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Edited by

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PREFACE

This is the sixth special issue of *Current Legal Problems* to appear. It is the first to be based on a series of seminars. These were held in October and November 1987. All seven contributors read prepared papers, after which valuable debate ensued. The papers are reproduced here, more or less in the form that they were given.

University College is particularly grateful to those who gave papers and to other distinguished participants who gave of their time. In particular, I would like to thank Dr. Raanan Gillon, the editor of the *Journal of Medical Ethics*, Dr. John Havard and Dr. John Dawson of the British Medical Association, Chris Heginbotham, the Director of MIND and Professor Christina Lyon of Keele University who were kind enough to agree to chair sessions, as well as a number of colleagues who helped me run the seminars, particularly whilst I laboured with the handicap of a broken leg. Bob Hepple, Ian Dennis, Dawn Oliver, Rodney Austin and Isobel Gurney deserve especial mention. The preparation of a series like this involved a lot of work which was rendered the easier with Suzy Hoey's able assistance. To her also I am extremely grateful.

M.D.A. Freeman
January 1, 1988

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Introduction: Legal and Philosophical Frameworks for Medical Decision-Making

M.D.A. FREEMAN

This special issue of *Current Legal Problems* is the first to emerge from a series of staff seminars. The seminars, seven in all, took place in the Autumn term of 1987.

The interface between law, medicine and philosophy which, in different ways, each of the essays in this volume explores is indubitably one of the most significant of current legal problems.[1] Science, in particular but not exclusively bio-technology, has given doctors tools to work miracles, to cause life and to prolong it. The ethical dilemmas to which this gives rise are both manifold and intractable.[2] Decision-making cannot be governed by consensus for clearly there is none. There may be agreement on such fundamental principles as the sanctity of life but conflict remains on the content to be attached to such a principle. Many who oppose abortion favour capital punishment.[3] The ultimate decisions cannot be left to doctors alone. But doctors are expected to provide answers. Lawyers and philosophers can debate the questions involved endlessly, but doctors must take decisions, often there and then.

They work within the framework of the law. In Britain this is largely the common law because Parliament has not found it easy to legislate in these sensitive areas. The Abortion Act of 1967 and the Surrogacy Arrangements Act of 1985, the former now a largely-discredited compromise which has failed to provide answers to problems raised by new techniques,[4] the latter a largely irrelevant panicked measure,[5] are the two main examples of statutory intervention. The Human Tissue Act 1961 is a third example. But there have been many more attempts to legislate which have foundered because of profound moral conflict.[6] There are areas in which legislation is urgently needed (for example, to regulate embryo research, a fact recognised by the Government in

a White Paper[7] published after the conclusion of the seminars): there are others in which control through self-regulation may be preferable, codes published by the British Medical Association or guidance by the Voluntary Licensing Authority. But these too can give rise to controversy, as witness the *Gillick*[8] saga or the conflict in 1987 between the VLA and the Humana Wellington Hospital on the number of pre-embryos transferred to the woman's uterus and on ovum donation between sisters and other close relatives.[9] A statutory licensing authority, as advocated in the recent White Paper,[10] may have more clout, but is unlikely to eliminate such conflict. Even where there is legislation it is surprising to discover how many issues of moral controversy remain. Thus, despite, or arguably because of,[11] legislation on mental health,[12] the question as to whether anyone could give consent to a mentally handicapped adult being sterilised fuelled the fires of controversy in 1987[13] and still remains a matter of profound legal and moral concern. It is reflected in two of the papers in this volume.[14]

But working within the framework of the common law is itself fraught with problems. Many of the issues thrown up by biomedical advances elude the ingenuity or the skills of lawyers. Precedent has an important role to play in areas of property and commerce, but often seems to obstruct solutions where novel ethical questions are posed. It is by nature a conservative doctrine and the reference back of new problems to old concepts, practices and institutions often can have a distorting effect. We can stretch the law of adoption (the ban on money changing hands, for example) to encompass surrogacy arrangements[15] or the law of perpetuities to embrace the stored frozen embryo (*en ventre sa mère* seemingly becoming *en ventre sa frigidaire!*)[16] but are we wise to do so? Lord Reid did not have matters as contentious as these in mind when, in 1969, he distinguished "lawyer's law" from "cases which directly affect the lives and interests of large sections of the community and on which laymen are as well able to decide as are lawyers"[17] but in his terms the problems spawned by medical developments would come into the latter category and show, in effect, how facile the distinction is, for who could pretend that lay persons are as well able to find solutions to the questions on the margins of life and death that now confront us? The limits of the common law are well-illustrated in Andrew Grubb's essay: but the limits of alternatives are also all too painfully obvious. If the courts have reached an impasse on such matters as informed consent or on what should be compensated when a sterilisation operation fails, who is to step into the breach? Are these matters we can entrust to a legislature without the assistance of a research and

reform body? And is the Law Commission, the usual remit of such tasks, composed as it is solely of lawyers, an appropriate forum for the debates involved? It has itself, on previous occasions, admitted that it can offer us more than a "field of choice,"[18] and we may doubt whether on the profound moral questions raised by medical progress it would necessarily even choose the correct field.

It is difficult to see a legal route out of this "moral quagmire." The establishment of a standing commission, composed of lawyers, doctors, philosophers, theologians and other disciplines, as advocated by Ian Kennedy[19] is part, perhaps an important part, of the answer. But the creation of structures is only as valuable as the expertise contained within them. Of course, inter-professional collaboration is important. "No man is an island," and we can all profit from the insights of other disciplines, as those of us who attended the seminars constantly found. Genuine inter-professional debate is not easy to attain, a fact testified to by anyone who has read the reports of inquiries into child deaths from Colwell[20] to Carlile[21] and Henry.[22] There is always the danger that it can lead to a broadening, but not a sharpening, of responsibility.

It is as well to be reminded that the problems confronting us in Britain are shared by the medical and legal professions as well as the philosophers of other countries.[23] The transplantation of solutions to ethical problems is far from straightforward but, where the countries have approximately similar cultures and philosophies, we should not ignore the work done in them. The Dutch experience with euthanasia legislation,[24] New Zealand's with no fault liability (discussed in Sheila McLean's paper, based on her own research in New Zealand),[25] the USA's with a compulsory sterilisation programme, which I discuss, are all valuable pointers. The Canadian Supreme Court decision in *Re Eve*,[26] the "Baby M" surrogacy litigation,[27] the US and Commonwealth case law on wrongful life (analysed in Grubb's essay) the *Quinlan*[28] and *Bouvia*[29] cases are precedents we should study, if only to profit from the mistakes of others.

The law is an indispensable framework but it is not some neutral tool wielded in an apolitical way by disinterested players. It is very much a social product, a reflection of the power of particular interest groups, economic, religious and professional. The political economy of decision-making in the area of medical law comes sharply into focus when health resource allocation is questioned,[30] as happened in two widely-published affairs during the period of the seminars. In the *Harriott* case,[31] an ex-prostitute, denied IVF treatment because of her history, unsuccessfully sought judicial review of the decision to take her off the programme. In the affair

over a "hole-in-the-heart" operation for a six-week-old baby,[32] litigation was brought (once again unsuccessfully) to force the hands of the health authority. But it is constantly present, as the work of Derek Morgan,[33] including his paper in this volume, amply illustrates. As elsewhere, ideology is cloaked by framing solutions as inevitable consequences of unquestioned and supposed unproblematic legal institutions such as the sanctity of contract and private property. But how well do these concepts fit, and what is the significance of trying to fit them, to the "sale" of a baby or rights over an embryo? How useful are notions of agency when the principal is mentally handicapped or comatose?

All the questions discussed in these papers are matters of ethics, they are about the decisions that we should take, about matters of right and wrong.[34] Should we permit involuntary sterilisation, is research upon embryos morally justifiable, of what moral significance is the "living will" of the terminally ill patient,[35] should we allow assisted reproduction and, if so, what limits should we put on the doctors, does negligence and therefore fault have a part to play in the medical setting? It would be idle to pretend that philosophers have the answers to these questions. They have answers and different philosophies, most obviously utilitarianism[36] and Kantianism,[37] the one concerned with a maximisation of welfare, the other with (in contemporary jargon) "taking rights seriously,"[38] have different answers. It would also be rash to ignore the political ideologies embraced by particular philosophies. Nor are philosophical statements necessarily always internally consistent. One of the more disappointing features of the Warnock report[39] is the incoherence of its philosophy, at times informed by utilitarian considerations, at other by deontological,[40] at times firmly wedded to autonomy, at others adopting a paternalistic or moralistic stance.[41] This leads it into the flabbiest of reasoning, as where it concludes that surrogacy (for the fertile) is "totally ethically unacceptable"[42] without telling us whose ethics have imposed this judgment or offering (for example) any appreciation of why some women might find the use of surrogates convenient. Instead it supports its objection by resort to classical Kantian argument (people should not "treat others as a means to their own ends"),[43] an argument curiously overlooked in its discussion of embryo experimentation, artificial insemination,[44] egg and embryo donation.

We can learn from the errors of the Warnock report. Whatever moral argument we use to support a particular policy must be coherent, it must be internally consistent, it must be justifiable to "significant others."[45] A series of inconclusive test matches has