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Reproduction and Medical Interventionism: An Historical Comment

Clyde Spillenger*

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Abstract

A common assessment of the case of *In re A.C.* is that it presents an insoluble dilemma, or a weighing of imponderables: an individual's bodily integrity on one side, and the potential life of the unborn on the other.

KEYWORDS: medical, reproduction, interventionism

Reproduction and Medical Interventionism: An Historical Comment

Clyde Spillenger*

A common assessment of the case of *In re A.C.*¹ is that it presents an insoluble dilemma, or a weighing of imponderables: an individual's bodily integrity on one side, and the potential life of the unborn on the other. One question that is usually left unanswered, however, is how societal "interests" that are defined primarily by the contemporary state of medical technology have been elevated to equal status with human values that have been recognized for thousands of years. Like Justice O'Connor's intimations in *Akron*² concerning the "viability-non-viability" distinction made in *Roe v. Wade*³, like the controversies over euthanasia and the "right to die," the decision in the *A.C.* case rests on the dangerous and fallacious view that whatever science and medical technology make possible should be implemented, by legal coercion if necessary.

Disagreement over the proper application of science and technology, from nuclear weaponry to biotechnology, is a persistent social tension. We have not resolved, however, all such issues in the same way. It is instructive to consider some other instances in which choices between the exercise of technological innovation and the preservation of human dignity or bodily integrity have been made. While enthusiasm for the "possibilities" of science has often overcome considerations of individual choice and integrity, in some cases those "possibilities" have been stifled. One theme connecting these episodes has been a distrust of reproductive functions, particularly those of women.

The classic example of the ambiguities of medical technology, at

* Associate, Powell, Goldstein, Frazer & Murphy, Washington, D.C. J.D. 1987, M.Phil. 1988, Yale University. The author participated in the submission of briefs by the NOW Legal Defense Fund and the ACLU Reproductive Freedom Project in the case of *In re A.C.*, discussed in this essay.

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1. 533 A.2d 611 (D.C. 1987), *vacated and reh'g granted*, 539 A.2d 203 (1988).
2. *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 456-58 (1983) (O'Connor, J., dissenting).
3. 410 U.S. 113 (1973).

least in the context of reproduction, is the evolution of interventionism in childbirth. Although childbirth is plainly a less dangerous and better understood medical procedure than it was before it became the province of hospitals and doctors, such historians as Judith Walzer Leavitt and Richard and Dorothy Wertz have demonstrated that the professionalization and desocialization of delivery exacted costs from women.⁴ In particular, the process by which childbirth became an affair of doctors rather than family, friends, and midwives involved at times a degree of interventionism that undermined the health and integrity of childbearing women.

For example, in the eighteenth and nineteenth centuries, as medical doctors supplanted midwives, the "exigencies of professional practice" created pressures for sophisticated interventions. Walter Channing, Professor of Midwifery at the Harvard Medical School in the early nineteenth century, commented on the tendency for the delivering doctor to feel that he "must do something. He cannot remain a spectator merely, where there are too many witnesses and where interest in what is going on is too deep to allow of his inaction."⁵ In the excitement of developing a new scientific specialty, physicians frequently acted overzealously and to the detriment of their women patients. Of course, such pressures were not limited to obstetrical specialties — the "consolidation of professional authority" in American medicine at this time has been thoroughly documented⁶ — but in the reproductive area they led to practices that today seem almost bizarre.⁷

The incentives for increased intervention persisted into this century as well, as greater medical knowledge of germs and infection generated energetic preventive routines. All too often such intervention not only

4. J. LEAVITT, *BROUGHT TO BED: CHILD-BEARING IN AMERICA, 1750-1950* (1986); R. WERTZ & D. WERTZ, *LYING-IN: A HISTORY OF CHILDBIRTH IN AMERICA* (1977).

5. Quoted in R. WERTZ & D. WERTZ, *supra* note 4, at 64. Mainstream physicians ("regulars") in nineteenth-century America were almost exclusively men. See J. LEAVITT, *supra* note 4, at 109 ("male medicine").

6. See generally P. STARR, *THE SOCIAL TRANSFORMATION OF AMERICAN MEDICINE: THE RISE OF A SOVEREIGN PROFESSION AND THE MAKING OF A VAST INDUSTRY* (1982).

7. Concerning the "mechanistic view" of reproduction held by French doctors that undergirded the new interventionism, the Wertzes observe drily, "It led some surgeons to make deep cuts to expand the birth canal or to open the abdomen, but, since the women usually died, they had to abandon such attempts to reshape or circumvent the birth machine." R. WERTZ & D. WERTZ, *supra* note 4, at 33-34.

was unnecessary but also reflected a contempt for the women enduring it, as when doctors treated poor or foreign-born women.⁸ As two major studies of maternal mortality published in 1933 demonstrated, excessive intervention, in particular a proclivity for unnecessary cesarean sections, was a major cause of delivery deaths.⁹ The problem persists. A study recently released by the Public Citizen Health Research Group reports that unnecessary cesarean sections in this country have reached alarming proportions. More than four times as many cesareans were performed in 1987 as in 1970.¹⁰

Unfortunate as the effects of reproductive interventionism were and have been, they seem benign when compared with the assaults on human autonomy perpetrated in the name of the "science" of eugenics in the early part of this century. Susan Stefan, in her article in this Symposium, discusses the Carrie Buck case, which has become so infamous an episode in American social and legal history.¹¹ What even *Buck v. Bell*¹² may conceal from a modern audience is that, until the experiments of Nazi Germany made clear the horrors to which eugenic theories could be put, the idea of regulating procreative capacity to achieve "societal" ends had broad appeal in this country.

The most influential eugenicists in this country — called "main-line" eugenicists by historian Daniel Kevles¹³ — were social conservatives; the gist of their program was to weed out "undesirables" and to produce a race of the "good type." Unacceptable as these views now seem, they were far from outlandish or unusual in an age — the Progressive Era — with an unprecedented faith in the beneficent effects of science.¹⁴ In 1930, half the states had compulsory sterilization laws.¹⁵ Many of these laws provided for the sterilization not only of convicted

8. *Id.* at 138-39.

9. *Id.* at 161-62.

10. L. SILVER & S. WOLFE, UNNECESSARY CESAREAN SECTIONS: HOW TO CURE A NATIONAL EPIDEMIC 1 (Public Citizen Health Research Group 1989).

11. Stefan, *Whose Egg is it Anyway: Reproductive Rights of Incarcerated, Institutionalized and Incompetent Women*, 13 NOVA L. REV. 405 (1989).

12. 274 U.S. 200 (1927).

13. D. KEVLES, IN THE NAME OF EUGENICS: GENETICS AND THE USES OF HUMAN HEREDITY 88 (1985).

14. Of the many works that have discussed this characteristic of Progressive Era social and political thought, see particularly S. HABER, EFFICIENCY AND UPLIFT: SCIENTIFIC MANAGEMENT IN THE PROGRESSIVE ERA, 1890-1920 (1964), and S. HAYS, CONSERVATION AND THE GOSPEL OF EFFICIENCY: THE PROGRESSIVE CONSERVATION MOVEMENT, 1890-1920 (1959).

15. D. KEVLES, *supra* note 13, at 111.

criminals, but also of those considered "feeble-minded" and those suspected of "sexual immorality." Indeed, the entire eugenics movement seemed obsessed with sexuality, virtually identifying "sexual immorality" and "criminal tendencies."¹⁶ The eugenics movement also illustrates the dangers of unexamined faith in science and technology, whose possibilities, as Lewis Mumford has stated, bode ill or well as those who deploy them bode ill or well.¹⁷ Carrie Buck's story, and Holmes's ill-chosen epigram, merely exemplify the surrender of human sensibilities to the "scientific" fervor over eugenics.

Although eugenic experimentation never became fully entrenched as a state-sponsored instrument of race hatred in this country, it did achieve that dubious status in Nazi Germany, where the American initiatives were at first envied and then exceeded. An obvious handmaiden of the Nazi extermination program, Germany's eugenics policy reflected the Nazi conviction that "the State is not there to see that the individual gets his rights, but to serve the race."¹⁸ One favored eugenic technique was removal of the entire uterus in "mentally defective" women. Again, the eugenic vision was one of compulsion, not of choice; even as "sterilization courts" issued orders terminating the procreative powers of women and men, the right to terminate a pregnancy was extinguished by laws prohibiting abortion.¹⁹

Parallels between the eugenics movement and the modern practice of court-ordered cesarean sections and other medical interventions are more than sensationalistic or theoretical. We read our own prejudices into the past if we satisfy ourselves that the present situation is at bottom a "difficult ethical dilemma," while the earlier episode is an obvious wrong. All such visions of the uses of medical technology are moral imperatives to those who hold them. For eugenicists from Charles Davenport to Theodore Roosevelt, regulation of reproduction in the interest

16. *See id.* at 107-12.

17. L. MUMFORD, *TECHNICS AND CIVILIZATION*, quoted in D. NOBLE, *AMERICA BY DESIGN* (1977) (frontispiece).

18. Quoted in R. LIFTON, *THE NAZI DOCTORS: MEDICAL KILLING AND THE PSYCHOLOGY OF GENOCIDE* 24 (1986).

19. According to Lifton:

Abortions were prohibited, but sterilization courts could rule that pregnancy could be interrupted for eugenic reasons in a "racial emergency" situation: that is, if the future child was likely to inherit certain defects or (in all probability) had mixed (Jewish and non-Jewish) parentage.

Id. at 42.

of society was a moral duty.²⁰ To regard the eugenics movement as an artifact of a less progressive day, spawned by those who (unlike ourselves) lacked a sense of moral insight, is to engage in self-justification.

This point is underscored by the diverse group of public figures who rallied behind the flag of eugenics. The movement attracted not only taciturn moralists, but also liberals, progressives, even utopian socialists. These different groups shared an unwavering, almost naive faith in science and its beneficent infallibility. The faith in science so characteristic of the Progressive Era remains an integral characteristic of this country's political culture. The willingness to exalt the possibilities of science at the expense of an individual's bodily integrity would be troubling under any circumstances; the danger escalates when the law, which for all its abstraction is frequently the last defense of individual dignity, places its affirmative coercive powers behind such uses of medical technology. That is what happened when 20,000 involuntary sterilizations were performed under color of state law in the first third of this century;²¹ that is what happened when the judge in *A.C.* ordered that a cesarean section be performed.

The recent history of the regulation of reproduction reveals more than a dangerous trust in science. It is not incidental that such regulation has disproportionately harmed women and has reflected a distrust, even contempt for, their reproductive powers. It is true that eugenic

20. I agree . . . that society has no business to permit degenerates to reproduce their kind. It is really extraordinary that our people refuse to apply to human beings such elementary knowledge as every successful farmer is obliged to apply to his own stock breeding. Any group of farmers who permitted their best stock not to breed, and let all the increase come from the worst stock, would be treated as fit inmates for an asylum. Yet we fail to understand that such conduct is rational compared to the conduct of a nation which permits unlimited breeding from the worst stocks, physically and morally, while it encourages or connives at the cold selfishness or the twisted sentimentality as a result of which the men and women who ought to marry, and if married have large families, remain celibates [sic] or have no children or only one or two. Some day we will realize that the prime duty, the inescapable duty, of the good citizen of the right type is to leave his or her blood behind him in the world; and that we have no business to permit the perpetuation of the wrong type.

Theodore Roosevelt to Charles Davenport, January 3, 1913, Theodore Roosevelt MSS, Princeton University. Davenport was probably America's most prominent eugenicist. D. KEVLES, *supra* note 13, at 44-56.

21. D. KEVLES, *supra* note 13, at 112.

sterilizations were performed on men as well as women.²² But a gender-neutral interpretation cannot explain the differing responses made by American legal culture to eugenics and to such issues as birth control and abortion. All these issues implicated questions of medical and biological science, visions of a social order, the individual's right to bodily integrity, and the role of women in society. Yet, even as many states found room in their statutes for the eugenic regulation of reproduction, distribution and even discussion of contraception remained criminal activity under both federal law and the laws of many of these same states.²³

The long struggle to decriminalize contraception is all the more striking in light of the possibilities that intelligent use of birth control represented for family planning and understanding and control of reproductive capacities. The persistence of Comstockian proscriptions on contraception, at a time when affirmative control of social conditions through science was becoming an American article of faith, suggests a bias in American legal culture against women's reproductive integrity. Fittingly, legal barriers to the availability of information concerning contraception only began to fall once its proponents began casting their arguments in terms that eugenicists could appreciate.²⁴ Needless to say, the enthusiasm for eugenics did not mitigate in the slightest the force of laws prohibiting abortion. The most ardent eugenicists in this country (as in Germany) were for the most part opposed to both abortion and the availability of birth control.

Further episodes in the history of reproduction — for example, the fiascos involving thalidomide and DES — illustrate the risks of hasty and unwavering deference to the claims of medical technology where basic human attributes are concerned. Of course, most such claims are no more inherently maleficent than they are inherently beneficent; they offer hope as well as risks. But awareness of these risks is especially important when a court is asked to grant legal sanction to the claims of science, at the expense of individual autonomy. For while the possibili-

22. It is worth noting, however, that, fifteen years after *Buck v. Bell*, the Supreme Court found a theory by which to overturn a state law under which a man was threatened with sterilization, without overturning *Buck v. Bell*. *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

23. See generally D. KENNEDY, *BIRTH CONTROL IN AMERICA: THE CAREER OF MARGARET SANGER* (1971).

24. For example, in 1919 Margaret Sanger wrote, "More children from the fit, less from the unfit — that is the chief issue of birth control." Quoted in D. KEVLES, *supra* note 13, at 90.