QUEEN VICTORIA MEDICAL CENTRE

THE FIFTH ANNUAL GENERAL MEETING OF CONTRIBUTORS

TUESDAY, 29 SEPTEMBER 1981

LAW FOR TEST TUBE MAN?

The Hon. Mr. Justice M.D. Kirby
Chairman of the Australian Law Reform Commission

September 1981

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A NEW ERA

A few weeks ago I was working with a colleague on a sunny Saturday afternoon. We were working at his home, putting the final touches on a report about child welfare. My colleague's wife is a specialist gynaecologist and obstetrician. Somewhat chauvenistically, I wondered when she would return from the hospital to prepare our lunch. She was on duty that day, attending the birth of a child. Eventually she entered the room. Busily she prepared the lawyers' meal. Under questioning from me (and with due respect for the rules of confidentiality and the anonymity of her patient) she revealed the problem of the day. Ultrasound and other tests had suggested that the baby would come into this world marred and disfigured by the grossest of physical and mental disabilities. The parents were aware of this. The father, who was at the hospital, insisted that nothing should be done to preserve the life of his child. He told the doctor that neither his wife nor he had the emotional, let alone the financial, strength to support such a child for 20 years and upwards. He insisted, without avail, that the drip be removed from his wife, lest, however indirectly, it support the life of this 'monster'. But a new element had entered the drama. For on the day of delivery, the father had arrived at the hospital accompanied by a lawyer, there to ensure that the law (in all its majesty and uncertainty) was observed.

We had our lunch. Then the lawyers returned to their labours and the gynaecologist to the hospital. Later I inquired what had happened. The baby was born dead. The ethical and legal questions were avoided on this occasion. I reflected upon the different world in which lawyers and doctors live and the different connotation we may give to notions of 'child welfare'. Here were the lawyers ruminating about the definition of 'child welfare' in a context of delinquency, neglect, child abuse, child employment, day care centres and so on. Here was the doctor, surrounded by an anxious nervous father, a resigned and patient mother, a lawyer advocating his client's cause and social, moral and legal questions of great complexity needing immediate answer, but upon which there would be deep divisions in the medical profession, as there would in society.

Within days of this occurrence I was in Britain. I thought I could escape the haunting complexities of the hospital case. But as if to remind me of the fact that all problems do not conveniently disappear either for doctor or lawyer, a case occurred which attracted great publicity and raised very similar issues. On 28 July 1981 a baby girl was born in a hospital in the district of Hammersmith and Fulham Borough, London. She was born with severe mental disabilities, diagnosed as Down's syndrome. She was also born with an intestinal blockage which would be fatal unless it was operated upon. Such blockages occur not infrequently in such births. When informed that the child was mentally retarded, the parents took the view that it would be unkind to the child to consent to the operation to cure the intestinal blockage. Without the operation, she would die within a few days. The medical team said that she would be kept under sedation so as to prevent pain. The doctors were informed that the parents refused their consent for the operation. According to the law report, it was agreed by all parties in the case that the parents came to their decision 'with great sorrow, believing that it was in the best interests of the child'.[1] Certain of the doctors in the hospital made contact with the local authority. The authority moved quickly to have the child made a ward of court. It then took the case before the High Court of Justice and sought an order from Mr. Justice Ewbank to give the authority care and control of the child and to authorise it to allow the operation to be carried out. The judge made the necessary orders. The child was then transferred from the hospital where she had been born to another hospital for the purposes of having the operation. But the surgeon, seeing the child, declined to operate on being informed that the parents objected. The intrepid local authority went back to Mr. Justice Ewbank. The parents were served with notice of the new proceedings. They appeared by counsel. The judge, after hearing the parents and counsel in the case, refused his consent.

Nothing daunted, the local council authorities made inquiries which showed that there were other surgeons at the hospital of birth, and at the neighbouring hospital, who were prepared to perform the operation, despite the refusal of the parents. Medical evidence suggested that, if the operation proved successful, the child would have a life expectancy of 20 to 30 years. No-one doubted for a minute that had the child not suffered from Down's syndrome, the operation would long since have been performed. The council appealed on the very same day from the order of Mr. Justice Ewbank. The case was brought on as an urgent matter in the afternoon before the Court of Appeal of England. Sitting were Lords Justices Templeman and Dunn. They delivered an ex tempore judgment. They allowed the appeal and gave consent to the operation.

Lord Justice Templeman said that the parents had indicated that no-one could tell what the life of a mongoloid child would be like, so that it would be in the child's interests not to have the operation. The local authority was confident, on the other hand, that good adoption arrangements could be made to provide the child 'with a happy life':

> What is in the best interests of the child? That she should be allowed to die, or that the operation should be performed? That is the question for the court. Is the child's life going to be so demonstrably awful that it should be condemned to die; or is the kind of life so imponderable that it would be wrong to condemn her to die? It is wrong that the child's life should be terminated because, in addition to being a mongol, she had another disability. Accordingly the court's duty is to decide that the child should be allowed to live. The judge erred because he was influenced by the views of the parents, instead of deciding what was in the best interests of the child.[2]

Many of you will know of this case. Many will have seen the correspondence that followed in the medical literature. But the point I want to make is that the issue also greatly agitated the general community. Day after day, the quandary was presented to the readers of the popular press in banner headlines. The father of the girl contended that the ruling was wrong and that she should have been allowed to die:

> We made a decision which we believe to be right. The court over-ruled us and although I do not want to say anything that would anger the court, we obviously feel that decision was wrong.[3]

The Director of the Social Services Department of the council, however, put his view:

> Doctors are not necessarily the people to decide whether the child could grow up to have a good life or not. They might not have the specialised knowledge of the prospects and opportunities the child may have. The statutory obligation is [on the council] to protect the interests of the child and we do everything in our power to do that. In this particular incident there was nothing that would lead us to believe that the child would not have a good future if this operation were carried out.[4]

Lord Justice Templeman put his position thus:

> Although it had been movingly argued for the parents that nature had made its own arrangements to terminate a life which was not fruitful ... fortunately or unfortunately, the decision does not lie with the parents or with the doctors, but with this court.[5]

As in the case of test tube babies, the media, print and electronic, had a field day. Generally speaking, the editorialists supported the Court of Appeal's decision. The 'Daily Telegraph' called it 'a just decision':

> Their Lordships' decision to order the lifesaving operation to go ahead was clearly consistent with the principles of English law. One can, however, go further. In their judgements Their Lordships spoke almost as normal, perplexed men, who were in a sense representative of a moral consensus about the sanctity of human life. The belief for example, that a mongol baby's life is useless may certainly be conditioned by fear or self-interest (very understandable and forgivable, no doubt) on the part of parents. On the other hand, such a belief may be the product of sheer pity. But it is, in either event, a partisan belief, shaped more by emotion than by a cool sense of justice, and necessarily made in intolerably fraught circumstances.[6]

The writer for 'The Times', in a leader, 'Life Comes First', sought to make a more general point about medical ethics:

> In the Reith Lectures last year, Dr. Ian Kennedy (a lawyer, not a doctor of medicine) accused society in effect of putting an unfair moral burden on the medical profession by giving them so wide a discretion in such cases. It was never very clear just how Dr. Kennedy envisaged that society might take a more active share of the onus in difficult cases. The courts are too laborious, and too cautious for trespassing on rival professional mysteries, to be usefully involved in any regular way. The development of medical skill is continuous, so that cases where the prospect of a rewarding life seem hopeless now may well seem worth active treatment in a few years' time. ... Dr. Kennedy was right to assert that medical ethics is only a branch of everybody's ethics. Where there is a serious doubt about general principles, it must be hammered out openly, by public debate and if necessary in the courts or in legislation.[7]

The debate goes on. The professor of pedaetrics at a children's hospital in Britain said that he thought the decision of the Appeal Court was 'very, very wrong':

> It was against the interests of the parents, the child and society.[8]

According to the professor, the praise for the Court's decision was 'grossly hypocritical' because more than 300 spina bifida babies a year are allowed to die in Britain without the slightest public protest. Heroic surgery, which had been the norm in the 1960s, was questioned in the 1970s. Does this show a greater awareness of the cruel burden of a life grossly handicapped? Or is it a sign of the greater unwillingness today to tolerate the emotional and financial drain of supporting people born with gross deformities?

Waiting in the wings are many parallel cases which will come before the courts to respond to the moral and legal dilemmas. In one case in Britain a consultant is accused of murdering a child suffering from severe Down's syndrome. It is alleged that the consultant administered a drug likely to make the child too drowsy to eat. The case is still before the courts.[9] In New York a doctor has been held legally responsible for the care of a child born with a defect, after he had erroneously told the parents that the risk was nil. Suits are reported as pending in many cities against physicians who failed to warn women over 35 of the increased chances of having a child with Down's syndrome.[10] Early this month came reports of the exact obverse of the case in England. A severely retarded boy is suing a California hospital on the grounds that he was wrongfully permitted to live. His lawyer says that the Sacramento Medical Centre should have informed the mother, aged 37, that she should have a test to diagnose the syndrome. The case has been brought in the name of the boy and permission to sue on the boy's behalf has been given by a superior court.[11]

TEST TUBE MAN

Issues of life and death, particularly the life and death of children, touch profound emotions in society. No-one should be surprised at the passions stirred by the pathetic case of a retarded child, not two weeks old, the centre of a legal tussle between heartbroken parents and a conscientious local authority. It is sometimes harder to understand the debate about the moral and legal problems of in vitro fertilisation. Many in society, most if opinion polls are to be believed, probably detect a qualitative difference between the most primitive forms of human life on a glass dish and a fully formed, though severely deformed, human baby. The point cannot be escaped, that in the opinion of some thoughtful observers, including some in our midst, the issues raised are not qualitatively different. They are simply different parts of the spectrum of human life for which respect and ultimately legal protection must be afforded. The great majority of the people of Australia probably support and applaud the work of Professor Wood and his team at this great hospital. There is a mixture of pleasure in the achievement of birth in a growing number of cases which would otherwise be denied the satisfactions of procreation and family life and a feeling of pride that the new technology is being pushed forward, here in Australia. It is difficult not to warm to the human stories recounted in the Women's Weekly, other print media, talk-back programmes and television shows. Not for a minute do I criticise this use of the mass media to explain the human side of the problem of infertility and the anguish, disappointment and frustration which the in vitro fertilisation may triumph over. The personalisation of moral issues may help in the identification of some of the considerations that have to be weighed. But in today's world, we must recognise the occasional tendency of the news media to abbreviate, trivialise, personalise and sensationalise issues. Questions of medical ethics, whether they relate to the termination of severely mentally retarded births or the sponsorship of fertilisation in vitro, deserve a more reflective, better informed and more widespread community discussion, fuelled by a proper debate in which lawyers, medical scientists, theologians and moral philosophers seek to assist the public and its lawmakers. It should include the debate about 'general principles'.

Let there be no doubt that equal only to the praise that has been heaped upon the in vitro fertilisation programme is the calumny and doubt expressed in some quarters. Some of the criticism and condemnation rests on an a priori basis : that the procedure represents not a mechanical means of overcoming a physical obstruction but a fundamentally unacceptable 'violation of God's natural processes'.[12] This is not a view held by a few cranks in society. It is, at least at present, the official teaching of the Roman Catholic Church. In 1956 Pope Pius XII touched on the issue in writing of the analogous procedures of human artificial insemination, whether by the use of husband or donor semen. He actually mentioned in vitro fertilisation:

> It is in the unity of this human act that we should consider the biological conditions of generation. Never is it permitted to separate these various aspects to the positive exclusion either of the procreative intention or of the conjugal relationship. ... On the subject of experiments in artificial human fecundation 'in vitro', let it suffice us to observe that they must be rejected as immoral and absolutely illicit. ... Artificial fecundation exceeds the limits of the right which spouses have acquired by the matrimonial contract, namely that of fully exercising their sexual capacity in the natural accomplishment of the marital act. The contract in question does not confer on them a right to artificial fecundation. ... Still less can one derive it from the right to the 'child'. ... The matrimonial contract does not give this right. ... Artificial fecundation isolates the natural law and is contrary to justice and morality.[13]

It is this departure from the normal means of producing human life that seems at the heart of a great deal of the opposition of commentators both in Australia and elsewhere. Mr. B.A. Santamaria refers to the 'wisdom' of the medieval philosophers of whom, he claims, the greatest was Thomas Aquinas:

> Fully seven centuries ago, he insisted that procreation should not be divorced from bodily physical love. Otherwise it would not merely threaten the bond between husband, wife and family, but it would dehumanise mankind. Well, here we are — frozen embryos and all.[14]

Writing on 'Modern morality and life from the test tube', Michael Barnard, in the Age, expressed a chilled reaction, doubtless shared by some of his readers:

> With ... the In Vitro Chorus, who needs Aldous Huxley? And who dare rest content with the assurances of the in vitro brigades, however intellectually honest they may be? Ultimately at issue is not frustrated motherhood but humanity itself — in the nature of our relationships, marriage, family, sexuality and personal identity.[15]

Mr. Santamaria has no doubt as to what the law should do. 'If there is any vision and courage left in Federal and State legislatures', he declares, 'they should enforce a 'total prohibition against these anti-human practices'.[16] The reference to the practices being 'anti-human' is supported by many illusions to the fact that the in vitro programme for human conception began decades ago in other animals. Given the long history of developments in human medicine and the treatment of man after earlier procedures involving animals, it will have been surprising to some to read the views attributed to an anonymous surgeon of the Royal Melbourne Hospital who wrote to the Age:

> Not all medical practitioners greet with joy and satisfaction the news that test tube babies are about to be born in Melbourne. I personally find it repulsive and bizarre that the technique of ovum fertilisation outside the body has been developed at all. It should be remembered that the technique has been applied to cattle for years and the process you hail in your editorial as a marvel of medicine should be truthfully hailed as a marvel of veterinary science.[17]

The appeal to opposition by reference to derogatory statements about veterinary science seem to me to defy the undoubted fact, now established by success in the programme, that in vitro fertilisation of other mammals is a procedure technically possible in human beings. The ethical debate is not advanced by pejorative references to veterinarians or even cattle. But the view is well established. Mr. Santamaria again:

> Are we to believe that the Australian medical community, which has silently acquiesced while some of its members have applied to human life veterinary techniques proper only to animals, will show any greater sense of collective moral responsibility? As the immortal Eliza Doolittle said, 'Not bloody likely'.[18]

It is the concern about man's interference in what is seen as a Divinely ordained scheme of things that has led observers from a number of Christian churches to object to in vitro fertilisation. Notwithstanding the happiness that it may bring to particular human beings, it is seen as unnatural, 'repulsive' and threatening to basic 'human values' which are accorded great importance by the Judeo-Christian tradition : marriage, family and properly ordered human sexuality. Responding to the birth of Louise Brown, the first test tube baby, Father Richard McCormick, a Jesuit and a Professor of Christian Ethics at the Kennedy Institute of Ethics, Georgetown University, wrote of his fear about uncontrolled, modern humanism: :

> It is the American way to measure by immediate results. We are an interventionist people. If the elderly become bothersome, disfunctional or dependent, we isolate them in leisure worlds, hospitals for the chronically ill and homes for the aged. If pregnancy is a nuisance, we end it.[19]

One specialist physician in Melbourne, writing of in vitro fertilisation in September 1981, from an avowedly Catholic point of view, asserts his opposition to be based on an a priori set of assumptions. They do not admit of negotiation. That which is believed to be Divinely inspired is not easily susceptible to consensus politics:

> All moral positions adopted by the Catholic Church are based on philosophical and theological principles. The Church is concerned that all procedures should be truly human and conform to the maintenance and enhancement of human dignity. In the biological order of living things, Man is a unique being, endowed with reason, a moral sense and a freedom to act. Created by God, Man has a singular destiny which can be known from revealed truth. These features of our humanity, a gratuitous endowment of Divine Providence, constitute our human dignity. This dignity raises Man above all other created things and imprints on his nature, a special value in the plan of almighty God. Human sexuality has a profound dignity. Christ revealed that truly human sexuality is a lifelong relationship between man and woman. It shares a relationship similar to that between Christ and the Church. Sexual acts are designated by God to achieve two purposes; to deepen the loving relationship between husband and wife and to share in God's creative powers. This is the Divine or intrinsic programme of human sexuality and reproduction; upon it rests the social institutions of marriage and family. ... It is because of [the] inherent threat [of in vitro fertilisation and embryo transfer] to the nature of human sexuality, of marriage and family, that the Church has consistently condemned several of the component aspects of in vitro fertilisation. Masturbation is an essential part of the programme and over many centuries has been rejected by the Church as an immoral act. ... The technology procures human sex cells for the laboratory production of human embryos which are at the mercy of scientists and irreverent manipulation. Fertilisation loses its truly human nature.[20]

Whilst deeply respecting the sincere way in which this view is advanced, there is no doubt that many Australians could not share it. The reference to 'magisterial teaching on masturbation'[21] does not appear to alter the overwhelming evidence of the widespread occurrence of this practice, nowadays generally believed to be harmless and certainly very widespread. Nobody has suggested Federal or State legislation to prohibit masturbation. Yet legislation has, as I have indicated, been called for to prohibit the mixing of semen procured by masturbation with a human ovum. Moreover, in the United States a Bill has just been narrowly approved by a Senate Committee, designed to reverse Supreme Court rulings and to define human life as commencing at the moment of conception. If such a principle were adopted in the law of Australia, clearly it would have great consequences for the in vitro programme. Father McCormick again:

> Dr. Steptoe estimated that he had, in his research, gone through roughly 200 fertilised ova. What are these 'discards'? Were they mini abortions? I am not sure. But there is a problem here. After all, the only thing standing between an 8-cell zygote and Louise Brown is a uterine home for nine months. Being a zygote is part of the history of all of us. We may differ on our evaluation of nascent life at this stage, but we should not close our eyes.[22]

LOOKING AT THE CONSEQUENCES

Not everybody approaches the resolution of the ethical problem raised by new medical techniques from the perspective of settled and clearly definied moral position. Surveys in Australia, and the answers to the national census, suggest a decline both in association with organised religion and in churchgoing.[23] Commentators may regret or deplore this. They may declaim against the 'secular humanist tide'. But they cannot ignore such a development when responding to complex ethical issues and to the appeal for their solution by reference to 'magisterial teachings' which are not generally, let alone universally, accepted. Lord Justice Ormrod, in an address to the Medico-Legal Society in England, declared in 1977:

> In parallel, and not wholly unconnected, with this great expansion of scientific capabilities, there has been marked and widespread change in moral attitudes. The questioning of accepted knowledge has extended to the questioning of moral attitudes, that is, of course, in the Western world, the moral teaching of Christianity and of other religions elsewhere. This means that the support of a form of authority, the accepted moral code, has largely gone, with the consequence that we are now faced repeatedly with choices which have to be made by each one of us on each occasion for ourselves, where before little or no question of choosing would arise. This, in my view, should not be regarded as a regression. However disturbing and difficult the consequences may be, the ability to choose imposes immense responsibilities, but it represents one of the greatest achievements of humanity.[24]

Although our laws, particularly on matters of life and death, remain profoundly influenced by the Judeo-Christian tradition (and seem likely to be so in the foreseeable future) the days have gone when the 'magisterial teaching' of a particular Church or even of all the Churches can command the respectful acquiescence of the legislators. Ours is a secular government. Ethical principles, to be reflected in the law, must be framed in the knowledge of the variety of attitude, sometimes passionately held by competing interest

groups. Thus, whilst a Melbourne surgeon may find the test tube procedure 'repulsive' and Mr. Santamaria may denounce it as an 'anti-human practice', I suspect that they would have fewer followers in the general Australian community than those who see no moral problem whatsoever, at least in the procedure at this stage which by-passes a physical obstruction and assures the joys of parenthood. Opinion polls on such a subject would not disturb Mr. Santamaria in the least. Moral judgments believed to be based on Divine truth are not displaced, for those who accept them, by the rude practices of democracy : particularly when democracy may not necessarily be based on full knowledge and thorough debate of the issues at stake.

The critics of in vitro fertilisation have not been confined to Christian theologians or those approaching the issue from a moral position settled a-priori A number of serious minded commentators have referred to issues they see in the debate, deserving of careful professional and social attention before the programme goes any further. Thus, the Chairman of the British Medical Association's Ethical Committee (Dr. Thomas) told the Annual Meeting of the Association this year that in his view doctors were getting close to a 'Brave New World' situation where children were produced in baby factories:

> We must make sure that in producing test tube babies we are not doing something which will later cause the nation to tell us we were idiots. It may be that after 10,000 births we shall find there was three times the chance of them being mentally sub-normal or having some congenital malformation.[25]

According to Dr. Thomas, technology has run ahead of ethics and techniques are available to modify the embryo whilst it is still in a test tube. That same techniques, he declared, might eventually be used before birth to make babies who will conform to the party line.

It should be noted that this speech, though couched in somewhat extravagant language, raises issues which may be more troubling to a society such as ours. Even those who cannot share a 'received morality' magisterially taught, will have concern for the social consequences of manipulation of the birth process if it is seen to threaten to destabilise society.

I mention some of the problems that have emerged from the literature, not because all of them are serious possibilities in the near future, but because they have been raised, usually by thoughtful commentators and because they identify some of the problems to which medical ethics, and possibly the law, must address themselves in the future:

> Even if the procedure is accepted as a valid one, with wholly beneficial results, does it represent the crossing of a kind of biological and ethical Rubicon into unchartered territory? What further possibilities does it open up for the manipulation by human beings of human development and are those possibilities desirable ones?[26]

A leading critic of in vitro fertilisation in the United States, Dr. Leon Kass, has asserted that the debate is distorted by the talk of test tube hatcheries. It is his view that the danger is not posed by totalitarian or authoritarian regimes but by deluded 'well wishers of mankind'. His comments are relevant for the examples with which I opened this piece:

> The most serious danger from the widespread use of these techniques will stem not from desires to breed a super race but rather from a growing campaign to prevent the birth of all defective children in the name of population control, 'quality of life' and so-called 'right of every child to be born with a sound physical and mental constitution based on a sound geno-type'.[27]

The development of the technique to promote embryonic sex selection, its potential for genetic engineering, the possible development of ectogenesis and the destruction of unused or abnormal embryos all raise complex issues for a world which, until our generation, has managed with the haphazard, random procedures of human sexuality.

In a recent address it was asserted that Australians are already 'worshipping sterility'.[28] Although this has been hotly disputed, the fact remains that we live in a country of a declining birth rate. Zero population growth has been achieved by contraception and abortion. Live births in Australia dropped from 226,000 in 1977/78 to 223,000 in 1979/80.[29] In fact these figures, and the decline in the number of children available for adoption, explain, in part, the pressures that are now upon childless couples to seek medical help to have children of their own.

The unanswered social questions raised by the in vitro programme do not stop at the uncertainty of the long-term consequences that must attend any new medical technique. So far as we can tell, now, apart from a pronounced tendency to the feminine gender, the babies appear normal. A report in last week's Times indicates that two more test tube babies have been born recently in Britain and 40 more are on the way. Doctor Robert Edwards, one of the pioneers of the technique, is reported to have told Nature that

the method is now 'an almost routine clinical process'.[30] But we are a long way short of 10,000 cases. The consequences are still under study. But it may be many years before the rhetorical question at the BMA Congress can be answered with a convincing 'no'.

Even if there are no untoward consequences and the Louise Browns and Candice Reids of this world grow up otherwise indistinguishable from the rest of us, other social issues have been raised and we will have to address them. Some of them are simply parallels of the questions that are mentioned in any debate about artificial insemination, whether by husband or donor. Others are new and different questions. Testing the limits of in vitro fertilisation may be irritating to those who are engaged in the daily task of striving for success in a thoroughly willing patient. But of course it is perfectly legitimate for these questions to be asked by society itself.

Father McCormick puts his point in a colloquial style. But he does so to make a serious observation on the subject of the use of surrogates:

> And then there is the host, or surrogate, womb for the malfunctioning uterus or the third party ovum for the woman with ovaries or the unattractive woman. Is it really impossible to imagine a movie star in the future auctioning an ovum for charity? ... A nation of hero worshippers where the family is already under serious assault is not likely to balk at a little sperm or ovum mixing or even a great deal of it. None of this need happen, of course. But today's incredibles are too often tomorrow's headlines. The slope is slippery in all places.[31]

For any critic who expresses fear that the in vitro fertilisation techniques will lead on to the selection of donors for supposedly favourably genetic characteristics, there are others who will contend that people who have been sterilised or whose work is unduly hazardous to life should have the opportunity to make arrangements for indefinite storage of their sperm (and possibly of an ovum) as an insurance against complete loss of reproductive capacity.[32] For every critic who points out that artificial insemination of any kind is non-human and morally suspect, others will argue that natural human behaviour is not always moral and that man has been the most successful killer of all species. For critics of selected breeding of human beings for desired characteristics, there are always those who will point to our acceptance of beneficial effects of animal breeding for improving behavioural and physical characteristics.[33] When rules taught by the Churches do not bind, and when we must make the choices of which Sir Roger Ormrod said we should be proud, and when we look to the consequences for individuals and society, the debates that are possible are virtually endless. Is it realistic to envisage that the end product of

Professor Wood's work will be Aldous Huxley's hatcheries? Is there really a fear that poor people will carry the children, fertilised in vitro, of wealthy, elegant woman who 'worship sterility'? Is it just a jest to talk of a world in which famous people would auction desirable children fertilised in vitro and selected for their supposedly attractive physical or intellectual qualities from a data bank? The numbers of children born to surrogate mothers are said to be rising. Draft legislation has been proposed in the State of Michigan to protect and legitimise the practice. Yet in the case of an in vitro conception, the Lancet points out that new problems arise. Will the donor or the surrogate have the final choice about aborting the pregnancy?[34]

> If a bank of frozen embryos is created, how will they be used? Is the identification of the parents recorded and who has the right of access to that record? Will the embryos be transferred to the wombs of women who are not the 'natural' mothers? Will they be transferred to wombs of lesbians, unmarried mothers, surrogate mothers or even into animals?[35]

The procedures for freezing embryos for future use pose the issue of how long such frozen embryos may be preserved. Technologically, we are told it may be more than a century. But is it acceptable that a child of our generation should be born decades or even centuries hence?

The financial costs of the programme has also attracted criticism in some quarters. It is said to be ethically wrong to divert large sums of capital and many talented people to a procedure addressed to a small percentage of the total female population and likely to succeed in no more than 25 or 30% of the patients involved.[36] It has always seemed to me that this is one of the lesser ethical issues in the debate. Many new medical techniques are expensive at the outset. The cost reduces as the technique becomes routine. Though some medical practitioners talk as if cost/benefit analysis has no place in modern medicine, I am sure they are wrong, just as lawyers who assert that justice is beyond price ignore the constant necessity of the economic choice. Devoting strictly limited resources to one activity limits their availability to others. Governments will doubtless have to consider the funds they make available from the public purse to the new technique. But this decision, whatever it may be, will not remove the more profound ethical questions posed by those who question the technique in the first place and would oppose it, whether it was used in the present modest scale and perhaps even more vigorously if it became cheap and brought the dreaded hatcheries of 'Brave New World' closer to feasible economic reality.

Quite apart from the numerous ethical problems, some of which I have outlined, many legal problems remain unanswered. Some of them simply parallel the issues of the artificial insemination debate. Others go further. For example, under the normal procedures of artificial insemination, the mother at least will be a person of this generation. In a world of embryo banks, maintained in a frozen state, a child might be born long after the natural parents had died. The consequences for the passing of property, the laws of inheritance, the reopening of estates and the redistribution of the property of the natural parents are issues upon which the law is either silent or uncertain. The entitlement of a child to sue over alleged negligent hospital treatment given to his mother eight years before his birth has recently been upheld in the Supreme Court of Victoria.[37] If this decision is upheld on appeal, it may have consequences not only, as has been pointed out, for the Agent Orange case, of the unborn children of Vietnam veterans, but also for the unborn (and possibly stored) children produced by in vitro fertilisation. Yet if such a child were born years after the medical team involved in the conception had died, would there be any way for the child to recover and if so, against whom? Who owns pre-implantation embryos and does the medical team have the right to destroy unused or abnormal embryos? What limitations should be imposed, if any, upon experimentation with embryos? How should we confront the legal consequences of surrogate parenthood? Michigan may anticipate legislation. But the courts of England have reacted with shock and outrage at a surrogate arrangement, which is infinitely more complex if the surrogate mother is not the natural mother but is carrying a child produced by the fertilisation of the ovum of another woman. Legitimacy, the passing of property, the right to identity, the control of surrogate parenthood, the control of storage, avoidance of incest, all present as issues to be addressed, provided the decision is made to reject the call for the prohibition of the whole procedure. Who are examining these questions?

WHO WILL MAKE THE RULES?

There are some who are cautious about the intervention of the law in controversies such as this. Mr. Justice Brennan of the High Court of Australia has cautioned against any endeavour to build a legal regime upon 'shifting sands'. Where there is no clear public consensus, it may be dangerous to seek the premature enactment of law. They may overlook changes in medical techniques and movements in community opinion, encouraged by greater knowledge of and familiarity with the techniques.[38] As well, in the matter of in vitro fertilisation, enough has been said to show that strongly held views are involved that do not appear readily susceptible to compromise. But whether it is to respond to the demand for total prohibition or to clarify the frame of reference in which these procedures will advance, the time cannot be far off when laws of one kind or another will be needed and the issues I have listed, will have to be addressed.

The alternative is that the call of the prohibitionists will simply be ignored and their debate forfeited to the ongoing progress of the technology. An Age editorial put it well:

> Like the hare and the tortoise, science and the law run a permanently unequal race. While science moves in dazzling leaps, and pirouettes, weaving wonder and miracles, the law plods sedately behind and collects the dust. It is sometimes a very long plod.[39]

In default of legislation, many of the legal and social quandaries will be left unanswered or will depend upon decisions in the courts of the kind forced upon the English Court of Appeal in the space of a busy afternoon when the life of a mentally retarded child was at stake. Such a procedure of answering such legal and ethical uncertainties is clearly unsatisfactory. It allows no widespread consultation, no professional and community debate and perhaps no time for reflective consideration of the difficult questions that have to be addressed.

In default of guidance from the legislators or the courts, an unequal burden is placed upon individual medical practitioners and the ethics committees of hospitals. This too is unsatisfactory. The individual practitioner may be as uncertain as the next man in society about the rules that should govern his conduct. He too may not have the time to reflect upon the issues at stake and many of them will be uncertain in any case. An ethics committee generally meets in private. It is not obliged to give reasons. It does not have open to it full procedures of consultation. It must do its best and this it will do in an earnest and sincere way. Nowhere is there likely to be greater concern than in a case such as has been faced in this hospital, where a spotlight of world attention has been focused upon the dramatic technical achievements made by Professor Wood's team. I return to last years's Reith Lecturer, Dr. Ian Kennedy. Pointing out that many medical dilemmas today are not purely matters of medical science, Kennedy contends, in language which is apt for this issue:

> They have underpinnings of a moral and ethical and political nature, which means that perhaps they shouldn't be uniquely deemed to be within the competence of medical people. ... We as individuals seem to have been content in the past to leave [decisions] to doctors to make. I don't think that's fair to doctors because it's a decision of great philosophical import, about how we think we ought to treat people — not treat them in a medical sense, but behave towards them; how we value life, how we value suffering. ... Those sorts of decisions are very complicated, obviously, very profound in terms of needing

careful analysis and we have gladly sloughed them off; and I think we have to begin to take some responsibility for them. ... Religious principle is eminently unclear in this area. ... Equally the law isn't clear. ... And of course ... the doctor's scheme of ethics doesn't give a solution here because he has to do that which is in the best interests of his patient and one doctor in Halifax may decide that differently from a doctor in Huddersfield. I am not saying that wrong decisions are made; I am saying that what has happened is that we have become more and more presented with these kinds of problems because of the availability of modern medicines and modern medical technology. ... [T]he rate of 'progress' has been so great that we've hardly had time to catch our breath and consider what we are doing with ourselves.[40]

How do we stop and catch our breath about the moral, social, legal and financial implications of the in vitro fertilisation programme? I have said that to do nothing is already to make a decision. It is to make the decision that we will ignore complicated consequences, some of which can already be dimly seen and reject the calls of those who would cry halt to the whole process. To leave it to the individual medical practitioner or the hospital ethics committee is unfair. Devoid of the sure anchor of a generally accepted community morality, the individual medical practitioner can play out his own values and idiosyncrasies. The case of the mentally retarded child in a London Borough displays vividly the division of medical opinion within adjoining hospitals and indeed the self-same hospital. The divisions of medical opinion in Australia about in vitro fertilisation are already plain.

Committing the matter to a hospital ethics committee is likewise unsatisfactory. There is too much secrecy, too little frank dialogue with the whole community which is affected. There may even be pressures for orthodoxy and caution which are not appropriate.

What then is left? The controversies and problems might be turned over to an ad hoc body, perhaps created by the Council of Health Ministers, a particular Department of State, a Royal Commission or the Standing Committee of Attorneys-General. The lastmentioned body recently announced its intention to secure Federal and State legislation to give 'full legal rights' to persons conceived through artificial insemination by donors and to those conceived by in vitro fertilisation.[41] However, even this modest announcement was criticised from a number of competing perspectives. For the Festival of Light, the Reverend Fred Nile said it was moving ahead of public opinion. He was troubled by 'the unseemly haste'. The Age editorial, on the other hand, pointed out that it was a generation since the first Australian was conceived through artificial insemination donor and described the move as 'belated but welcome'.[42] The Secretary

of the Council for Civil Liberties in New South Wales, Professor Buckley, pointed out that there had been little discussion on the subject and urged that there should be more before any legislation was passed.[43] Many matters were not covered in the Attorney-General's announcement, including rights to identity, legal control over the selection and screening of donors, recording of genetically retransmittable diseases, avoidance of accidental incest and so on.

EPITAPH FOR A GENERATION

In the United States there is a Presidential Commission for the study of ethical problems in medicine and bio-medical and behavioural research. We have no permanent body specifically established in Australia to bring together the various disciplines for expert advice to provide the basis for an informed community debate on medical ethical issues. However, in 1977, the Australian Law Reform Commission produced a report on Human Tissue Transplants.[44] It did this by a procedure which seemed to me to be appropriate to the issues raised by the in vitro fertilisation debate. Indeed, in its report, the Commission specifically drew attention to the prospect of in vitro fertilisation and the need for laws to deal with it:

> It is clear that very substantial problems are raised by embryo transplants, and any form of fertilisation of the ovum of a woman whether in utero or in vitro in which the semen of a donor, not her husband, is used. These problems extend to the legitimacy of the child, matrimonial or family law, and the inheritance of property. It is inappropriate to treat these problems, which are also problems of 'normal' artificial insemination as practised throughout Australia today, as a minor aspect of an inquiry on human tissue transplants. Important social and moral, as well as legal, questions are involved. They are not appropriate for legislative attention in a general ordinance dealing with transplantation. Some doubt has been expressed whether the in vitro fertilisation, embryo transplants and artificial insemination do in fact fall within the terms of this Reference. ... It has been suggested that the fertilisation in vitro, of an ovum and the subsequent implant of the embryo in a living woman, may not fall within the Reference. It has also been suggested that the act of donating semen is of such a different nature from the act of removal of other tissues for transplant, that it may not be comprehended by the words of the Reference.[45]

Although by a majority the Commission felt that the subjects did fall within the terms of reference, it recommended that they should be excluded from general transplantation legislation and dealt with separately and urgently.[46]

The Commission's report was produced with the assistance of a team of consultants including specialists from all the relevant medical disciplines, from all parts of Australia, theologians of differing religious persuasion, a moral philosopher and other experts. Sitting at the table of the Commission, as members of the Commission, were some of the most distinguished lawyers in our country, including Sir Zelman Cowen (now Governor-General) and Sir Gerard Brennan (now a Justice of the High Court of Australia). The Commission's tentative views were widely distributed throughout Australia and then debated in public hearings, professional seminars and on radio and television before audiences of millions. The whole procedure raised a national community debate which attracted the approbation even of overseas medical observers such as the British Medical Journal[47] which saw the technique as one which could be followed in Britain. The result has been a draft law which is working its way through the parliaments of this country. It has been accepted in the Capital Territory and the Northern Territory. It is in operation in Queensland. It has lately been recommended for acceptance in Victoria. It is under consideration elsewhere.

Upon particular subjects there may be differences of view, as indeed there were within the Commission itself. However, a vehicle was provided to mobilise expert and community opinion, to face up to the issues raised and to state the options for legislators to choose. For the 'too hard basket' if we are serious about the rule of law and providing guidance of the law in difficult social questions, our lawmakers need help. Laws governing in vitro fertilisation should not be developed in secret. They should not be developed in a superficial and inadequate way. They should not be developed in urgent litigation in a busy court unable to consult widely the requisite experts and the general community. They should not be left to hospital committees to muddle along, doing the best they can, within the rigours of the daily life of medical practitioners. Above all they should not be left to drift, in the hope that the problems will go away. Every thoughtful commentator who has looked at the moral, social and legal problems that are opened up by the potential of in vitro fertilisation has urged the need for public discussion and debate as the prelude for any laws that may follow. Father Richard McCormick put it thus:

> A good historical memory should tell us ... two ... things. First, that technology can, at times, represent a mixed blessing. Second, it should warn us that the best way to discern blessing from burden is through open public discussion before the fact.[48]

I realise that some are dubious of the ability of a body, such as a law reform commission, overwhelmingly of lawyers, to act as the catalyst in an area of such complexity. I also realise that in Australia medical law is substantially State law, although a Federal body may sometimes be of help where the problems really do not differ from one side of our country to the other. I also realise that some issues stir such strong emotion as to defy consensus solutions. I am not unaware of the natural tendency, in a democracy, for politicans to steer clear of debates such as this.[49]

But unless we can find an appropriate interdisciplinary means for raising the issues, searching for an informed community voice and helping our lawmaking process to work, it may be the reproach of future generations that we in Australia were in the vanguard of the medical technology which developed test tube man but were inadequate for the ethical and legal consequences which followed. I do not choose to believe that it is beyond the skills of Australians in the law, theology, moral philosophy and parliaments to be just as skilful and imaginative in their spheres as Professor Wood and his team have proved themselves in theirs. The chief enemies are apathy, indifference, timidity and the ever present willingness to under-estimate our ability to face up to and answer hard questions in law and morality. Let it not be the epitaph of our generation that we proved ourselves brilliant in a dazzling field of scientific endeavour but so morally bankrupt and legally incompetent that we just could not bother or did not have the courage to sort out the consequences for our society and for the human species.

FOOTNOTES

1. Re B, Times Law Report, The Times, 8 August 1981, 14.

2. ibid.

3. Daily Telegraph, 10 August 1981.

4. D. Plank, cited The Standard, 10 August 1981, 1.

5. Cited The Guardian, 8 August 1981, 1.

6. Daily Telegraph (London), 10 August 1981, 10.

7. The Times, 10 August 1981, 9.

8. Professor J. Lorben, cited in The Times, 13 August 1981, 1.

9. Mentioned in The Times, 10 August 1981, 9.

10. News Week, 18 May 1981.

11. Re Aragon, reported Melbourne Herald, 5 September 1981.

12. Letter by J. Cox, Sun Herald, 23 August 1981.

13. Pope Pius XII, cited L. Walters, 'Human In Vitro Fertilisation : A Review of the Ethical Literature', Hastings Center Report, 9(4), 1979, 25.

14. Newsweekly, 15 April 1981.

15. The Age, 21 July 1981, 13.

16. Newsweekly, 22 July 1981.

17. id., 20 February 1980.

18. id., 22 July 1981.

19. R.A. McCormick, 'Life in the Test Tube', New York Times, 6 August 1978, E7.

20. J.N. Santamaria, 'In Vitro Fertilisation', mimeo, September 1981, 10.

21. id., 9.

22. McCormick, ibid.

23. See e.g. 'The Declining Power of Religion', in National Times, 16 August 1981, 13.

24. R. Ormrod, A Lawyer Looks at Medical Ethics, (1977).

25. As reported, Daily Telegraph (London), 3 July 1981, 3.

26. G. Grobstein, 'External Human Fertilisation', in Scientific American, June 1979, Vol. 240, No. 6, 33.

27. L. Kass, cited in M. Barnard, 'Modern Morality, and Life from the Test Tube', in the Age, 21 July 1981, 13.

28. M. Decter, Latham Memorial Lecture, reported The Australian, 22 August 1981, 3.

29. The figures are cited in the Age, 19 September 1981.

30. The Times, 25 September 1981, 1.

31. McCormick, ibid, n.19.

32. D.M. Danks, 'Genetic Considerations', in C. Wood (ed), Artificial Insemination by Donor, 107.

33. ibid.

34. D.J. Cusine, 'Some Legal Implications of Embryo Transfer', in the Lancet, 25 August 1979, 407, 408.

35. J. Santamaria, n.20.

36. C. Wood, cited the Age, 11 March 1981, 1.

37. Kosky v. St. Vincent's Hospital, reported the Age, 20 August 1981.

38. F.G. Brennan, 'Law, Ethics and Medicine', adapted from the Langford Oration 1977, delivered at the Annual Meeting of the College of Medical Administrators, Brisbane, September-October 1977, Medical Journal of Australia, 1978, 2 : 577-578.

39. The Age, 10 August 1981.

40. I. Kennedy, interview, The Listener, 30 August 1980, 568.

41. Sydney Morning Herald, 3 August 1981, 1.

42. The Age, 10 August 1981, 13.

43. Sydney Morning Herald, 3 August 1981, 1.

44. The Law Reform Commission, Human Tissue Transplants (ALRC 7) 1977.

45. id., 19 (para. 42).

46. id., 19 (para. 42).

47. British Medical Journal, 28 January 1978, 195.

48. McCormick, n.19 above.

49. Grobstein, n.26 above, 43.