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Doctors and Lawyers and Wolves

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Relations between lawyers and physicians, and therefore between law and medicine, are getting more and more destructive and counterproductive. It used to be a joke, but it's not funny anymore. We can't afford the continuing and escalating acrimony between our professions and it's time that we take constructive steps in the public interest to deal with it.

Lewis Thomas, the insightful physician-essayist, once wrote an essay called "Ponds."[1] It involves a construction site in Manhattan. Demolition had been completed and a giant hole had been dug for a new apartment building on First Avenue at Seventieth Street. The hole filled with water and some of the neighbors came and dumped goldfish into this pit. Few thought they could survive in the contaminated water. But in fact the goldfish flourished. They propagated and everybody got very nervous. The Society for the Prevention of Cruelty to Animals started a petition to capture these goldfish. To quote Thomas, "You'd think they were rats or roaches, the way people began to talk. Get those gold fish out of the pond, I don't care how you do it. Dynamite, if necessary, but get rid of them."[2] Thomas concludes that "goldfish in a glass bowl are harmless to the human mind . . . but goldfish let loose, propagating them-

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[1]L. THOMAS, THE MEDUSA AND THE SNAIL 31-35 (1979).

[2]*Id.* at 33.

selves, and worst of all, *surviving* in what may seem to be a sessile eddy of the East River, somehow threaten us all."[3]

Without taking the analogy too far, it can be said that physicians have often looked at lawyers the way the New Yorkers viewed the goldfish in this pond. When lawyers started getting involved in the intrinsically fascinating issues of medicine and medical ethics a couple of decades ago, many physicians had the reaction: "I don't care how you do it, get rid of them, dynamite, if necessary, but get the lawyers out of here!" The fact that lawyers were flourishing, and actually enjoyed working in the health law field, was seen as very, very threatening. It still is.

This kind of territorial reaction, and defensive attempts to keep the law in a "glass bowl," are not terribly helpful. Our professions, medicine and law, have historically been viewed as natural allies by almost everybody but ourselves. Faulkner and Hemingway, for example, wrote some insightful letters touching on this subject in the early fifties after Faulkner had been asked to review Hemingway's *The Old Man and the Sea*. Faulkner responded to the request by recalling that a few years earlier Hemingway had said that writers should stick together "just as doctors and lawyers and wolves do."[4] In recalling the quotation, Faulkner seemed to call Hemingway "just another dog,"[5] and that prompted a pouting letter by Hemingway.[6] But both writers took it for granted that lawyers and doctors were in the same category of professionals, appropriately stuck together, didn't stab each other in the back, and like wolves knew how to work together.[7] There was no notion of any split between the two professions.

Today lawyers may still be characterized as wolves, but physicians see themselves as their prey, and not as their natural colleagues. For example, in 1986 the president of the Association of American Medical Colleges told a medical school graduating class, "We're swimming in shark-infested waters where the sharks are lawyers."[8] And the dean of the Yale Medical School has expressed his distaste for law in even more florid terms, saying that the general explanation of the disillusionment that modern physicians now have with their professional lives is the "pervasive, unwelcome, crushing embrace of medi-

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[3]*Id.* at 33–34 (emphasis in original).

[4]Letter from William Faulkner to Harvey Breit (June 20, 1952). SELECTED LETTERS OF WILLIAM FAULKNER 333 (J. Blotner ed. 1977).

[5]*Id.*

[6]Letter from Ernest Hemingway to Harvey Breit (June 29, 1952). ERNEST HEMINGWAY: SELECTED LETTERS: 1917–1961, 771–73 (C. Baker ed. 1981).

[7]Hemingway explains: The wolf "is hunted by everyone. Everyone is against him and he is on his own as an artist is. My idea is that wolves should not, and in the wild state never would, hunt each other. The part about the doctors and lawyers is that there is a *secret professional* and the good ones do help each other. Gypsies don't steal from each other." *Id.* at 771.

[8]Robert G. Petersdorf, quoted by Fox, *Physicians versus Lawyers: A Conflict of Cultures*, in AIDS AND THE LAW 210, 211 (H. Dalton & S. Burris eds. 1987).

cine by law.''[9] In some senses this attitude toward lawyers is not entirely new, but recalls a time when physicians were still relying on bloodletting and leeches. There's an old Italian proverb that ''a bad agreement is better than a good lawyer.'' An old German proverb says ''a lawyer and a wagon wheel must be well greased.'' There is a French proverb that ''no lawyer will ever go to heaven as long as there is more room in hell.'' And the Danish have a saying, ''virtue in the middle, said the devil as he sat between two lawyers.''[10]

The modern equivalent of these old proverbs are the stories (they can't really be called jokes) one frequently hears at medical meetings. Three stories physicians are especially fond of telling illustrate the current mood. The first is the physician's definition of a tragedy: a bus load of lawyers that loses control and goes off the cliff. Everyone is killed, but there's an empty seat on the bus. The second is that scientists have found a new experimental animal to work with, the lawyer. They multiply just as fast as rabbits, you don't get attached to them. They will also do things even rats won't do. The only problem is that one cannot be sure that the results apply to human beings. The third is a question, ''What is black and brown and looks good on a lawyer?'' The answer: a Doberman. These ''jokes'' really aren't funny: they are starting to get almost vicious. There's obviously something behind them that expresses more than just a little irritation; it's a view that physicians just can't work with lawyers. I don't think most physicians would go so far as to say we'd all be better off if all the lawyers died, but lawyers are viewed like the New York goldfish: We have to get them out of our pond. There's no point in entering a constructive dialogue, the best strategy is to isolate them, and not deal with them.[11]

This response is neither reasonable nor responsible. Isolation doesn't get either profession anywhere, and cannot benefit the public. Perhaps it is time to begin again by re-examining the reality of doctor-lawyer relationships, and then addressing what the relationship of physicians, lawyers, and scientists should be. First, the reality.

The ''reality'' is often portrayed within a false paradigm. The paradigm is one that former Chief Justice Warren Burger articulated about fifteen years ago in a medical journal where he expressed what I think most lawyers believe: ''the law always lags behind the most advanced thinking in every area,'' and this lag is inherent in the nature of the law.[12] Similarly, Sir Zelman Cowen, in a keynote address to the first international meeting on Law, Medicine, and Health Care in Sydney, Australia, in 1986, quoted an Australian jurist with approval who said that ''the law marched with medicine, but in the rear and

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[9]Dean Leon Rosenberg, quoted in Dickens, *Patient's Interests and Client's Wishes: Physicians and Lawyers in Discord*, 15 LAW, MED. & HEALTH CARE 110, 111 (1987).

[10]J.G. DUNNE, DUTCH SHEA, JR. 168 (1982).

[11]*Cf.* ''For most physicians, encounters with lawyers remain occasions for impatience or anger.'' Fox, *supra* note 8, at 217.

[12]Burger, *The Law and Medical Advances* (Supp. 7), 67 ANNALS INTERNAL MED. 15, 17 (1967).

limping a little.''[13] He also suggested that this was necessary; that the law always had to be behind medicine and science and always be reacting to it. In one sense, of course, this is true. Judges and legislatures can't deal with new developments in science until they actually occur, or at least until we know what they are likely to be. But in another sense this observation is trivial and self-serving. It really says, ''Hey lawyers and judges, don't worry, be happy. You don't really have to deal with these biomedical issues before they're on the horizon, you don't have to think about them, your job is to react. Let's just sit back, relax, and see what the scientists and the physicians do, and then react to it.''

Many writers,[14] myself included,[15] have tried to decipher why doctors and lawyers can't talk to each other, and have often ended by pointing to their varied educational training, and the difference between the adversary system and the scientific method. These articles suggest that doctors and lawyers have different ways of thinking, and different ways of problem solving.[16] But many people have different ways of thinking and different educational backgrounds in the United States and can still get along together. The critical reason for the cleavage seems more related to disparate professional goals or values. Professor Bernard Dickens has underlined this point.[17]

In general, the goal of lawyers is to serve their clients by doing whatever their clients want within the law. Lawyers are at the service of their clients, and believe that the will of the individual should basically be the highest value. So it is easily understandable that promoting liberty as self-determination is the major goal of lawyers. To physicians, preserving life and enhancing health is seen as the major goal. These goals come into conflict and we've seen this in many

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[13]Cowen, *In the Rear and Limping a Little: Some Reflections on Medicine, Biotechnology, and the Law*, 64 NEB. L. REV. 548, 550 (1985), quoting from *Mount Isa Mines, Ltd. v. Pusey*, 4 S. A. ST. R. 88 (1971).

[14]*E.g.*, Powers, *Interprofessional Education and the Reduction of Medicolegal Tensions*, 17 J. LEGAL EDUC. 167 (1965); Borillo & Ebaugh, *Medicolegal Liaison: A Need for Dialogue in the Criminal Law*, 37 COLO. L. REV. 169 (1965); Beresford, *The Teaching of Legal Medicine in the United States*, 46 J. MED. EDUC. 401 (1971); Dietz, *Clinical Approaches toTeaching Legal Medicine to Physicians: Medicolegal Emergencies and Consultation*, 2 AM. J. LAW & MED. 133 (1976); Schwartz, *Teaching Physicians and Lawyers to Understand Each Other*, 2 J. LEGAL MED. 131 (1981); Gibson & Schwartz, *Physicians and Lawyers: Science, Art and Conflict*, 6 AM. J. LAW & MED. 173 (1980).

[15]Annas, *Law and Medicine: Myths and Realities in the Medical School Classroom*, 1 AM. J. LAW & MED. 195 (1975).

[16]*Supra* note 14.

[17]Dickens, *supra* note 9, at 112:

> . . . health care professionals are trained to consider that good health is an ultimate value or good, and that other values such as individual freedom of choice are means to that end, whereas lawyers come to consider personal autonomy the ultimate value, and see health as serving the instrumental or utilitarian role of facilitating and informing choice. Health care professionals devalue freedoms that compromise health, and lawyers oppose the rendering of health care that negates or jeopardizes individual choice. Professionals in both health care and law are oblivious to or suspicious of the norms and values that inspire the professional dedication of members of the other profession. . . . Health professionals seek to know and serve their patients' best interests, but lawyers seek to know and serve their clients' wishes.

legal cases, when a choice seems to have to be made between them—for example, when a patient refuses treatment that could save the patient's life or cure a mental disorder. The conflict is between the physician's goal of protecting the patient's life and the lawyer's goal of protecting liberty, even if the exercise of liberty ends in death.[18] Both professionals often look at each other incredulously in such situations, simply unable to comprehend how the other could be so narrow-minded and pig-headed. The law's very reasonable attempt to reconcile issues of patient rights with patient welfare has been the development of the doctrine of informed consent. The law, however, has inadequately communicated the rationale for this doctrine to the medical profession.

What we've seen in the last five to eight years is that the primary goals of society as a whole are only superficially related to the primary goals of each profession. Langdon Winner in his tough-minded study of technology and why we fail to react sensibly to it asks, "Are there no shared ends that matter to us any longer than the desire to be affluent while avoiding the risk of cancer?"[19] He concludes that there are not; the only universal values in the United States are the desire to accumulate money while avoiding death: greed and a quest for immortality. Unfortunately, Winner seems to be correct.

There was a study published in the *New York Times* last week of freshmen going to college. Ten years ago if you asked freshmen whether accumulating wealth was an important goal in their life, only 39 percent said yes. This year, more than 75 percent of them said yes, accumulating wealth is one of the most important goals of going to school.[20] That mirrors society. We've gotten to the point where almost everything is stated in terms of money, and many people argue that price and value are the same thing and should be thought of as interchangeable. There's even a whole movement in the law. The law and economics movement seems to believe that our society should be judged on the basis of how close we come to Adam Smith's "free market," that money really is the only valid measure of value, that everything has its price, including children and organs for transplant, and that the way decisions should be made is by a consequentialist cost/benefit calculation. There are other legal schools of thought, such as critical legal studies, that argue that law is indeterminant in principle, and exists primarily to protect the status quo, enabling those with power and wealth to keep it. Serious work has also been done in linguistics, applying methodologies of deconstruction and structuralism to judicial opinions, and areas some of you are probably more familiar with than I.

All of this work has provided us with new perspectives and insights, but a drama critic may be better than a literary critic at discerning how the law operates in the United States. This is because from television news (what we call "news"), to trials, to medical cases— the artificial hearts implanted in Barney

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[18]*See, e.g.*, the cases involving treatment refusals discussed in G. ANNAS, JUDGING MEDICINE 261–324 (1988), from Karen Quinlan (1976) to Paul Brophy (1986).

[19]L. WINNER, THE WHALE AND THE REACTOR (1986).

[20]Carmody, *To Freshmen a Big Goal Is Wealth*, N.Y.Times, Jan. 14, 1988, at 14, col. 1.

Clark and William Schroedor are two that come immediately to mind—we've transformed almost everything in our culture into entertainment.[21] We are asked as a society to suspend judgment of medical experiments and innovations, to refrain from applying any moral or ethical standards to them, and to simply enjoy them and respond to them the way we would to melodrama. In a standard melodrama there is a heroine who is threatened by a villain (it could be a disease) and the audience is asked to suspend its critical judgment, identify emotionally with the heroine, and just let things play themselves out and be entertained as the hero saves the day. And many of us see the law that way too. It should not be surprising then that the Judge Wapner Show is very popular in the United States. That is law as pure entertainment, and so were cases like *Baby Fae*[22] and *Baby M.*[23] They're a kind of morality play, but maybe a little different than melodrama, because we're meant to learn something from them. What we're meant to learn, however, is never very clear, because the premise usually is that we are a pluralistic society and therefore everything goes, and that we really shouldn't have strong values or morals. Or if we should have values and morals, we should be a little ashamed of them, because the only real value is that people should be able to do whatever they want, while accumulating wealth and avoiding cancer, at least as long as the rights and welfare of others are not seriously affected.

In Act I, King Lear asks his daughters, "Which of you doth love us most?" Lear wants to divide his kingdom among his three daughters. Two of them are exceptionally greedy (like the legal and medical professions?), and respond with long speeches about how much they love their father and how wonderful he is. The only daughter who really loves him is tongue-tied, and so can't express her real feelings. She's banished from the kingdom. The whole kingdom eventually falls apart and everyone is dead by the end of the play. This is not necessarily the future of law and medicine, but it could well be unless we rid ourselves of this almost pathological carping at each other. The notions that we can't talk to each other, we may be better off if we each drop dead, the only good lawyer is a bad lawyer, there are no good doctors because they're all guilty of malpractice, and the only benefit they have is that they help send our sons and daughters to college because we can make money suing them, are all silly and destructive caricatures.

What should the relationship of law and medicine be? For lack of a better word, let me argue for "biorealism." By this I mean dealing with the *real* world. Reliance on entertaining vignettes, little jokes, and a melodramatic view of the world is simply inadequate to deal with the major issues, especially those involving birth and death, that confront society and our professions. First

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[21] *See* N. POSTMAN, AMUSING OURSELVES TO DEATH (1987).

[22] *See* Annas, *Baby Fae and the Anything Goes School of Human Experimentation*, 15 HASTINGS CENTER REP. 15 (Feb. 1984).

[23] *In re* Baby M, 537 A.2d 1227 (N.J. 1988). *And see* Symposium Issue, *Surrogate Motherhood*, 16 LAW, MED. & HEALTH CARE 1-137 (1988).

the law. The law at its best stands for most of the fundamental premises embodied in modern medical ethics: self-determination, nonmaleficence, and justice. Arguing that the law must be a generation behind medicine turns out to be simply wrong. The fact is that the law changes as the real world changes, and does so without going back and rewriting statutes, cases, or the Constitution. With the exception of the amendments, for example, we have basically the same Constitution that we had 200 years ago in language. But it's clearly a different document today—much more powerful and protective.

The point, I think, was best made by Jorge Luis Borges, the master Argentinian writer. In a very powerful short story, "Pierre Menard, author of the Quixote,"[24] he explores the question, what would happen if someone sat down today to write *Don Quixote*? His hero, Pierre Menard, actually writes an identical chapter by steeping himself in late 16th century and early 17th century Spain, trying to make himself Cervantes. His chapter of the *Quixote* contains exactly the same words Cervantes used. So it is *exactly* the same chapter. Nonetheless, although the words are the same, Borges suggests that Menard's *Quixote* is more subtle than Cervantes; more ambiguous, and "almost infinitely richer."[25] What can he possibly mean by that, since the words are identical? What he means is that the experience of the readers, all of our shared experiences since the 16th century, have made the words carry more meaning. We put the words in a modern context, informed by the events and writings of the past 350 plus years. Similarly, freedom of speech means much more today in an electronic age than it meant 200 years ago. And the courts can and do interpret the same first amendment to mean new and different things, and to increase our liberties by responding to new technological developments as they occur.

It is in this regard that the Constitution today is a much richer document than it was 200 years ago. Nonetheless, we should not have the conceit that the current law can answer all questions, and that there are no new legal questions that new technology can present. Solzhenitsyn, in his much maligned commencement address at Harvard University about a decade ago (a year after he came from exile in Russia to the United States) made the point well. He was probably invited to speak at Harvard because they thought that he would talk about how horrible Russia was and how wonderful it was to be in the United States. Well, he didn't do that. Instead he talked about the law, and about what values the law brings to a society. He did say that he came from a society where there was no law, there was no justice, no equality, no due process, and he said that was a terrible society, and he was glad to leave it behind. But he also said that a society with no other standard than the law is not one worthy of man either. In his words, "A society based on the letter of the law and never reaches any higher is taking small advantage of the high level of human possibilities. The letter of the law is too cold and formal to have a beneficial influence on

[24] J. BORGES, LABYRINTHS 36-44 (1964).
[25] *Id.* at 42.

society. Whenever the tissue of life is woven with legalistic relations, there is an atmosphere of mediocrity paralyzing man's noblest impulses.''[26]

Professor Allan Stone has made a similar observation about the law's impact on medicine. He has noted that every time there is a legal judgment that seems to increase liability exposure physicians form committees, in effect circling the wagons, and bureaucratize decision making in hospitals to try to protect themselves.[27] That's a natural reaction, even though it's frustrating and thoughtless. Wherever you see the law as the *only* judge of morals and values, Solzhenitsyn is certainly correct; there *is* an atmosphere of mediocrity paralyzing man's noblest impulses. Physicians and lawyers often concentrate primarily on limiting liability, on self-protection, and forget, or at least place second, their clients and patients.

What can be done? We can't just rely on the law to set our agenda and judge our actions, and that's one reason we all thought it was extraordinarily important to get the philosophers and ethicists involved in this dialogue as well, and therefore are very pleased that many have joined us for this conference. We must broaden our horizons, and take our professional obligations to society and the public good seriously.

How do we deal with really *new* science? Without any pretext of profundity, the first thing we need to do in support of biorealism is to distinguish between issues that are new, really new, and issues that are really the same old issue that we've dealt with before presented in a new guise. We need to do this so we don't spend all of our energies reinventing the wheel every time we have a headline that says science has brought us a new ''miracle.'' We must concentrate on what science is doing to actually change the world we live in if we expect to develop reasonable responses that are in the public interest. There are some examples of nonproductive and counterproductive involvement of the law getting into extraordinary detail where it was totally unnecessary. There are also developments we have yet to face.

Brain death is a classic example of a seemingly new medical issue that did not require any new law. Indeed, in 1968, when the Harvard Ad Hoc Committee on Brain Death issued its report, the committee said explicitly that no new laws were required for the medical profession to adopt brain death criteria for legal death. The medical profession only had to accept it as a standard of practice: ''No statutory change in the law should be necessary since the law treats this question [*i.e.*, the determination of whether death has occurred] essentially as one of fact to be determined by physicians.''[28] The committee was absolutely right; the law has always been, and remains, ''you're dead when the doctor

[26]Solzhenitsyn, *The Exhausted West*, Harv. Mag., July-Aug. 1978, at 22.

[27]Stone, *Judges as Medical Decision Makers: Is the Cure Worse than the Disease?*, 33 CLEV. ST. L. REV. 579, 583 (1984–85). In Stone's words, ''Juridicogenic cures contribute to the bureaucratization of medical care.''

[28]Ad Hoc Committee of the Harvard Medical School to Examine the Definition of Brain Death, *A Definition of Irreversible Coma*, 205 J.A.M.A. 337, 339 (1968).

says you're dead," at least as long as the determination of death is based on accepted medical criteria. The point should not be missed: the law is strongly supportive of medical practice—even medical practice based on new criteria to determine death.

Nonetheless, we know what happened. A few medical associations, Kansas first and later the American Medical Association itself, took the position that physicians would not use brain death criteria to declare death unless states passed new laws. The statutes had to declare not only that brain death was death, but also that physicians were not legally liable for malpractice or homicide for declaring a patient dead using brain death criteria.[29] And for the last twenty-two years we've witnessed battles all around the country, in legislatures, in commissions, and in courts, about whether or not brain death criteria is a "legal criteria," as if someone could be medically dead but not legally dead. And we have seen weird headlines. My favorite appeared after an accident in Connecticut: "Six dead, one brain dead." Press reports such as, "the victim is dead, kept alive only on a respirator," are still common. We are still having problems with the concept of brain death.

Almost all neurologists I've talked to understand it, but not all surgeons do. A few months ago I was doing grand rounds at a major hospital in New York, and we were discussing a case in which a neurologist had not been able to persuade the surgeons that brain death was death. The notes of the neurologist in the chart of the patient in the intensive care unit read, the first day, "the patient is brain dead." And on the following days, "the patient is still dead." It took seven days before the neurologist could persuade the surgeons to get this deceased patient out of the ICU. The great brain death law debate was pointless and destructive for two reasons. First, it seemed to suggest that there were two different kinds of death—instead of two different criteria to determine death. Second, it led many physicians to conclude that they couldn't do what they knew was right because of the law, because their state hadn't passed a statute on brain death. The belief that one can get into legal trouble for practicing medicine based on accepted medical standards is destructive to relationships between doctors and lawyers, and reinforces a notion that the law is essentially arbitrary and anti-science.[30]

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[29]PRESIDENT'S COMMISSION FOR THE STUDY OF ETHICAL PROBLEMS IN MEDICINE AND BIOMEDICAL AND BEHAVIORAL RESEARCH, DEFINING DEATH 117–18, 127 (1981).

[30]The good news to come out of this debate was the initial cooperation between physicians and lawyers in developing the criteria for brain death in the first place. Indeed, the committee model, with multidisciplinary participation in which the lawyer plays a key role, has been emulated with success. One of the most notable examples was in a report recomending that brain death criteria, which had previously been adopted by the medical profession only for individuals over the age of five years, could now be applied to individuals over seven days old. This report emphasized that no new laws were needed for the profession to adopt its recommendations as standard practice, only acceptance of its rationale and conclusions by the medical profession itself. To date, the report has received widespread acceptance in the medical profession. Task Force on Brain Death in Children, *Guidelines for the Determination of Brain Death in Children*, 80 PEDIATRICS 298 (1987). *See also* G. ANNAS, JUDGING MEDICINE 365–69 (1988).

The debate has been rekindled with the proposal to use anencephalic newborns for organ donors. Can a physician use brain death criteria in an anencephalic child? Can the organs of an anancephalic child be used for transplant before the child is dead? These issues are not new issues to the law. The rule is that you're dead when the doctor says you're dead. That's always been the law as long as the doctor applies good and accepted medical criteria.[31] Nonetheless that's gotten us off on a tangent and we've spent untold hours on the issue.[32]

The surrogacy debate is another example of an old issue posing in new clothes. The *Baby M* case, for example, is a child custody dispute between two natural parents. No new science, just a novel preconception contract. Yet a lower court judge said, essentially, "gee, there are no laws on surrogacy, therefore, this situation is entirely new." His conclusion was that he had to write on a clean slate, and that none of the existing laws were applicable.[33] Three cheers, from me at least, for the New Jersey Supreme Court for seeing the reality behind the melodramatic media event. [34] We have laws on adoption, on custody, and on termination of parental rights. Our job is to apply the laws we have, not to pretend that a child custody dispute involving a child conceived by artificial insemination, following the signing of a contract to give the child up at birth, is some new scientific development that requires us to fashion new laws to deal with it.

There are many things that only appear new, for which we have laws that deal with it quite well. Human experimentation is another good example. Much of what we'll be discussing in the genetic engineering group is straight from the Nuremberg Code and other human experimentation codes that set forth principles of reasonable experimentation and consent that we've dealt with in many contexts before.[35] Most often our job will be to apply these principles to new experiments rather than to develop new principles.

The most inexcusable example of lawyers assuming that new technology (neonatal intensive care) required new legal interventions is the case of *Angela C* at George Washington University Medical Center. Hospital lawyers, apparently believing that a competent pregnant woman lost her right to refuse treatment when she became terminally ill, sought a court order authorizing a forced cesarean section to deliver an arguable nonviable fetus. The judge, who himself treated the woman as if she was already dead, ordered the operation. The premature and nonviable infant died shortly thereafter, and so did the mother—but only after being subjected to this operation against her will and after being informed of

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[31] *See* Annas, *From Canada with Love: Anencephalic Newborns as Organ Donors*, 17 HASTINGS CENTER REP. 36–38 (Dec. 1987).

[32] *See, e.g.*, articles in symposium on Anencephalic Infants: A Source of Controversy, 18 HASTINGS CENTER REP. 5–33 (Oct. 1988).

[33] *In re* Baby M, 217 N.J. Super. 313, 525 A.2d 1128 (1987); *see also* Annas, *Baby M: Babies (and Justice) for Sale*, 17 HASTINGS CENTER REP. 12–15 (June 1987).

[34] *In re* Baby M, 537 A.2d 1227 (N.J. 1988) discussed in Annas, *Death Without Dignity for Commercial Surrogacy*, 18 HASTINGS CENTER REP. 21–23 (Mar. 1988).

[35] *See* J. KATZ, EXPERIMENTATION WITH HUMAN BEINGS (1972).

the death of her child. Lawyers who act as if judicial grants of immunity are more important than good patient care and respect for individual rights are a menace, and physicians who witnessed this "legal proceeding" (her attending physicians wanted to respect her wishes) could only come away with a cynical view of the law, liability avoidance, and the role of hospital lawyers.[36]

The conclusion is that a lot of the things we treat as new are really old issues in novel forms; the law has dealt with them quite adequately in the past, and we don't need new laws to deal with them now. On the other hand, science does discover and invent new things that humans can do, does change the world, and does modify our view of humanity itself. In these instances, science and medicine require us to reconceptualize, amend, or repeal our old laws, and sometimes even to rethink our morals and beliefs. One example of new science is the separation of the gestational and genetic mother. This separation was not biologically possible before the advent of in vitro fertilization (IVF), which makes conception outside the human body and transfer of the resulting embryo to a genetically unrelated woman possible. This new science creates a new legal issue: As between the gestational and genetic mother, which one should the law consider the legal mother with presumptive rearing rights and responsibilities?[37]

A second example is genetic engineering for modifying germ line cells (not for somatic cells, because that is so similar to other therapeutic medical procedures done to cure illness). Should we alter genes that may be able to reproduce themselves through the generations?[38] This has never been possible, is not possible yet, but will be possible at some point. That will be new, something that the law will have to deal with. Embryo research is a third. What should be the status of the human embryo? How should we treat it?[39] It's not a person, but what is it? So far we've said we have to treat it "with respect." What does that mean? What does it mean to respect the human embryo? Or to respect the fetus? Do we need new laws to deal with fetal tissue transplants, or are current laws on organ donation sufficient? Since we've only recently been able to even manipulate the human embryo or to use fetal tissue for transplanta-

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[36]*See* Annas, *She's Going to Die: The Case of Angela C*, 18 HASTINGS CENTER REP. 23-25 (Jan. 1988).

[37]For a discussion of this issue see S. ELIAS & G. ANNAS, REPRODUCTIVE GENETICS AND THE LAW 238-39 (1987). Physician-Philosopher Leon Kass has properly noted that in developing new ways to reproduce, we are considering:

> not merely new ways of beginning individual human lives but also . . . new ways of life and new ways of viewing life and the nature of man. Man is defined partly by his origins and his lineage; to be bound up with parents, siblings, ancestors, and descendants is part of what we mean by human. By tampering with and confounding these origins and linkages, *we are involved in nothing less than creating a new conception of what it means to be human.*

L. KASS, TOWARD A MORE NATURAL SCIENCE 48 (1985) (emphasis added).

[38]*See Id.* at 267-71; and Anderson, *Human Gene Therapy: Scientific and Ethical Considerations*, 10 J. MED. & PHIL. 275 (1985).

[39]*See* ELIAS & ANNAS, *supra* note 37, at 231-42.

tion, these are new issues and these new issues are the ones that we really have to deal with and focus on.

These examples tell us that the primary question is, what kind of world do we want to live in? There's no question that it's going to be a different world. We know that. We have to accept it. Medicine and science are not going to be the same tomorrow as they are today. New developments in science and medicine will change and transform the world we live in. The question we have to address is, will it be a better world, and what do we mean by "better"? What human characteristics and values do we think are critically important and demand preservation, and how do we go about effectively protecting them?

Daniel Callahan recently suggested that we think seriously about a very basic question: What's a good life? How long should we expect to live? And after what length of time should we conclude that we have lived a "good" human life? The public policy issue is after what point does the community cease to have an obligation to provide an individual with expensive life-prolonging medical procedures?[40] People have accused Callahan of age discrimination, of wanting all the old people to die. That's clearly not true. What he really wants us to do is think about a question we don't want to think about. Why? Because one of the two goals that we all agree on, besides making money, is avoiding death. We fear death and want to deny and postpone it as long as possible. And Callahan says, with George Bernard Shaw, "Do not try to live forever, you will not succeed."[41]

Death is not optional, it's inevitable. We don't want to accept death as a society, yet we must accept the inevitability of death before we can start talking seriously about how long we should live. So far we haven't been able to. Instead we contemplate new ways to replace worn out organs, and dream about *2001* and beyond when we may be able to transfer our brains to a metal and plastic body, or even to computer chips to attain a sort of immortality. Is this the "evolutionary road" we want to take? Would this make us more fulfilled as human beings? What would a "better world" look like? What is a good life for a human being? What things are good, beautiful, right, just? What kind of a society do we want to live in? These are all questions that our professions should be pondering.

It is inconceivable that all the potential changes science and technology can bring us are "good" and are thus to be welcomed as part of the "good life." The advent of the nuclear age sufficiently rebuts this claim. But in the area of medicine, a field which has traditionally been seen as a beneficent one, we are unlikely to be on guard against potentially dangerous threats to human well-being. The challenge to our laws and their guardians is to appreciate that technology is more than a tool, and that only by safeguarding what we have come to accept as fundamental human rights, are we likely to enjoy a future as human

[40]D. CALLAHAN, SETTING LIMITS (1987).
[41]G. SHAW, DOCTOR'S DILEMMA (1906) (preface).

beings, with some coherent concept of what it means to live well on this planet. Neither physicians nor lawyers can meet this challenge alone. We will need more thoughtful courses on law in medical schools, and less financially-oriented courses on medicine and law in law schools. But we cannot wait for the next generation of professionals.[42]

Unless lawyers and doctors, ethicists and the public, can work together to constructively confront these critical questions, we will wind up as King Lear did when he died. Having suffered the treachery of his two lying daughters who brought ruin on his kingdom and himself, and having indirectly caused the death of Cordelia, the one daughter who loved him and merited his love in return, he despairs of life and dies viewing a world devoid of those virtues that make life worth living. With Cordelia's body in his arms he wails, "Why should a dog, a horse, a rat have life, and thou no breath at all?" Let not our own dying words be, "Why should doctors, lawyers and scientists pursue pointless goals, while the values that give meaning to life are so eroded that life is no longer worth living?"

We have witnessed death while heartbeat is technologically maintained, and birth by a mother not genetically related to her child. Our views of ourselves and what it means to be human are being altered by effective contraception, safe abortion, organ transplantation, and life-sustaining medical technologies. Debate on the right to refuse treatment is shifting to debate on euthanasia and "the right to die."

We have failed to work together effectively in the recent past, but this is primarily because we have so distrusted each other's actions and motives that we have not really tried. Let this conference signal a new beginning of understanding and cooperation fueled by a desire for a better society. Tragedy in the real world also presents us with new opportunities to engage in cooperative efforts for the public good. The AIDS epidemic is a classic example in which physicians and lawyers can work effectively together. "Many physicians understand that this may be the first epidemic in this country in which lawyers can do as much for victims as doctors—and maybe more."[43] In *Pitch Dark*, Renata Adler asks herself two recurring questions: "Did I throw the most important thing, perhaps by accident, away?" and "Was I a citizen of my time?"[44] Let us work together on these complex issues of medicine and biotechnology so that when we ask ourselves these questions we can answer the first in the negative and the second with a resounding "yes"!

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[42]One very positive sign of lawyer-physician cooperation at the ABA-AMA level was the joint publication of an editorial entitled "Fifty Hours for the Poor" in both *JAMA* (258:3157; 1987); and the *ABA Journal* (Dec. 1987). Signed by the editors of these two publications, the editorial urged doctors and lawyers to serve society by providing a minimum of "50 hours a year—or roughly one week of time . . . without expectation of financial remuneration." *And see* Klages, *MDs, Lawyers Join for Pro Bono*, 1989 A.B.A.J. 23.

[43]Fox, *supra* note 8, at 217. Although Fox concludes, "For most physicians, encounters with lawyers remain occasions for impatience or anger."

[44]R. ADLER, PITCH DARK (1983).