1-1-1984

Amniocentesis, Coercion, and Privacy

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THE 1973 ABORTION DECISIONS of the Supreme Court were based on a right of reproductive privacy which the Court in 1965 had discovered in certain elusive "penumbras formed by emanations from the Bill of Rights."[1] This fictional right of privacy was used by the Court to declare unconstitutional virtually all state restrictions on abortion; according to the Court's rulings, the states have no effective power to prohibit abortion at any stage of pregnancy. Even in the third trimester, the state may not prohibit abortion where it is necessary "in appropriate medical judgment for the preservation of the life or health of the mother."[2] Since the Court defined the health of the mother to include "psychological as well as physical well-being" and said that "the medical judgment may be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the mother,"[3] the ruling is a license for elective abortion at every stage of pregnancy up to the time of normal delivery.

One widely overlooked aspect of *Roe v. Wade,* however, is its implicit sanction of compulsory abortion. As Professor Robert Byrn noted in his definitive article on the decision:

It must be remembered that the Court in Wade rejected

> any absolute right of a woman to choose whether or not to abort, and premised its holding on a limited right of privacy, subordinate to compelling state interests. As one example of an appropriate state limitation on the right of privacy, the court cited *Buck v. Bell* (274 U.S. 200 [1927]) which upheld the validity of a state statute providing for compulsory sterilization of mental defectives whose affliction is hereditary. The state "interest" in that situation was, of course, in preventing the proliferation of defectives.
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> It had been thought that *Buck v. Bell* died after the Nazi experience, and its revival now is rather frightening. By implication in Wade, the Court espoused the constitutional validity of state-imposed, compulsory abortion of unborn children diagnosed intrautero as mentally defective. Neither the child's constitutional rights (of which the Court could find none) nor the mother's right of privacy (which the Court, by citing Buck, found limited by the state's "interest" in preventing the birth of mental defectives) could, according to the theory of Wade, be interposed to challenge such a statute.[4]

Fortunately, in the decade since *Roe v. Wade,* the courts have not explicitly recognized the legitimacy of compulsory abortion. However, technological developments have recently established the foundation for a compulsory eugenics program:

> During the past decade, advances in the antenatal diagnosis of genetic disorders have proceeded at a revolutionary pace. Amniocentesis and karyo-type analysis of fetal cells have made the detection of Down's syndrome (trisomy 21) and a host of other chromosomal abnormalities almost routine. In 1979, 28.7% of all pregnant women in New York age 35 or older underwent prenatal cytogenetic studies. Steady advances in ultrasonography, fetoscopy, biochemical screening, and the application of recombinant DNA technology to fetal DNA promise that this diagnostic revolution will not

soon subside. The advent of antenatal diagnosis and the rapid growth of university-based clinics that specialize in genetic counseling have created a complicated liability problem for obstetricians, pediatricians, and family practitioners.[5]

Since 1975, courts have increasingly recognized a wrongful birth cause of action in which physicians may be held liable to parents for the costs of raising a defective child and related damages where there has been either a failure to test for defects or negligence in administering the tests.[6]

In "wrongful birth" cases parents sue for the costs of raising handicapped children. The theory of the suit is usually either that if the doctor had told them of the risks of birth defects the child would not have been conceived or that, if they had been told during the pregnancy that the child was likely to be defective, they would have had an abortion. Other "wrongful birth" cases involve the birth of normal children after a sterilization operation which failed due to the negligence of the defendant doctor.[7] This paper is not concerned with this last type of case, but rather only with cases imposing liability on doctors for negligent counseling or testing as a result of which the mother did not choose to abort her unborn child. In such cases, courts have adopted three general lines of reasoning as to the extent of damages that may be recovered:

> There are cases in which courts have concluded that a physician found negligent in a "wrongful birth action" can be liable for the entire cost of raising and educating the child until the child reaches majority. While it may appear extreme, courts have held that the award of such damages is proper.
>
> Other courts have held that while such damages are cognizable, the benefit of watching a child achieve and grow to maturity must be balanced with the cost of raising the child. The value of the benefit must be assessed to mitigate the cost of rearing the child. However, courts following

> either of these lines of reasoning have given no indication of what monetary amount of damages would be considered an appropriate award. Finally, some courts have rejected awarding such damages in cases involving wrongful birth actions, indicating that such damages are not cognizable, too speculative, and an unrealistic burden for the physician.[8]

For example, in *Karsons v. Guerinot,*[9] New York's intermediate appellate court allowed parents to maintain a cause of action for the birth of a mongoloid child against a physician who negligently failed to notify them of the risks of pregnancy and availability of amniocentesis. And in *Becker v. Schwartz,*[10] the highest court of New York held that a physician had a legal obligation to warn a 38-year-old woman of the increased age-related risk of bearing a child suffering from Down's syndrome. In a companion case the court recognized a cause of action on behalf of the parents of two children who had been born with a hereditary kidney disorder because after the birth of the first child the defendant doctors failed to warn them that the disease was hereditary. In both instances the *Becker* court allowed the parents to sue, but refused to permit the child to sue in its own behalf.

In addition to wrongful birth actions, the courts have recently recognized wrongful life causes of action brought on behalf of the defective child rather than the parents. The child's claim is not to recover damages for his physical or mental defect or illness which was caused or aggravated by the doctor's alleged negligence; rather it arises from maternal or genetic conditions; it is that the doctor negligently failed to discover the prospect of the child's birth defect or negligently failed to bring that prospect sufficiently to the attention of the child's parents. In order to establish causation, it is further claimed that, had the parents been properly informed of the prospect of birth defects, they would have practiced contraception or obtained an abortion so as to prevent the plaintiff's conception or birth. The essence of the claim is that the plaintiff's mere existence is a

harm, and that but for the physician's breach of duty, the plaintiff would not have been born.

Initially, in *Gleitman v. Cosgrove*[11] the New Jersey Court rejected both wrongful birth and wrongful life actions. Jeffrey Gleitman was born in Jersey City on November 25, 1959, with substantial defects in sight, hearing, and speech. His mother had contracted German measles one month after she became pregnant with Jeffrey. When she was two months pregnant, she routinely consulted Drs. Cosgrove and Dolan, who practiced obstetrics and gynecology together in Jersey City. When she asked the doctors several times during the pregnancy about the effects of German measles, she "received a reassuring answer" each time. After the birth of Jeffrey, Mr. and Mrs. Gleitman sued the doctors to recover damages for the emotional effects and added financial burden caused to them by the doctors' failure to apprise them of the high risk of birth defects from German measles. The parents' theory was that, if the doctors had told them of the risks, they would have procured an abortion and thereby would have avoided their emotional and financial injury. There was no way that the birth defects could have been minimized during the pregnancy; the alternatives, therefore, were birth or abortion. More significantly, the parents sued for wrongful life on behalf of the infant Jeffrey. The court rejected by a majority vote of 4-3 all the parents' claims, on their own behalf and on behalf of Jeffrey.

In *Curlender v. Bio-Science Laboratories,*[12] however, the court recognized a wrongful life cause of action brought on behalf of a defective child against a medical laboratory which negligently administered a test to determine whether the child would be likely to be born with a genetic defect. The court stated:

> We construe the wrongful-life cause of action by the defective child as the right of such child to recover damages for the pain and suffering to be endured during the limited life span available to such a child and any special pecuniary loss resulting from the impaired condition.[10]

Significantly, the court indicated that in an appropriate case the child might even be allowed to sue his own parents for allowing him to be born:

> One of the fears expressed in the decisional law is that, once it is determined that such infants have rights cognizable at law, nothing would prevent such a plaintiff from bringing suit against its own parents for allowing plaintiff to be born. In our view, the fear is groundless. The "wrongful-life" cause of action with which we are concerned is based upon negligently caused failure by someone under a duty to do so to inform the prospective parents of facts needed by them to make a conscious choice not to become parents. If a case arose where, despite due care by the medical profession in transmitting necessary warnings, parents made a conscious choice to proceed with a pregnancy, with full knowledge that a seriously impaired infant would be born, that conscious choice would provide an intervening act of proximate cause to preclude liability insofar as defendants other than the parents were concerned. Under such circumstances, we see no sound public policy which should protect those parents from being answerable for the pain, suffering and misery which they have wrought upon their offspring.[14]

No such action by the child against his own parents has been sustained, but there is some logic in the comment by Dr. Margery Shaw, acting director of the Medical Genetics Center of the University of Texas at Houston, that "it's inevitable" that such an action will be allowed. "Physicians," in Dr. Shaw's opinion, "may be required to warn patients that if they allow a defective child to be born, they may incur a liability."[15] In response to the *Curlender* court's suggestion of a potential parental liability, the California legislature enacted a statute which relieves the parents of liability in such a situation and further provides that the parents' decision shall neither be "a defense in any action against a third party" nor "be considered in awarding damages in any such action."[16]

Moreover, in *Turpin v. Sortini,* the California Supreme Court itself limited *Curlender,* holding that a child born because of a physician's wrongful failure to inform the parents of possible genetic defects could not collect damages for being allowed to exist, but could collect for the extra costs resulting from the handicap.[17] In rejecting the allowance of recovery by the child for his very existence, the court said:

> The basic fallacy of the Curlender analysis is that it ignores the essential nature of the defendants' alleged wrong and obscures a critical difference between wrongful life actions and the ordinary prenatal injury cases noted above. In an ordinary prenatal injury case, if the defendant had not been negligent, the child would have been born healthy; thus, in a typical personal injury case, the defendant in such a case has interfered with the child's basic right to be free from physical injury caused by the negligence of others. In this case, by contrast, the obvious tragic fact is that plaintiff never had a chance "to be born as a whole, functional human being without total deafness"; if defendants had performed their jobs properly, she would not have been born with hearing intact, but—according to the complaint—would not have been born at all.[18]

Perhaps the most far-reaching decision in this area is *Harbeson v. Parke-Davis, Inc.,*[19] in which the Washington Supreme Court expressly recognized causes of action for wrongful birth and wrongful life. The suit was based upon medical care that Mrs. Harbeson received from military physicians who had prescribed Dilantin for her after she suffered a grand mal seizure in 1970. In March 1971, while on Dilantin, Mrs. Harbeson gave birth to a normal child. Thereafter, however, Mrs. Harbeson gave birth to two defective children who were diagnosed as suffering from fetal hydantion syndrome, i.e., they suffered from mild to moderate growth deficiencies, mild to moderate developmental retardation, wide-set eyes, lateral ptosis (drooping eyelids), hypoplasia of the

fingers, small nails, low-set hairline, broad nasal ridge, and other physical and developmental defects. Prior to the conception and birth of their children, Mr. and Mrs. Harbeson had informed the military physicians that they were considering having other children and inquired about the risks of ingesting Dilantin during pregnancy. The physicians informed the Harbesons that Dilantin could cause a cleft palate and temporary hirsutism in the fetus, but they did not conduct literature searches or consult other sources for specific information regarding the correlation between Dilantin and birth defects.

Mr. and Mrs. Harbeson and a guardian ad litem appointed for the two defective children filed suit in the U.S. District Court for Western Washington and since there were no Washington cases concerning wrongful birth and wrongful life, the federal court certified several questions concerning the availability of these actions to the Washington Supreme Court.

In recognizing the existence of a wrongful birth cause of action on behalf of the parents of the defective child, the Washington Court stated:

> That this duty requires health care providers to impart to their patients material information as to the likelihood of future children being born defective, to enable the potential parent to decide whether to avoid the conception or birth of such children. The duty does not, however, affect in any way the right of a physician to refuse on moral or religious grounds to perform an abortion. Recognition of the duty will "promote societal interests in genetic counseling and prenatal testing, deter medical malpractice, and at least partially redress a clear and undeniable wrong." (Rogers, *Wrongful Life and Wrongful Birth: Medical Malpractice in Genetic Counseling and Prenatal Teaching,* 33 S.C.L. Rev. 713, 737 [1982].[20])

With respect to damages recoverable by the parents, the *Harbeson* court held that they could recover medical, hospital, and medication expenses attributable to their children's birth

and defective condition, and damages for their own emotional injury. In considering damages for the parents' emotional injury, the court held that the jury would be entitled to consider the countervailing emotional benefits attributable to the child's birth.

Moreover, the *Harbeson* court held that the children could maintain a wrongful life action in order to recover the extraordinary expenses to be incurred during their lifetime as a result of the congenital defects. The court limited this recovery, however, by noting that the costs of such care during the child's minority could be recovered once, and, therefore, if the parents recovered them, the child could only recover costs incurred during majority. Finally, the *Harbeson* court denied recovery of general damages in wrongful life actions, noting that "measuring the value of an impaired life as compared to nonexistence is a task beyond that of ordinary mortals. . . ."[21]

The rise of the causes of action for wrongful birth and wrongful life is a direct outgrowth of *Roe v. Wade.* This point was recognized last year by the Seventh Circuit Court of Appeals in holding that physicians can be sued for failure to give parents the information they need to decide whether to choose abortion and that the damages can include the lifetime costs of raising the child as well as the extra costs occasioned by the child's handicap. Indeed, the court's opinion specifically recognized the routine character of the wrongful birth action once *Roe v. Wade* is accepted:

> State courts have been quick to accept wrongful birth as a cause of action since *Roe v. Wade,* because it is not a significant departure from previous tort law. A case like this one is little different from an ordinary medical malpractice action. It involves a failure by a physician to meet a required standard of care, which resulted in specific damages to the plaintiffs. The government tries to separate this case from those of ordinary medical malpractice by raising political and moral questions concerning abortions, but the Supreme Court has already settled that issue. In *Roe v. Wade,* the

> Court held that it was the mother's consitutional right to decide during the first trimester of pregnancy whether to obtain an abortion. The staff at the OB-GYN clinic at Fort Rucker deprived Mrs. Robak of the opportunity to make an informed decision when they failed to tell her of her rubella and the potential consequences on her fetus. Because of this negligence, the Robaks are faced with large expenses for Jennifer's care and special treatment. As in any other tort case, the defendant must bear the burden for injuries resulting from its own negligence. "Any other ruling would in effect immunize from liability those in the medical field providing inadequate guidance to persons who would choose to exercise their constitutional right to abort fetuses which, if born, would suffer from genetic (or other) defects." *Berman v. Allen, supra,* 404 A.2d at 14. The district court was therefore correct in holding that the Robaks' complaint stated a valid cause of action in wrongful birth.[22]

The well-established wrongful birth cases and the emerging wrongful life cases effectively compel doctors to inform expectant mothers of the abortion option at least in high-risk cases. Under the fear of malpractice actions, this practice may extend to all pregnancies. This trend will also force physicians to test exhaustively for any remote indication of trouble in a pregnancy and to make full disclosure of those risks to the mother. Since physicians will be virtually relieved of potential civil liability if the mother does have the abortion, the tendency will be for the doctor to emphasize that option. The compulsion is only directly applicable to the mother. Instead, it is an economic compulsion of the doctor which in turn influences his relation with the mother.

The availability of amniocentesis introduces an additional pressure on physicians to promote the choice of abortion where the test discloses fetal anomalies. Concurrently, other technological developments are making the performance of abortion a private affair known only to the woman herself (and the victim child). While the constitutional right of reproductive privacy, as

invented by the Supreme Court, is essentially fictional, with no foundation in the Constitution, the New Biology is making total reproductive privacy a reality. The typical abortion of the near future will be accomplished chemically by way of pill, injection, or other method capable of self-administration. For example, a team of Swiss and French researchers has developed an after-conception pill that appears to be 100% effective in "preventing pregnancies." The woman need only take the pill for two to four days a month. It causes expulsion from the uterus of any egg fertilized that month, thus inducing an early abortion.[23] This pill, which is based on a hormone described as an anti-progesterone name RU-486, was described by *Washington Post* columnist Clayton Fritchey as "making most surgical abortions superfluous."[24] Similar products are undoubtedly in various stages of development in the United States and other countries.

Since liberalized abortion was first proposed by the American Law Institute in 1962, the right-to-life movement has concentrated on surgical abortion as the evil to be prevented. In that context, the continual debates on phrasing of a human life amendment, whether it should include exceptions and, if so, which ones, etc., were relevant. Now, however, abortion is becoming a private matter totally within the control of the mother. We have, finally, caught up with the pagan Romans who endowed the father, the paterfamilias, with the right to kill his child at his discretion, only we give that right to the mother. But it is all the same to the victim. The power of the law to control private, elective abortions will be limited. The major means of controlling such private abortions will be by licensing and regulation of the abortifacient drugs or devices.

The privatization of the abortion act and the implicit compulsion of physicians to recommend it require that the law, if it is to restore the right to life, must first reestablish the basic principle that all human beings are persons with respect to their right to life. Such a restoration will help to maintain a climate favorable to the promotion of widespread and spiritually based respect for life which is essential if private, do-it-yourself abortions are to be discouraged. The restoration of personhood

) the unborn with respect to the right to life could also prevent ourts from imposing liability on doctors for failing to counsel arents as to the abortion option. And, finally, the recognition f legal personhood for all human beings from the time of onception would also protect the retarded, the elderly, and thers endangered by the predictable extension of the principle ıat some innocent human beings can be defined as non-ersons and killed at the discretion and for the convenience of thers.

It is essential that the constitutional protections attach from ıe moment of fertilization, by using that phrase or another of qual clarity. This is no mere academic point. Even the upreme Court in *Roe v. Wade* admitted that if the unborn hild is a person he cannot be killed by a legalized abortion in ny case.[25] If the unborn child is not a person his life is no more rotected by the Constitution than the life of a housefly. If onstitutional protections attach to the unborn child, not at the ıoment of fertilization, but at some latter point, such as nplantation in the womb, which generally occurs approx-nately seven days after fertilization, it will legitimize early bortions by pill, menstrual extraction, and other means. The ıtrauterine device, for instance, almost certainly operates by reventing implantation. It is, therefore, not a contraceptive ut an abortifacient. With advancing technology, the abortion f the future is likely to be by pill rather than by surgery. If the onstitutional protections do not attach at the earliest moment, ıat is, at fertilization, there will be no constitutional impedi-ıent to the licensing of abortion pills for use at early stages of regnancy and if they are licensed for use at an early stage, they ill be used at every stage. Clearly, therefore, constitutional rotection must be restored unambiguously from the very eginning of life.