JUSTICE HORIZONS

"NU HOU KANAWAI"

TRENDS, RESEARCH FINDINGS AND EMERGING ISSUES

The Judiciary

Law & Technology:

"Wrongful Life: A New Generation"
Janet L. Tucker
Journal of Family Law
Volume 27, 1988-89

Summary:

Is life better than death? This is the basic question disputed in a wrongful life action. According to Tucker *"wrongful life describes the cause of action brought by or on behalf of an infant born with genetic defects."* In a wrongful life action, the plaintiff alleges that because of the defendant doctor or health care provider's negligent advice to or treatment of his parents, he or she was born with gross genetic defects. In essence, the infant must be able to prove that had the parents been notified of the infant's genetic defects while in the utero, the parents would have aborted the pregnancy to spare the infant from pain and suffering.

"Ultimately, the infant's complaint is that he would be better off not to have been born. Man, who knows nothing of death or nothingness, cannot possibly know whether that is so."

Specialists in the field of genetic engineering are developing procedures to correct genetic defects so that infants may someday have a reasonable expectation of being born a whole, functional human being. However, there exists no constitutional protection to be born a whole, functional person. Instead, the quality of life *"is contingent upon available procedures for prenatal diagnosis and treatment."* Tucker says, *"until recently, medical science was unable to provide parents with the means of predicting the birth of a defective child. Now, however, the ability to predict the occurrence and reoccurrence of defects attributable to genetic disorders has improved significantly. After conception, new diagnosis techniques such as amniocentesis and ultrasounography can reveal defects in the unborn fetus."*

The issue posed here strikes deeply into society's belief in the sanctity of life; for the question being asked is not whether children should or shouldn't

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Social Issues:

"Laboratory Babies"
Prabhat Rainjan Sarkar
PROUT in a Nutshell, v. 15
(Calcutta, India, PROUT Press, 1990)

Summary:

In this article social philosopher and activist Sarkar forecasts the future of genetic engineering and the implications of its development on social relations. For Sarkar, *"a day is sure to come when human beings will make test tube babies in laboratories."* When this becomes widespread, then just as humans evolved from Australopithecus a new species will emerge out of humans.

Unlike other spiritual activists, Sarkar does not see babies born and raised in test tubes as a social negative; rather he believes as humans locate themselves less in the sexual discourse (practices, languages and structures), they will become more creative in science, art, and music. The creative urge in humans will be relocated from child bearing to the creation of new ideas and amenities for the betterment of the collective good.

For Sarkar there will be two types of laboratory inventions: mechanical and biological. The first will be genderless without a nervous system and thus incapable of feeling pleasure and pain. They will not be able to reproduce; they will be the silent slaves of humans.

The second will be created in laboratories through the fusion of ova and spermatoza. However, while the entire body and brain can be created, for Sarkar (departing from the Occidental forecasts of genetic engineering), the soul/mind cannot be created. In Sarkar's view the soul/mind finds the appropriate body to realize its desires, its karma. The mind has tendencies and past desires to experience and is different from the brain which is the receptacle of the mind. Thus, while these biological humans will be able to disconnect their limbs and move freely with only their brains, the brain will not be replaceable as it ultimately holds the mind. While they will not live forever, they will certainly live thirty to forty years longer than present humans.

Humans eventually will no longer need to reproduce sexually. Rather all humans will be created in laboratories. Who would risk a physical birth with all its discomforts and possibilities for genetic diseases (and who would not want to enhance the genetic character-

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Wrongful Life *from Page 1*

be born with genetic defects, but rather if they should be born at all. According to Tucker *"a claim for wrongful life poses the difficult ethical dilemma of whether, under particular circumstances, nonlife is preferred to impaired life."*

Tucker claims that wrongful life is, in essence, a particular form of negligence. However, it is distinguishable from wrongful conception and wrongful pregnancy, in which the birth of a healthy child allegedly is caused by a breach of duty owed to the parents. A wrongful life action claims a *"breach of duty owed by a health care provider to a child to impart information or perform medical procedures with due care where the breach is a proximate cause of a defective child."*

According to Tucker, earlier wrongful life actions have been dismissed by the courts on public policy grounds. Tucker says that one court explained its reasoning in the following manner:

"Ultimately, the infant's complaint is that he would be better off not to have been born. Man, who knows nothing of death or nothingness, cannot possibly know whether that is so.

We must remember that the choice is not being born with health or being born without it....Rather the choice is between a worldly existence and none at all....To recognize a right not to be born is to enter an area in which no one can find his way."

Indeed, an issue like wrongful life may be better left to the philosophers and the theologians. Nonetheless, the courts have been presented with this issue and in 1979 in *"Berman v. Allan the New Jersey Supreme Court held that the parents of a child with birth defects could maintain a cause of action against the physician for special damages."* However, the court refused to recognize the infant's separate wrongful life claim.

Tucker states that the first court to hear a wrongful life action was a New York case, Park v. Chessin. In brief Mr. and Mrs. Park filed a suit against the doctor who assured them that their second child would not be afflicted with a hereditary kidney disease that killed their first child. Unfortunately, the second child was born with the disease and died shortly after. According to Tucker, *"with the availability of abortions after Roe v. Wade, the court held that general damages were available to the infant plaintiff. The court suggested that where technology could predict with 'reasonable medical certainty that the child would be born deformed,' children have a right to be born 'whole functional human beings'."*

Tucker points out however, that in *"the companion case of Becker v. Schwartz, the New York Supreme Court reversed the Park decision. The court, holding that the law was incompetent to compare the value of life with handicaps against no life at all, allowed neither the Park infant nor the Becker infant to recover."*

"Serious questions are raised as to whether humans are best served in the long run by limiting the gene pool in the short run."

California represented the first state to recognize a wrongful life action in Curlender v. Bio-Science Laboratories. Tucker asserts that *"until then, every court confronted with the issue had denied the child's right to bring a wrongful life cause of action."* In the Curlender case the California Court of Appeals awarded general and special damages to the Curlender infant which was born with Tay-Sachs disease. Tucker explains that the Curlenders obtained services from the defendant laboratories *"to conduct tests to determine whether the parents were carriers of genes that would result in having children with Tay-Sachs disease."* The defendant laboratory administered the tests and determined that the parents were not carriers. The Curlenders allegedly relied upon the laboratory's tests and did not considered amniocentesis. Consequently, the infant's disease was not discovered until after birth.

In ruling in favor of the Curlenders the court determined that a *"medical laboratory engaged in genetic testing owed a duty to parents and unborn children to use ordinary care in administering the tests and in providing information about potential birth defects."*

Following the Curlender case, in 1983 the Washington Supreme Court in Harbeson v. Park-Davis Inc., *"ruled in favor of an infants right to bring a wrongful life claim."* Until then courts in Alabama, South Carolina, Texas, New York, and Wisconsin all rejected wrongful life claims.

According to Tucker, in Harbeson the defendant doctors prescribed Dilantin to Mrs. Harbeson to control her epileptic seizures. *"The Harbesons specifically asked the attending physicians about possible birth defects associated with taking Dilantin during pregnancy. The physicians assured them there were no risks."* Mrs. Harbeson gave birth to two children both afflicted with fetal hydantoin syndrome. In the Harbeson case *"the court held that children 'may maintain an action for wrongful life in order to recover the extraordinary expenses to be incurred during the child's lifetime, as a result of the congenital defects'."*

Tucker asserts that *"the recognition of a wrongful life action constitutes a logical extension of the right to die."* As a humane gesture, wrongful life actions would be aptly justified as Tucker points out that *"in 1979 the third leading cause of infant deaths in the United States was genetic disease, with genetic disorders being the second leading cause in one to four-year-olds."* Moreover, Tucker claims that twenty-five to thirty percent of those receiving acute hospital care were eighteen and under. In essence the parents have an obligation to protect the interest of their unborn children.

Likewise, health care providers also share in the obligation to inform potential parents of the risk to those not yet born or conceived. The courts must decide if a breach of duty owed by the health care provider to both the parents and the unborn child to detect a detectable defect had been broken. The issue therein is one of proximate cause.

Tucker claims that genetic engineering will in the long run raise serious legal, moral, and ethical questions. Tucker asserts that *"genetic engineering and counseling present choices about specific traits without knowledge of future environmental requirements. A process whereby parents may choose to maintain the desired status quo undermines Dar-*

winian theory of genetic survivability. Serious questions are raised as to whether humans are best served in the long run by limiting the gene pool in the short run."

In addition, recognized wrongful life claims bring into question the value of life itself. In recognizing claims the courts have in essence decided that nonlife is better than an impaired life. One court questions wrongful life claims by stating *"would claims be honored, assuming the breach of an identifiable duty, for less than a perfect birth? And by what standard or by whom would perfection be defined?"* While Tucker asserts that no claim has been recognized where the infant was not *"seriously impaired,"* with the progression of genetic research it is entirely possible that you and I will someday be viewed as defective. Tucker says *"there would no longer be genetically defective plaintiffs to bring wrongful life claims. Rather, the infant plaintiffs would be suing for being something less than 'perfect'."*

Tucker claims that this may lead to an action being brought based on a *"dissatisfied life"* as opposed to a defective one. According to Tucker, *"given that court attitudes are a function of scientific advancement and social change, it is conceivable that 'dissatisfied life' might become a future legal issue."*

According to Tucker, wrongful life does not question the issue of abortion to terminate a pregnancy. Rather, wrongful life *"focuses on the right of the child and the rights of parents to act on behalf of their children."* In addition, wrongful life *"is not intended to devalue an impaired or handicapped life. Rather, wrongful life is a statement on the value of a whole, functional life."* ❖

See: *"Genetic Engineering and the Right of Privacy,"* NHK/Justice Horizons, (Vol. I, No. 2, 1989).

Laboratory Babies *from Page 1*

istics of "their" child). Eventually, these humans will not have the same attachments to the family as we presently do. *"They will be bereft of family ties."* Indeed, they will lose any relationship to the physical world; they will be mental and spiritual beings. *"They will gradually develop an aversion to worldly enjoyment."*

Comments:

These developments will radically alter family and gender relations. Females will no longer be placed in a biological discourse, parenting will become a social collective function instead of one based on the nuclear family. Whether the state or cooperatives will manage these laboratories is unclear from Sarkar's forecasts. What is important is the location of these developments not as ones that should be stopped as being unnatural, but as events that will change the natural and lead to increasing levels of ideational and spiritual culture. While the world has been dominated by the Sensate (materialistic, economic, empiricist) civilization in the past five hundred years, Sarkar's forecasts (as do the visions of Sorokin, Toynbee, De Chardin and others) point to the development and awakening of a new civilization that transcends the dichotomies of mind/body, technology/culture, ecology/progress, and global/local. The newly emerging planetary civilization will be one, then, that emerges from a new rationality that synthesizes science and spirituality.

Humans eventually will no longer need to reproduce sexually. Rather all humans will be created in laboratories. Who will risk a physical birth with all its discomforts and possibilities for genetic disease.

The issue for family courts and law in general are mind boggling. But Sarkar's forecasts are not meant for the fantasy discourse, rather he sees these events as approaching in the decades to come. The present, then, is merely a transitional phase to the development of a new human being in a new civilization. Our children will be the last to be produced *"naturally."* The natural and nature itself will be transformed. ❖

Juvenile Justice:

"Criminal Kids"
Paul Marcotte
ABA Journal
April 1990

Summary:

About 100 years ago juvenile courts were established to deal humanly with wayward children. *"Treatment rather than punishment would be stressed."* Marcotte states that these courts were to *"act in the best interest of the child."* The United States Supreme Court enforced this philosophy with the 1967 landmark decision of In Re Gault, 387 U.S. 1, which *"guaranteed to juveniles in delinquency proceedings: a right to counsel, notice of charges, privilege against self-incrimination, and a right to cross-examine witnesses."*

However, according to Marcotte the historical mission of America's juvenile justice system *"not only has failed, it may be scrubbed."* The juvenile justice system has in recent years come under increasing criticism from the legal as well as the educational community. Marcotte asserts *"that some legal experts charge that juveniles still get the worst of both worlds—neither the due-process safeguards guaranteed by the Supreme Court nor the solicitous care intended for children."*

Barry Feld, a University of Minnesota law professor, points out that *"despite In Re Gault, kids often are not represented by lawyers."* Feld discovered that approximately *"half the youths who appeared before juvenile courts in Minnesota, Nebraska, and North Dakota were not represented by counsel. In another study last year, he found that one-third of Minnesota juveniles removed from their homes and one-fourth incarcerated in training schools never saw a lawyer."*

Contributing to the failure of juvenile courts are social scientists who according to Ira Schwartz, director of the Center for the Study of Youth Policy at the University of Michigan, *"have proved to be remarkably incapable of diagnosing and prescribing treatment for youths' problems."*

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Feature Trend:

THE PROGRESS OF PREGNANCY: REPRODUCTIVE TECHNOLOGY AND THE JUDICIAL RESPONSE [1]

In Control of Nature[2], John McPhee recounts three ways human beings have sought to control nature—stopping a massive lava flow in Iceland, controlling the course of the Mississippi River, and averting the natural destruction of the inevitable mud and debris flows in Los Angeles suburbs—all done in the name of progress, all on behalf of human beings.

Meanwhile in the ultrasound room of a local hospital, a poster proclaims the *"progress of pregnancy."* The poster refers to the now munade tracking of an individual's pregnancy through unltrasound procedures. The poster also brings to mind the increasingly common attempts to control nature through biotechnology. From macro technologies to microsurgical instruments, human beings rail against and attempt to control nature globally and personally.

Hypothetical

Abe and Sarah have not been able to produce their own children. Abe can produce sperm and Sarah can produce eggs but Sarah's womb cannot accommodate the embryo. As they want biological children they decide to attempt in vitro fertilization (four to seven of Sarah's eggs will be removed and fertilized with Abe's sperm) and seek a surrogate to bring an embryo to term.

The fertilization procedure is successful and seven embryos (each a collection of cells) are frozen and stored at the U-Freeze and Store Cryogenic Lab. Meanwhile, Abe and Sarah go through a law firm known for *"brokering"* the services of surrogates. They enter into an agreement with Mary who lives in another state. They agree to pay Mary $10,000 upon delivery of a healthy baby. They have already paid the law firm in excess of $10,000 for *"legal services"* in connection with the surrogate agreement.

Five embryos are then shipped to Mary's doctor via air express. Two embryos remain in storage. En route, two embryos are damaged. The remaining three embryos are implanted in Mary.

Abe and Sarah immediately file a lawsuit against both U-Freeze and the air express company alleging negligence, gross negligence, wrongful death, infliction of emotional distress, and loss of consortium.

To the doctor's surprise, all three embryos begin developing. Joe, Mary's husband, although not a party to the surrogate agreement, begins to voice doubts about the whole arrangement. He is particularly worried about Mary's continued ability to care for their six biological children.

Traditionally, society has been concerned with the "when"of childbearing. The new biotechnologies also raise concerns of "how" and by "whom."

As stipulated in the surrogate agreement, Mary undergoes amniocentesis. The results reveal that one of the three fetuses has a genetic defect. Although the agreement stated that a defective fetus would be aborted, Mary is now refusing to risk selective abortion because of the possible harm to the other fetuses and because she opposes abortion in general. Both Abe and Sarah insist that she go through with the abortion of the one fetus. They file in each states' civil courts for breach of contract and fraud and seek specific performance. They also file an action against the doctors for wrongful life. Meanwhile, Joe vociferously wants Mary to abort all three fetuses.

Three children are born alive, two boys and one girl. One child, a boy, has congenital birth defects. Consequently, no one wants this boy who is eventually taken into state custody from the hospital.

Mary allows the girl child to be given to Abe and Sarah. However, all her six children are girls and she wants to keep the remaining boy, having bonded to him while in the hospital. Abe and Sarah refuse to pay any money until both healthy children are in their custody.

Abe and Sarah now seek delivery of the child in their original lawsuits. They also file custody actions in the Family Court of both states. They also request the Prosecutor's office in both states to prosecute Mary for kidnapping and custodial interference (Mary's state agrees and files criminal charges against her). Abe and Sarah also file a malpractice action against the law firm for failure to adequately screen Mary and for representing Mary as someone who would be able to psychologically separate from children she bears.

Mary files a counter claim for $10,000 as payment for the girl child delivered to Abe and Sarah pursuant to the surrogate agreement.

A few months later, Sarah and Abe separate. Abe goes to U-Freeze to collect the two remaining embryos because he wants his new girlfriend to bear those children. U-Freeze refuses to release the two embryos. Abe sues them for breach of contract and files a complaint with the prosecutor's office for kidnapping.

Sarah files for divorce and seeks custody of the normal boy and girl as well as the two embryos still in storage. Sarah's motion to join U-Freeze as a third party is granted. The court appoints a guardian ad litem for the two children and the two embryos.

Joe files for divorce. He has grown attached to the boy and seeks custody of him but does not want the six girls.

Legal Issues

The above hypothetical illustrates the many possible intersections of the courts and one of the most private human decisions—childbearing. Traditionally, society has been concerned with the *"when"* of childbearing. The new biotechnologies also raise concerns of *"how"* and by *"whom."*

The hypothetical raises these issues: What status, if any, should be accorded embryos? How should the

state define *"parent"* (by genetics or by behavior)? What are the rights and responsibilities of persons/entities; involved in these *"transactions?"* What ethical standards should apply to these various parties and participants?

Other issues include: Whether there should be state regulation of the production, sale, disposal of, and research involving extra-corporeal embryos? What values should be encouraged by society regarding human life, childbearing and child rearing? How do we frame issues and encourage constructive public debate in light of our society's moral and cultural pluralism, in light of the rise of consumerism and decline of the family and communities? How do we avoid merely applying the perceived *"norm"* to this debate; e.g., heterosexual marriages?

Should the state regulate access to these services? Who decides whether bearing a biological baby is *"a frustrated desire or a medical necessity?"* Why should health insurance, already so costly, cover in vitro fertilization? Does the state have an obligation to insure access to this technology by the poor? Should the state determine society's priorities (e.g., research time and monies) according to need or according to market principles?

In related areas where state interests intersect with private rights: What part should the state play in insuring a mother's use of enhanced medical procedures such as ultrasound, amniocentesis, fetal heart monitoring, in utero operations, and genetic screening? With the increasing knowledge of how babies can be harmed in utero, especially with alcohol and drugs, are there compelling reasons for state intrusion? Does a moral obligation by a mother always translate to a legal (and therefore enforceable) obligation? Should the state regulate a person's choice of genes for their offspring, e.g., choice of sex (particularly after the Human Genome Project completes its monumental job of identifying and charting human genes)?

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Genetic Futures

Scenario I. Fighting the Gene Doctors

There are struggles over forced genetic manipulation, where government compulsion is used to force parents to accept some level of enhancement of children who would otherwise be below "normal." The debate over whether to forcibly intervene on behalf of Down Syndrome children against the wishes of their parents reaches a peak. The anti-technology forces against gene therapy battle against the gene doctors by employing the tactics used by anti-abortion protesters today.

Scenario II. Medicaid Meets Gene Therapy

Access to gene therapy has become an important determinant of life enjoyment, success, and status. The technology can guarantee a healthy, intelligent baby free from significant mental illness and of good size and musculature. The poor, economically shut-out of access to the technology demand gene therapy for their offspring. The nation debates a future in which the rich not only get richer, but smarter and stronger, while the poor "genetically unwashed" face not only economic hurdles for rising out of poverty, but inherited obstacles as well.

Scenario III. Social Monitoring Through Prediction

Our ability to detect genetic susceptibility to disease outpaces our ability to remedy it, and a 21 year old person with positive diagnosis for Huntington's Chorea is denied employment as a truck driver and denied life and health insurance. At this time the person is completely unimpaired by the disease, but its gradual onset at an age which varys from individual to individual makes it impossible to predict when and how rapidly he will deteriorate first intellectually and then physically.

Scenario IV. Prohibition

Faced with mounting pressures from a strange coalition of religious fundamentalists, environmentalists, and "green" anti-technologists, Congress imposes a ban on all human gene therapy other than that used to cure fatal childhood diseases. "Bootleg" gene therapy in secret clinics becomes the purview of those anxious to ensure their own health and that of their children.

Professor Robert Bohrer
California Western School of Law
Chairman of San Diego Biotechnology Forum at California Western School of Law

Pregnancy *from Page 5*

And finally, should the judiciary be the forum for debate and decision?

Judicial Response

There has been relatively little public debate in this area. The state and the judiciary are ill-prepared to address the problems which will inevitably arise.

The judiciary is often on the cutting edge of new issues because of disputes presented for resolution. This does not mean that the judiciary then proceeds to establish public policy and create new laws. A court would apply existing legal concepts to a specific fact situation, leaving to the legislature the job of taking public sentiment and current information and fashioning responsive laws within constitutional and moral constraints.

There has been relatively little public debate in this area. The state and the judiciary are ill-prepared to address the problems which will inevitably arise.

If not raised by others, the judiciary should consider raising these various issues for debate before disputes arise. The judiciary can frame issues and provide input without invading the province of the executive or legislature. A vehicle could be established by legislative resolution similar to what has been established for determination of death in H.R.S. Section 327-1 (e):

"The director of health shall convene in every odd-numbered year, a committee which shall be composed of representatives of appropriate general and specialized medical professional organizations, licensed attorneys, and members of the public. The committee shall review medical practice, legal developments, and other appropriate matters to determine the continuing viability of this section, and shall submit a report of its findings and recommendations to the legislature, prior to the convening of the regular session held in each even-numbered year."

The New Jersey Supreme Court commented on this need in In the Matter of Baby M., 537 A. 2d 1227, 1264 (N.J. 1988):

"We do not underestimate the difficulties of legislation on this subject [of surrogacy]. In addition to the inevitable confrontation with ethical and moral issues involved, there is the question of the wisdom and effectiveness of regulating a matter so private, yet of such public interest...The problem is how to enjoy the benefits of the technology—especially for infertile couples—while minimizing the risk of abuse. The problem can be addressed only when society decides what its values and objectives are in this troubling, yet promising, area." ❖

Judge Frances Q. F. Wong
Hawaii Family Court

Notes:

1. Many thanks to *"The Women Judges' Fund for Justice"* for inviting Judge Evelyn Lance and me to its conference on *"The Impact of Reproductive Technology on the Law"* and for funding our participation.

2. John McPhee, The Control of Nature, (New York: Farrar, Straus, and Giroux, 1989).

Corrections:

"How to Make Crime Pay"
Asiaweek
July 28, 1989

Summary:

International Corrections Corp. represents the new trend toward the privatization of prison systems. James Ricketts, former director of the Arizona Department of Corrections and founder and president of International Corrections Corp., states that, *"the next great growth industry begins at the prison gate."*

According to Ricketts, *"the criminal justice establishment is ripe for private enterprise. U.S. prisons are horribly overcrowded and getting worse."* Ricketts asserts that, *"beleaguered state officials are turning to the private sector for creative, cost-efficient answers."*

Although Ricketts foresees a limit to the profit potential in the privatization of corrections, he does admit *"that the market potential for jails is 'frightening'."*

Indeed, Ricketts was recently in HongKong to establish Corrections Enterprises Ltd. According to Ricketts, *"the company will market his prison acumen around the region—and around the world."* We are thus seeing the internationalization of prisons, although Ricketts asserts that franchising at present is not likely.

Comment:

While corporations, individuals, and social movements have become increasingly global, it now appears that prisons will follow the same path of statelessness. Will this eventually lead to a global prison? Will it contain individuals who have committed global crimes; for example, against the environment (the ecosphere and the more subtle noosphere) and against other stateless structures? A global prison might especially gain currency as the nation-state continues to disintegrate. Where might the prison be housed? Should Hawaii have the first off coast world prison?

While corporations, individuals, and social movements have become increasingly global, it now appears that prisons will follow the same path of statlessness. Will this eventually lead to a global prison?

Among the difficulties in the international prison concept is that different nations and cultures construct crime and punishment differently. Still, the internationalization of global consumer culture has lead to the globalization and standardization of crime and thus the potential for the international standardization of corrections as well. Those sentenced then will have the prior knowledge that wherever they are imprisoned they will be treated the same. ❖

Criminal Kids *from Page 3*

Marcotte says that *"attempts by Congress to correct the problems have had limited success."* For example, *"the 1974 Juvenile Justice and Delinquency Prevention Act encouraged community alternatives to confining non-dangerous youths in large juvenile training centers."* Despite federal funds to support the program, it was found that the law was having little effect. Schwartz claims that *"the custody figures showed federal officials were out of touch with what was happening in the states."* Not only were many states not promoting alternatives but were in fact promoting stricter measures. As a result, many states began to lower the age by which juveniles could be heard in criminal court. Vermont for instance, *"permits juvenile judges to waive kids as young as 10 into criminal court. In Montana it's 12, and in Georgia, Illinois and Mississippi it's 13. In New York 14-year-olds are regularly tried as adults."*

Shepard states that "adult correctional facilities are the last place you want to put someone who is 14, 15, or 16 years old."

Fueled by the public's demand for tougher sentencing in the mid-1970s the juvenile courts began to break from its 75-year philosophy of rehabilitation. According to Robert Shepherd Jr., director of the Youth Advocacy Clinic at the University of Richmond School of Law, *"nearly every poll you read shows that people think juvenile crime is exploding, and it's not true. We're getting more kids in secure facilities for lesser offenses."*

Statistically, Shepard is correct for the U.S. Department of Justice reported that *"in 1987, the number of youths held for the most serious, violent offenses—murder, manslaughter, robbery, aggravated assault—continued to decline 8 percent from 1985 and 11 percent from 1988."* Yet, the number of juveniles held since 1985 for alcohol and drug abuse increased 50 percent.

Shepard feels that this growing trend of sending youth offenders to criminal court is a mistake. Shepard states that *"adult correctional facilities are the last place you want to put someone who is 14, 15, or 16 years old."* Indeed, in a study conducted by Martin Forst, a researcher at Ursa Institute's Center for Law and Social Policy in San Francisco, discovered that *"the youths in adult prisons were five times more likely to be sexually assaulted than in a training school, twice as likely to be beaten by guards, and weapon attacks were 50 percent more common."* Forst also discovered that these youths were more prone to commit crimes upon release.

Without question, juvenile courts sometimes become too involved in trivial instances of juvenile misconduct such as truancy and runaways. Marcotte says that various alternatives *"to handle runaways, truants, and other minor offenders"* could be extended to outside social service agencies; agencies take could a more active interest in the child's welfare. ❖

See: Bernardine Dohrn, *"Juvenile Court: Crime or Punishment,"* Human Rights Journal, Summer 1989 (Vol. 16, No. 2).

Law & Technology:

"Toward a Simple Law Machine"
Jurimetrics
Summer 1989
David Warner, Jr.

Summary:

Warner explores the contours of artificial intelligence by arguing for a simple reasoning machine (SLM) that attorneys and judges utilize to remove the intellectual drudgery of legal work. Warner suggests that the SLM *"can provide us with a tool for explaining and developing an understanding of legal reasoning. More significantly, it should also permit us to identify the point at which human analysis must enter the process, and to have a clear understanding of the reasons human intervention is required at that point."*

To begin with the SLM would use sequential reasoning; that is, conventional problem solving. However, as law is context and culture based, the SLM must include parallel problem solving. In parallel reasoning it is imperative that the solution to each sub-problem change the entire set of other problems; that is, the sequence changes. *"Thus, as we solve each unit problem we must dynamically recalculate the solution for all prior unit problems."*

With parallel reasoning the law machine would provide humans with the *"demarcation between formal reasoning and the exercise of judgement or resort to discretion."* In this way the various ill- defined *"rules of thumb"* which are heuristically or experientially acquired can be made part of the SLM. For instance, judges and attorneys do not make decisions based solely on sequential logic; rather, other factors are considered. A SLM would have to deal with those. It would have to acknowledge that the legal reasoning process is dynamic and context based. The SLM would have to model this parallel reasoning process.

To do this there would have to be interaction between the SLM and the human user. In this way, a SLM works with humans dynamically and humans can use it to understand their own decisions better.

Comment:

Warner does not argue that computerized judging and other expert systems will make *"lawyering"* obsolete. Rather as with other advancements in technology, it will change the nature of resolving and administering conflicts—in some ways increasing the role of humans and in other ways decreasing the role. What Warner does not address are the political implications of the SLM. Would power shift from judges to technocrats? Or will a profession emerge: the courtocrats—judge, attorney, bureaucrat, and computer expert all in one. The design of the computer system will certainly influence the type of legal decisions reached. However, in any case the SLM will for Warner help us understand how judicial decisions are made and thereby increase the efficacy of these decisions, thus allowing judges and attorneys less drudgery and more time for issues of design and social policy. Will judges then become Plato's philosophers? And what will law clerks in this future do? ❖

Law & Society:

"Are Contingency Fees Legal?"
Leslie Spencer
Forbes
February 19, 1990

Summary:

For decades contingency lawyers have realized *"obscene profits"* at the expense of the American public. According to Spencer, *"the contingency fee, through which lawyers collect up to one-third of court awards, has helped to bloat a tort system that cost U.S. consumers, businesses and government an estimated $80 billion a year in higher insurance bills and court expenses."* Without question the negative economic implications have caused many to question the legality of the American contingency system.

Lester Brickman, professor of law at Benjamin N. Cardozo School of Law in New York asserts that the contingency fee system is not necessarily on firm legal ground. Brickman states, *"contingency fees are illegal if there is no realistic risk of damages not being awarded."* Brickman's point is a valid one as *"fewer than 5% of tort cases go to verdict, and plaintiffs' recovery rate for those that do has increased by 100% since 1960."*

According to Brickman, "the contingency fee system gives a reward for taking on certain risks, and if you are not taking them, you are not entitled to claim the rewards."

Brickman estimates that at least *"25% of all personal injury cases are illegal and unethical."* He feels that *"the percentage charged by a lawyer should reflect the degree of risk."* Clearly this makes the standard 33% not only ridiculous but akin to price fixing. According to Brickman, *"the contingency fee system gives a reward for taking on certain risks, and if you are not taking them, you are not entitled to claim the rewards."*

The fact of the matter is that contingency fees are illegal in virtually every industrialized country except the U.S. Moreover, Spencer argues that the contingency fee system promotes unscrupulous litigation and *"incites lawyers to challenge established liability law."*

While the contingency system was initially established to assist the poor people in bringing their cases to court, today, *"top plaintiffs' lawyers usually decline any case worth less than $100,000."* Apparently, there is little if anything contingent about contingency fees. ❖

Justice Horizons is a *review* of the latest trends, research findings and emerging issues that may impact the Hawaii Judiciary. Its purpose is to anticipate the changing judicial needs of the public. If you find any of the issues selected of particular interest and would like more information (for example, a copy of the original article or other references) or if you would like to pass on issues and comments to us, please contact James Monma of the Planning and Statistics Office at (808) 548-8589.

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