She must find a licensed clinic after month three; and after her child was viable, she must find an abortionist who believed she needed an abortion. When the full dimensions of the liberty were realized, the liberty was little short of unlimited.

J. NOONAN, A PRIVATE CHOICE: ABORTION IN AMERICA IN THE SEVENTIES 12 (1979). For a critical discussion of the holding and reasoning of *Roe*, see Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973).

9. Akron v. Akron Center for Reproductive Health, 103 S.Ct. 2481, 2507 (1983). Justice O'Connor explained her criticism of the *Roe* trimester approach as follows:

> As the medical risks of various abortion procedures decrease, the point at which the State may regulate for reasons of maternal health is moved further forward to actual childbirth. As medical science becomes better able to provide for the separate existence of the fetus, the point of viability is moved further back toward conception. Moreover, it is clear that the trimester approach violates the fundamental aspiration of judicial decisionmaking through the application of neutral principles "sufficiently absolute to give them roots throughout the community and continuity over significant periods of time. . . ." A. Cox, The Role of the Supreme Court in American Government 114 (1976). The *Roe* framework is inherently tied to the state of medical technology that exists whenever particular litigation ensues. Although legislatures are better suited to make the necessary factual judgments in this area, the Court's framework forces legislatures, as a matter of constitutional law, to speculate about what constitutes "accepted medical practice" at any given time. Without the necessary expertise or ability, courts must then pretend to act as science review boards and examine those legislative judgments.

Id.

ity moves closer to conception? How will personnel changes on the Supreme Court impact on the issue?

Another issue that challenges the professional imaginations of today's physicians and lawyers is the propriety of withholding medical treatment from defective newborns. Suppose, for example, that a child is born suffering from two defects, Down's Syndrome (or "mongolism"), a condition resulting in mental retardation the precise extent of which cannot be determined in early infancy,[10] and a tracheoesophageal fistula (or an incomplete development of the passage from the mouth to the stomach), a surgically correctable condition that prevents the child from receiving oral nourishment.[11] How should the law respond when the parents of the handicapped infant and the attending obstetrician choose to forego corrective surgery for the esophageal condition, a course of treatment that will lead inevitably to the death by starvation or pneumonia of the child? The Indiana Supreme Court recently upheld lower court rulings that recognized the right of the handicapped child's parents to follow a medically recommended course of non-treatment for the infant.[12] The untreated child died of starvation one day later.[13] Obviously, this and similar cases raise many significant legal and ethical questions concerning the rights and interests of parents, handicapped infants, physicians, and society with respect to the decision to provide or withhold life-sustaining medical treatment. How should these questions be answered?

At the same time that advances in technology and medicine have challenged the legal profession to respond to significant questions concerning the right to life of the unborn and of handicapped infants, a variety of medical techniques facilitating conception have provoked serious legal and ethical debate concerning artificial, or noncoital, conception and its impact on the institution of the family. These techniques include artificial insemination of a

10. *See* Comment, *Baby Doe Decisions: Modern Society's Sins of Omission*, 63 NEB. L. REV. 888, 889 n.3 (1984).

11. *Id.* at 890 n.4.

12. *See In re* Infant Doe, No. GU8204-004A (Cir. Ct. Monroe County, Ind., April 10, 1982). Other recent cases dealing with non-treatment of handicapped newborns include Weber v. Stony Brook Hosp., 60 N.Y.2d 208, 456 N.E.2d 1186, 469 N.Y.S.2d 63 (1983), and American Academy of Pediatrics v. Heckler, 561 F. Supp. 395 (D.D.C. 1983). For a discussion of the many complex issues raised by the *Infant Doe* case, see Comment, *supra* note 10, at 893-929. *See generally* Longino, *Withholding Treatment from Defective Newborns: Who Decides, and on What Criteria*, 31 U. KAN. L. REV. 377 (1983); Robertson, *Involuntary Euthanasia of Defective Newborns: A Legal Analysis*, 27 STAN. L. REV. 213 (1975); Smith, *Quality of Life, Sanctity of Creation: Palliative or Apotheosis*, 63 NEB. L. REV. 709 (1984).

13. *See* Comment, *supra* note 10, at 889-93.

female with the semen of either her husband or a third-party donor; surgical removal of ova from a woman which ova are then fertilized in vitro—or externally—with the sperm of her husband or a donor and then implanted in the uterus of the woman; and surrogate mothering, which is usually sought when the female partner of a married couple is infertile, and which typically involves a contract for reproductive services with a third party—the surrogate mother—who agrees to be artificially inseminated with the husband's semen, to carry the child to term, and to relinquish the baby at birth to the contracting couple.[14] As one commentator has pointed out, the technology of conception has created "the possibility of collaboration among six different people, excluding medical personnel, in the conception, bearing, and rearing of a single child."[15] Should these techniques be made available at all? If so, should their availability be limited to infertile married couples? Which of the reproductive collaborators should be given parental rights and responsibilities? Should the contract between the surrogate mother and the rearing parent or parents be legally enforceable? What will be the social and psychological effect of noncoital reproduction on children engendered in this fashion? When conception occurs externally, should the law permit the fertilized egg to be destroyed or experimented with before implantation?[16] Looking into the future, should we allow genetic engineering of sperm, egg, or embryo for the purpose of producing a child with certain genetic traits?[17] What difficult questions of property and inheritance law would be raised if a widow were to be artificially inseminated with the frozen semen of her deceased husband?[18]

Obviously, the list of issues spawned by the technological

14. *See* Robertson, *Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth*, 69 VA. L. REV. 405, 421-23 (1983); Wadlington, *Artificial Conception: The Challenge for Family Law*, 69 VA. L. REV. 465, 468-76 (1983).
15. Robertson, *supra* note 14, at 423. This figure would include an infertile couple, the donor of the egg, the donor of the sperm, and the gestational donor or surrogate herself together with her husband. *See id.* at 423 n.49.
16. Unlike in the case of abortion, an embryo conceived by in vitro fertilization is external to the mother until implantation. Therefore, the validity of rules protecting the embryo against destruction prior to implantation is not necessarily controlled by *Roe* and its progeny. However, one commentator has recently argued that the right of procreative autonomy ought to include the right "to abort fetuses or to refuse to implant embryos with undesired gender or genetic traits." *Id.* at 431.
17. Although noting that the technology for such genetic engineering is not a realistic possibility in the foreseeable future, one commentator recently concluded that the right of procreative autonomy ought to allow parents to manipulate genes or reproduction in ways that are not harmful to the children. *Id.* at 431-32.
18. *See* W. WADLINGTON, J. WALTZ & R. DWORKIN, LAW AND MEDICINE: CASES AND MATERIALS 786 (1980); Leach, *Perpetuities in the Atomic Age: The Sperm*

revolution in medicine is endless. More significantly, in answering these questions of life and death we are engaged in the process of defining the very essence of our society, and history will judge us accordingly. The situation clearly cries out for serious thought, discussion, and scholarship.

In ancient Greece, a symposium was a social gathering where participants engaged in intellectual discourse. The Nebraska Law Review's Medical Jurisprudence Symposium seeks to be a gathering place for scholars to exchange ideas about the interface of law and medicine. The tendency of the law to lag behind advances in medicine will only be remedied by efforts, such as that undertaken in this Symposium, to bridge the gap between legal institutions and medical technology.

I am proud that the Nebraska Law Review has decided to respond to this challenge with its Medical Jurisprudence Symposium.

Bank and the Fertile Decedent, 48 A.B.A. J. 942 (1962); Wadlington, *supra* note 14, at 500-01.