

Book Review

CASES, MATERIALS AND PROBLEMS OF BIOETHICS AND LAW.
By Michael H. Shapiro and Roy G. Spece, Jr. St. Paul, MN: West Publishing Co., 1981. 892 pages.

Reviewed by Ralph Slovenko, LLB, PhD

Any book on bioethics and law must essentially be futuristic in nature. The development of techniques such as DNA recombination, cloning, physical and chemical control of the brain, body banks for transplantation, selective breeding, and the like are closer to the present than when Aldous Huxley wrote *Brave New World* or when George Orwell wrote *1984*, but they are still beyond the horizon. To be sure, the technology is available or soon will be, but its use will be much dependent on moral, ethical, philosophical, political, or legal obstacles.

The acceptance of these new biological technologies will call for some kind of consensus regarding autonomy of the person; a determination of whether certain moral values are enough to curb biomedical technology; a political choice as to whether decisions in biomedical technology should be made democratically, autocratically, or in some other manner; a legal and ethical decision as to how distributions of scarce technology and organs shall be made; a cost-benefit decision as to which research and procedures will be fostered by government; and decisions as to who shall bear the risk.

In *Bioethics and Law*, a law-styled collection of court opinions, articles, and problems, Professor Michael H. Shapiro of the University of Southern California Law Center and Professor Roy G. Spece of the University of Arizona College of Law give an overview of these problems stressing the areas of behavioral control, genetic and reproductive control, control of dying, and organ transplantation. In the first paragraph of the preface Professors Shapiro and Spece describe the reasoning behind these new teaching materials:

Within recent years, a number of biological technologies have commanded the attention of courts, legislatures and administrative and executive agencies. These technologies—the 'New Biology'—sharply extend our powers to control, explain, and predict human attributes and life processes. We have developed, for example, techniques for pharmacological regulation of behavior; new methods of human reproduction; and complex techniques for prolonging life (or prolonging the process of dying), including organ transplantation as well as life-support systems and lifesaving therapy. There is also the prospect of determining the genetic constitution of individuals and of society. Because of these technological portents, some basic (if usually unstated) assumptions underlying human activities have been undermined —e.g., that our individual attributes and identities endure more or less intact over time; that reproduction requires direct human participation through all stages of producing a new human being; and that

BOOK REVIEW

the difference between being alive and being dead is conceptually simple and readily determinable by elementary empirical means When these postulates change, so also do our interpersonal relationships, and therefore our legal relationships. It thus seems prudent, if not imperative, for scholars and students to address these matters

In their opening section on the field of bioethics and law (pp. 1-212), Shapiro and Spece set out an overview of the major philosophical and ethical theories that come into play with the "new biology." As these materials point out, the new biology may bring about an "engineering" model of the human being. In the ethical field, the promise that "we know what we want" may have to be reevaluated. Will a person have a basic right to "be left alone"? Much of biomedicine involves chemical control, selective breeding, prolongation of life, and other techniques that, in some measure, undermine a right of privacy. Will the courts say that a state interest in a "great society" is compelling enough to outweigh the right of privacy?

Part II of the book (pp. 122-325) deals with control of mind and behavior. The issue has faced the courts in recent years in regard the right to treatment or rehabilitation during penal and civil commitment, the right to refuse treatment, informed consent of prisoners and incompetents, "synthetic" (drug-induced) competency to stand trial or qualification for discharge following a not guilty by reason of insanity verdict, the right of access to behavior-control technologies for religious purposes, access to such technologies for recreation, and access to such technologies for augmentation of one's ability. The authors make much of how the courts will deal with certain behavior devices that may be imposed by the State: telemetric systems to monitor the behavior of parolees or dangerous individuals, conditions imposed on reproduction, drugs mandatorially given to school-children, mandatory sterilization of those carrying genetic abnormalities, and so on.

Part II-A of the book (pp. 326-498) deals with genetic control covering birth control, reproductive control, death control, and genetic research. Numerous genetic diseases such as Down's Syndrome provide a therapeutic justification to explore the possibility of genetic screening of couples, recombinant DNA, early abortions and the non-use of extraordinary treatment of the newborn genetically deficient infant. Non-therapeutic justifications include the improvement of the human race (positive) and the elimination of defective humans (negative). They challenge the right of procreational autonomy. Should there be an unrestricted right to breed? Should there be a right to beget a random child (a child whose genes are randomly chosen through the act of nature)? Tax laws providing incentives or penalties may provide the greatest stimulus for genetic screening or population control (for example, by providing tax benefits for families with fewer children or by imposing a tax surcharge on children), but this type of incentive/penalty program would cut across the board and not provide the selectiveness that justifies genetic control.

Part III-B of the book (pp. 499-569) deals with reproductive control. The introductory chapter deals with the various methods of procreation including artificial insemination, *in vitro* (test tube) and *in vivo* fertilization, cloning, surrogate parenthood, and parthenogenesis. What are the rights of donors or surrogates? Is embryo research subject to the same control as research on human subjects? What of banking of human embryos? Do such procedures weaken the family?

The next part of the book, Part IV on death control (pp. 570-739), begins with a definition of death, with focus on the criteria set out by a committee of the Harvard Medical School in 1968. Medical definitions of methods of resuscitation are set forth explaining the relative extraordinary nature of the remedy as well as their relative intrusiveness. The materials then turn to the choice of a dying person (competent or incompetent) or his or her parent and guardian to make the choice of withdrawing extraordinary methods of life support. The most notable case is that of Karen Quinlan in 1976 where the New Jersey Supreme Court decided that Karen had a fundamental right to privacy that outweighed any interest of the state in continuing life-preserving treatment, and that Karen's decision could be made by her parents and physicians.¹

Another issue that arises in the area of death control is the right of the terminal patient to make a decision as to what kind of treatment he or she will receive. This is particularly an issue where an experimental treatment or drug (such as laetrile) is involved. In cases of this sort the courts have so far acquiesced in the judgment of the medical profession or the pertinent regulatory agency as to the validity of the treatment on the theory that selection of procedure is a matter of medical discretion. The Supreme Court in a recent opinion has ruled that the decision by the patient whether to have a treatment is a protected right, but his or her selection of a particular treatment, or at least a medication, is within the area of governmental interest in protecting public health.²

Another issue is the right of a parent or guardian to demand surgery or extraordinary treatment for infants or children with an incurable genetic disease. Here a balance is to be made between parental autonomy and the risk of the procedure. At this point the courts have not made much of the difference between diseases that condemn the infant to a certain death in a short time, those that predicate a life with constant severe pain, and those that force the child to a life unable to participate in meaningful human experience. The issue of whether civil or criminal liability attaches to the removal of life-sustaining treatment from a terminal patient was discussed in the Quinlan case. There, as noted, the court decided that a decision by the terminally ill patient or a substituted judgment is protected by the right of privacy. The courts have often upheld the power of a trial judge to order the transplantation of an organ from an incompetent person for implantation in the body of a relative to save the latter's life. This "equity" power is based on saving the life of the donee, and also on the donor's psychological benefit

BOOK REVIEW

obtained by this contribution to a relative. The courts, in coming to this conclusion, assume that the incompetent, were he able, would himself make that choice.

Part V (pp. 740-875) deals with organ transplantation. The Uniform Anatomical Gift Act has simplified many of the informed consent decisions where the donor is comatose or incompetent to give informed consent to a transplantation. The Uniform Act contains no provision that the donor will not be paid for these organs, but a few states have legislation forbidding payment for certain organs. A great deal of controversy in the press and in the case law has centered around blood obtained from a paid donor when it might be obtained elsewhere. The law on the subject has not had much impact since blood usually is in short supply, so hospitals have a license to use blood from paid donors. The argument against paid donor blood (and indeed of organs) is that the quality of blood from paid donors (often from addicts) is likely to be inferior; that paying donors discourage voluntary donations; that many donees (especially in the case of organ transplantation) are unable to pay; and that the process is ethically repulsive.

How should scarce organs be allocated? Arguments are made in a hypothetical case that due process does not require notice and a hearing for those denied an organ since an allocation scheme is not adversarial. Similarly, Shapiro and Spece argue, equal protection is not violated since there is a rational reason (that is, shortage) and that there is no fundamental right to an expensive operation. By what criteria shall the allocation be made? By the age of the donee? His or her terminalness? By lot? The competing arguments are presented.

This "casebook," as noted, is essentially futuristic. As such, it has few cases in comparison to casebooks in established areas of law. What this book does do is to provide an approach to the "new biology" with an understanding of those aspects of advances in the life sciences that most seriously challenge traditional assumptions concerning the control of human characteristics and behavior, and to address the acute legal and moral problems arising from these challenges. As such, it is a unique and valuable book.

References

1. *In the Matter of Karen Quinlan*, 70 N.J. 10, 355 A.2d 647 (1976)
2. *United States v. Rutherford*, 442 U.S. 544 (1979)

□