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LEGAL CONCEPTS OF HUMAN LIFE: THE INFANTICIDE DOCTRINES

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The time is not far distant when the law will be faced with novel questions concerning human life. Medical science is already solving problems of artificial and transplanted organs, prolongation of the life-span, artificial insemination, fetal surgery, hormonal control, and suspended animation. As the boundaries of life are expanded by these new scientific possibilities, legal concepts of life wil have to be capable of resolving new and complex medically-related questions. To do this, the law wil need, as never before, a clear understanding of the proper relationship between the medical and legal models of human life.

Several definitions of life can be found in the law. Blackstone called life "the immediate gift of God and a right inherited by nature in every individual,"[1] and more specifically, "a state in which energy of function is ever resisting decay and dissolution. . . ."[2] For some purposes, the law recognizes the physiological "fact" that life commences at the moment of conception,[3] but more often, the legal state of life is measured from quickening in the womb,[4] or from birth.[5]

Whether or not such legal concepts of life will be sufficient in the future is not clear. Could they be applied to a human being created from undamaged portions of cadavres, in a Frankenstein fashion? Or to babies developed entirely in the laboratory?[6] Or to someone "brought back to life" after a period of death-like suspended animation?[7]

The purpose of this paper is to evamine the legal field that so far has been the most involved with legal notions of life—the law of infanticide. The murder of infants on the threshold of life is one area in which the courts already have been forced to adopt some concept of human life. A survey of the life-doctrines developed in these cases, as well as a brief look at certain related doctrines, may help to indicate how well today's courts are prepared for the new biomedical problems they must soon face.

The Early English Doctrines

The Nineteenth Century in England witnessed a series of alleged

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[1] 37 C.J. *Life* at 347 n. 5(a), citing 1 BLACKSTONE COMM. 129.

[2] United States v. 4 Live Silver Black Foxes, 1 F.d 933, (D.D.C. 1924), citing 1 BLACKSTONE COMM. 129.

[3] *Id.* at 934.

[4] *See, e.g.,* Evans v. People, 49 N.Y. 86 (1872), and Atkinson, *Life, Birth and Live-Birth,* 20 L.Q. REV. 134, 136 (1904).

[5] 53 C.J.S. *Life* § 881 (1948).

[6] *See, e.g., Control of Life,* 59 LIFE no. 11, p. 59 (Sept. 10, 1965).

[7] *See, e.g.,* Karl Brown, *The Man They Could Not Hang,* Columbia Pitcures (1939).

infanticides committed by unwed mothers, out of fear or embarrassment, while or immediately after giving birth to their illegitimate offspring.

Rex v. Poulton,[8] in 1832, was one of the early such cases to come before the Courts. Ann Poulton, the defendent therein, was accused of killing her child by strangulation, but it was not clear from the facts whether the child had died before or after the birth had been completed. There was medical testimony to the effect that the child had breathed before expiring, but the medical witnesses were unable to give opinions as to whether the breathing took place during or after the process of birth. The Court at Old Bailey began its summation to the jury by holding that a conviction of homocide was not possible unless the subject of the homocide was alive, that is, unless the infant in this case had been born alive. Being born alive, the court continued, requires "that the whole body is brought into the world; and it is not sufficient that the child respires in the process of the birth."[9]

One year later in a similar case, *Rex v. Enoch,*[10] at the Worcester Assizes, the court also held that a complete birth was necessary before a child could be sufficiently alive to be the subject of a murder. It used as the criterion of live birth the establishment of "an independent circulation in the child."[11] The following year at the Oxford Assizes, the court in *Rex v. Brain*[12] heard a case in which the medical evidence tended to prove that the decedent child had not breathed before its death. While again requiring that the child be "wholly in the world in a living state to be the subject of a charge of murder," the court did not consider breathing to be essential, since "many children are born alive, and yet do not breathe for some time after their birth."[13]

Thus far developed, the English law of infanticide required a complete live birth as determined by an independent circulation, which could not be proved or disproved merely by evidence of breathing or not breathing. As such, the rule was rather ambiguous. It was unclear what marked the completeness of the birth or what constituted an independent circulation.

The case that attempted to answer both of these questions was *Regina v. Trilloe*[14] decided in 1842. The infant in that case had been strangled by its mother after it had been fully produced from her body, but before the umbilical cord had been severed. The court held that such production was sufficient for a complete birth, and that medical testimony proving that the child breathed after having been fully pro-

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[8] 172 Eng. Rep. 997 (1832).
[9] *Id.* at 998.
[10] 172 Eng. Rep. 1089 (1833).
[11] *Ibid. Accord,* Regina v. Wright, 173 Eng. Rep. 1039 (1841).
[12] 172 Eng. Rep. 1272 (1834).
[13] *Ibid. Accord,* Rex v. Sellis, 173 Eng. Rep. 370 (1837).
[14] 174 Eng. Rep. 674 (1842).

duced was sufficient to establish that the child had had an independent circulation.[15]

These four cases summarize the doctrine that developed in the first half of the century. All convictions for infanticide required live births, and the supposedly medical criterion of an independent circulation was the favorite view from about 1780 on.[16] Proof of breathing was usually considered relevant but not conclusive in determining the question of independent circulation.

However, although the doctrine was beginning to crystalize, its vague dependence on scientific criteria made it difficult to apply. Due to the secrecy surrounding most of these births, there were rarely witnesses who could testify as to facts that could determine whether or not the victim had established an independent circulation. Post-mortem tests were almost always inconclusive since the legal requirements for an independent circulation had never been spelled out.

Judges and juries often took advantage of these difficulties of proof, acquitting defendents whenever possible. Even in the rare cases of convictions, the inflexible practice soon became to reprieve any mother who had killed her child before it had lived a full year.[17] As a consequence of the difficulty of conviction and of the resulting leniency in the courts, the law of infanticide became highly unpopular. An 1862 medical treatise by Dr. W. Burke Ryan criticized the necessity to prove life as a "legal fiction" that serves merely as an obstacle to punishing those who sacrifice infant life.[18] The *Morning Chronicle* frequently attacked the legal rule as one based on sympathy rather than justice:

> When a woman is arraigned for the murder of her illegitimate child—for to this class such offenses principally belong—a jury is almost certain to return a verdict of not guilty. Compassion takes the place of justice. They see before them, perhaps, a servant girl, the victim of some well bred scamp, who has betrayed and deserted her. She is young, good-looking, friendless. The traces of misery are still on her face, and there is an eloquent counsel pleading for her who knows how to turn all the circumstances of her pitiable case to good account. . . . Again and again this scene is enacted in our Courts of Law and almost invariably with the same result—acquittal.[19]

This process continued, criticized but basically unchanged, until the Infanticide Acts of 1922 and 1938 were passed. Under this legislation, a mother who killed her child under the age of 12 months was to be

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[15] This ruling was anticipated several years earlier by the court in Rex v. Crutchly, 173 Eng. Rep. 355 (1833).

[16] Winfield, *The Unborn Child,* 8 CAMB. L.J. 76, 79 (1944).

[17] Royal Commission on Capital Punishment, Report 57-59, Sec. 155 (1953).

[18] Ryan, Infanticide: Its Law, Prevalence, Prevention and History (1862), review in Infanticide Memorandum (author unknown) 162, newsclippings and original manuscript (1861), only known copy: Harvard Law Library UK/983/INF.

[19] Infanticide Memorandum, *supra* note 18, at 16, from the Morning Chronicle (London), Sept. 7, 1861.

punished as if for manslaughter only, if "at the time of the act or omission [causing the death], the balance of her mind was disturbed by reason of her not having fully recovered from the effect of giving birth."[20] The new law was more in keeping with popular sentiment for it provided a way to find a mother guilty of infanticide without inflicting upon her capital punishment, which was generally thought to be too severe.

It also avoided the legal question of life. The doctrine of live birth became largely irrelevant, for courts now had available the compromise charge of manslaughter for which no proof of live birth was thought to be necessary.[21]

Thus, the early English attempt to form a legal meaning for life out of supposedly medical criteria had failed and was discarded. It failed partly because the scientific measurement needed to make the criteria meaningful was not yet available and partly because judicial and popular opinion was opposed to making an all-or-nothing distinction between natal and post-natal deaths. In effect, it failed because the proper relationship between medical knowledge and judicial opinion in decisions of this kind had not yet been worked out.

The American Doctrines

In the United States, the law of infanticide developed in a more complex fashion than it had in England. With more jurisdictions there was more room for differing views on the necessity of live birth, the relevance of breathing, and the meaning of independent circulation. As of the end of the Nineteenth Century, there was no authoritative view of infanticide that had been adopted by the courts.[22] By the middle of the Twentieth Century, however, a majority view and a minority view had been established, the former requiring live birth, and the latter requiring only viability of the infant.[23]

The majority American view was an elaborated version of the old English doctrine. The requirement of live birth was usually said to be based on the necessity of proving a corpus delicti, which was generally held to be as essential in cases of homicide as in other cases.[24] Unless the subject of the supposed homicide had been aliving person, it was said that there logically could be no murder and therefore no murderer.[25] Most courts insisted upon a complete live birth to establish the corpus delicti,[26] and upon proof of independent circulation to establish the live birth.[27]

[20] Infanticide Act of 1938, 1 & 2 Geo. 6, c. 36, sec. 1 (1).
[21] Royal Commission Report on Capital Punishment, *supra* note 17, sec. 156.
[22] Atkinson, *supra* note 4, at 134.
[32] Ishmael, *Proving Live Birth in Infanticide,* 17 WYO. L.J. 237, 242 (1963).
[24] 41 C.J.S. *Homicide* § 312 (f) (1944); 26 AM. JUR. 376 *Homicide* § 326 (1940).
[25] Williams v. People, 158 P.2d 447, 452 (Colo. 1945) (Hilliard, J., dissenting) *Accord,* Morgan v. State, 148 Tenn. 417, 256 S.W. 433 (1923).
[26] Annot., 159 A.L.R. 523, 525 (1945).
[27] 2 WHARTON, EVIDENCE IN CRIMINAL CASES § 874, at 1510 (11th ed. 1935);

The first important case in this line of authority was *State v. Winthrop*,[28] decided in 1876 in Iowa, in which a physician was charged with murdering a child that he had attempted to deliver. The lower court had instructed the jury that live birth was a necessary element of the crime, but that to prove live birth, only the child's "independent life" and not his independent circulation need be shown. The Supreme Court of Iowa viewed this instruction as erroneous since, in its opinion, there could be no independent life, but only the possibility of it, until independent circulation had been established. *Winthrop* soon became a leading authority in infanticide cases, and it was followed widely by courts that favored the live-birth requirement.[29]

The criterion of independent circulation set out in *Winthrop* however, remained basically as unclear in the cases that followed as it had been in the early English cases. As in those cases, respiration was generally considered as an indication of independent circulation, but it was almost always held inconclusive.[30] In *Morgan v. State*[31] the post-mortem examination of the decedent included the "hydrostatic test," in which the decedent's lungs had been placed in water. The lungs had floated, which is usually an indication that they contained air and that the child had therefore breathed, but the medical experts admitted that gases of decomposition might also cause flotation. Although the court held that there was insufficient evidence of respiration, it went on to say, "Generally, [but not always] if respiration is established, that also establishes an independent circulation and independent existance."[32] This was an adoption by the courts of the usual medical practice of taking breathing as the rough test of live birth.[33] However, in *Benett v. State*[34] when the medical expert testified that breathing was "the most reliable indication as to whether a baby is born alive,"[35] the court rejected such testimony as a determinate of whether independent circulation had been established, and it chided the expert for not being able to provide a clear medical definition of independent circulation. In *Jackson v. Commonwealth*,[36] the court required that both respiration and an independent existence be proved in order to establish that a child was born alive, which made the relationship of breathing to independent circulation even more unclear. The use of respiration to show independent circulation was fur-

40 C.J.S. *Homicide* § 2 (b) (1944).
[28] 43 Iowa 519 (1876).
[29] *E.g.*, Shedd v. State, 178 Ga. 653, 173 S.E. 847 (1934); State v. O'Neall, 79 N.C. 571, 60 S.E. 1121 (1908).
[30] 2 WHARTON, EVIDENCE IN CRIMINAL CASES § 874, at 1510 (11th ed. 1935); 40 C.J.S. *Homicide* § 2 (b) (1944); Annot., 159 A.L.R. 523, 527 (1945).
[31] 148 Tenn. 417, 256 S.W. 433 (1923).
[32] *Id.* 256 S.W. at 434.
[33] Atkinson, *supra* note 4, at 145.
[34] 377 P.2d 634 (Wyo. 1936).
[35] *Id.* at 635.
[36] 265 Ky. 295, 96 S.W.2d 1014 (C.A. 1936).

ther complicated by the large number of still-births in which the fetus died, just before delivery, from anoxia (lack of oxygen), which can present some of the same symptoms as strangulation.[37]

Faced with the confusing methods by which some courts have tried to incorporate medical evidence of respiration into the legal definition of live birth, other courts turned to other criteria of independent circulation. A few courts have relied heavily on the simple opinion of a medical witness as to whether or not the child had lived. In *State v. Merrill*,[38] the medical expert had been asked whether in his opinion the decedent had been alive when the strangulation took place, and he had replied, "No one could tell that." It was held on appeal that his testimony showed that there was insufficient evidence to establish the corpus delicti. The court in *Montgomery v. State*,[39] after rejecting the evidence of respiration, construed the expert's statement, "I could not say the child's heart ever beat after it was separated from its mother completely," clearly to mean that the child had never been born alive. In *People v. Hayner*,[40] however, the court rejected the expert's opinion that the child had been born alive, because the medical evidence was thought to be highly ambiguous. It held that medical opinion as to live birth under such circumstances could be only "of slight or merely conjectural significance."[41] Medical opinion sometimes was held to be of greater significance when other evidence supported it. In *People v. Ryan*[42] an expert's opinion that the infant had lived was bolstered by a witness who testified to having heard the child cry. The expert's opinion of live birth in *Hubner v. State*[43] was satisfactorily supported by evidence of air in the lungs and stomach of the child, of its dry and clean hair, and of the discoloration of the skin of its neck where a rag had been tightly tied.

Another alternative to the breathing test was briefly considered in *State v. Osmus*.[44] The medical witness in that case, Dr. Stuckenhoff, had testified that a physician delivering a baby usually waits until the pulsation in the umbilical cord ceases before cutting the cord. The court decided that the ceasing of this pulsation was probably the best medical criterion of "independent circulation," for it marked the point in time when the infant stopped sending its blood into the placenta for oxygenation. Fortunately the court also realized the unfeasibility of adopting this medical procedure as a legal criterion since it could be used only

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[37] Grove, *Causes of Death in the Peri-Natal Period*, 6 J. FORENSIC MEDICINE 43, 51 (1959).
[38] 72 W.Va. 500, 78 S.E. 699 (1913).
[39] 44 S.E.2d 242 (Ga. 1947).
[40] 300 N.Y. 171, 90 N.E.2d 23 (1949).
[41] *Id.* 300 N.Y. at 176.
[42] 9 Ill. 2d 467, 138 N.E.2d 516 (1956).
[43] 131 Wis. 162, 111 N.W. 63 (1907).
[44] 73 Wyo. 183, 276 P.2d 469 (1954).

when the birth was attended by a physician who was later available to testify in court. Furthermore, as pointed out in *Wehrman v. Farmers' and Merchants' Savings Bank of Durant*,[45] the ceasing of this pulsation may also be caused by a mere reduction of placental oxygenation, or by the death of the infant, and in the latter case, the court might mistakenly take the child's death as an indicator of "independent circulation," and therefore of life. Severance of the umbilical cord itself was generally not considered necessary for independent circulation.[46]

Thus, the rule requiring live birth had been more elaborately developed in America, but it was not significantly clearer or easier to apply than the older English rule. It still suffered from a vagueness in its use of scientific knowledge and from a failure to separate the medical questions from the legal ones.

Partly, perhaps, in reaction to this vagueness, and paralleling the legislative concern in England, a minority of American courts stopped requiring a showing of live birth in infanticide convictions. Leading these cases was *People v. Chavez*,[47] decided in California in 1947. The *Chavez* court completely rejected the well precedented requirements of live birth and held that a child is alive for purposes of the law of infanticide when it becomes viable, that is, when it is able to live independently of the mother if removed from her body. The court explained:

> There is no sound reason why an infant should not be considered a human being when born or removed from the body of its mother, when it has reached that stage of development where it is capable of living an independent life as a separate being, and where in the natural course of events it will so live if given normal and reasonable care. It should equally be held that a viable child in the process of being born is a human being within the meaning of the homicide statutes, whether or not the process has been fully completed.[48]

The court was particularly critical of the legal adoption of any medical criterion of the "moment of birth." It insisted that there was no substantial difference between a viable, pre-natal infant and a newly born infant, and that any legal distinction would be artificial. A few courts that had been troubled by the live-birth rule were quick to follow *Chavez,* for the viability rule made much of the highly technical and often speculative testimony of medical experts no longer necessary.[49] Some courts, while not clearly following *Chavez,* relied on it in making strong assumptions of live birth.[50]

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[45] 221 Iowa 249, 259 N.W. 564, 569 (1935).
[46] 2 WHARTON, EVIDENCE IN CRIMINAL CASES § 874, at 1511 (11ht ed. 1935); Annot., 159 A.L.R. 523, 528 (1945).
[47] 176 P.2d 92 (Cal. Dist. Ct. App. 1947).
[48] *Id.* at 94.
[49] *E.g.,* Singleton v. State, 35 So. 2d 375 (Ala. Ct. App. 1948).
[50] State v. Shephard, 255 Iowa 1218, 124 N.W.2d 712 (1964).

Of course the *Chavez* rule was not entirely free from ambiguity. Although the age of viability is generally taken to be approximately seven months,[50] there is no way to be sure of viability in any particular case,[52] and many fetuses only twenty-four weeks old have been able to survive with intensive care.[53] At the present time, it is true that the question of whether or not a child was viable is less likely to arise than the question of live birth, but this may change in the near future as the use of incubators and artificial wombs grows. When that happens, the minority of courts that follow the *Chavez* rule will once again be faced with the problem of integrating medical knowledge and judicial decision, a problem that they will have succeeded in avoiding only temporarily.

Related Doctrines of Life

Although the law of infanticide has delved the deepest into the legal question of human life, several other fields of law have had to face a similar problem when elements of their legal doctrine were affected by the life status of the parties. It will be helpful to briefly examine a few of these fields here.

One such field closely related to that of infanticide is the law of torts against unborn children. The basic question to be answered is whether or not an unborn fetus can recover for injuries to himself occuring during his mother's pregnancy. At common law an unborn infant rarely had the right to sue for such injuries. For example, in *Allaire v. St. Luke's Hospital*,[54] the court held that an unborn infant had no distinct and independent existence, in contemplation of the common law.[55] Mr. Justice Boggs dissented in this opinion, arguing that once a fetus is viable, he is no longer part of the mother's life,[56] but the courts invariably followed the majority view. Recoveries were possible, however, when statutes had been passed to allow suits for pre-natal injury.[57] In *Scott v. Peterson*,[58] the court defended such statutes, arguing that the statutory existance granted to an unborn child was "an established and recognized fact by science and by everyone of understanding." Such statutes were passed in a majority of the states and they often were not limited to post-viability injuries.[59]

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[51] West v. McCoy, 233 S.C. 369, 105 S.E.2d 88, 91 (1958); Chapman, *Wrongful Death of Stillborn Viable Fetus*, 9 TRIAL LAW. GUIDE 25, 1965 TRIAL LAW. GUIDE ANNUAL 283, 294.

[52] Atkinson, *supra* note 4, at 136.

[53] *Control of Life, supra* note 6, at 60.

[54] 184 Ill. 359, 56 N.E. 638 (1900).

[55] *Accord.* Dietrich v. Northhampton, 138 Mass. 14 (1884). *See also*, Reed, *Pre-Natal Injuries: Development of the Right of Recovery*, 10 DEFENSE L.J. 29 (1961).

[56] 56 N.E. at 641.

[57] Scott v. McPheeters, 33 Cal. App. 2d 629, 92 P.2d 678 (1939).

[58] *Id.*

[59] Byrne, *The Legal Rights of the Unborn Child*, 41 *Los Angeles B. Bull.* 24, 68 (1965). *See also* Yearick, *The Viable Child*, 1949 INS. L.J. 885.

A criterion for determing the starting point of human life can also be crucial in cases involving wills and estates whenever a death and birth occur so close in time that the question of whether one party survived the other is unclear. One of the most intriguing of such cases is *Wehrman v .Farmers' and Merchants' Savings Bank of Durrant.*[60] The factual question to be determined in that case was whether either of two newly born children "survived" his mother, who had died in the same operation that resulted in delivery of the twins. The mother had been given a spinal anesthetic preliminary to a necessary Caesarian section, but about eight minutes after receiving it—and before any incision had been made—she stopped breathing. Attempts at resucitation failed and she was pronounced dead seven minutes later. The physicians then performed the section and were able to deliver both children, although neither infant showed any signs of respiration. Attempts to begin respiration in the infants also failed, and they were pronounced dead after thirty minutes. After hearing expert testimony that a newborn child can live (his heart can beat) for several minutes without respiring, due to the high oxygen content in his blood cells, and after noting that no attempt to find a heartbeat had been made, the court concluded that the children would be presumed to have lived long enough to survive their mother, absent evidence by the plaintiff that they had died earlier.[61]

The legal concept of life can also become relevant at the other end of the life-span, when questions arise as to when life ends and death begins. In the law of homicide the courts are unanimous that a human being with any life left whatever, "even the last spark," is a proper subject for homicide.[62] This is true even if the victim had been suffering from an incurable disease,[63] had been under a sentence of execution,[64] or had been already dying at the time,[65] as long as the defendent's act accelerated the death.[66] Thus, in *State v. BeBee,*[67] the defendent was convicted of murder when he fired a bullet into an officer already dying from a previous bullet wound. The medical expert testified that either shot alone would have been fatal, and the court did not even require evidence of how the second shot contributed to the death. On the other hand, once a person is dead, he is no longer a human being in the eyes of the law, and he can no longer be the subject of a homicide.[68] Fortunately, the problem of determining legally the exact criterion of death is rarely in issue, and there has been very little legal discussion of the complex medical indications of death. But the near future may bring

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[60] 221 Iowa 249, 259 N.W. 564 (1935).
[61] *Id.* 259 N.W. at 570.
[62] *1* WHARTON, CRIMINAL LAW AND PROCEDURE § 190, at 436 (1957).
[63] 40 C.J.S. *Homicide* § 2 (a) (1944).
[64] 26 AM. JUR. *Homicide* § 33 (1940).
[65] People v. Cione, 293 Ill. 321, 127 N.E. 646 (1920).
[66] WHARTON, *supra* note 62, § 190, at 435.
[67] 113 Utah 398, 195 P.2d 746 (1948).

important advances in artificial life prolongation and suspended animation devices, and with them new problems of the meaning of death. Is a man dead when he functions only because he is connected to a heart-lung machine? Is he dead if there is a 90 percent chance that he can be brought out of a death-like state of suspended animation? Or a 50 percent chance? Or a 10 percent chance?

One medical field that is already beginning to question the court's simple notion of death is that of euthanasia, sometimes called "mercy killing." Euthanasia traditionally has been viewed by the courts as the killing of a living human being, motivated by an intention to end the victim's incurable suffering from a painful and fatal disease.[69] As such it is repeatedly held to be homicide, for the law of homicide recognizes no defense based on motivation or good intentions.[70] In actual practice, defendents are treated leniently by the courts[71] and often are not prosecuted at all.[72] However, it has been suggested that a person whose only existance is perpetual pain might be viewed as no longer alive for legal purposes, even though he may still display many of the medical indications of life. Horace M. Kallen holds this view, maintaining that "human existance is consciousness. . . . The human person ceases when awareness goes out and unawareness goes out when it becomes intolerable to itself."[73] This approach may seem too foreign to fit into current legal doctrines, but future questions about the boundaries of human life may well require consideration of views like this, and a clear understanding of the separate roles of medical and legal concepts will be essential.

Conclusion

The development of the doctrine of infanticide, and of the related doctrines that have been examined, unfortunately displays a tendency that may hamper the legal resolution of biomedical questions of the future. It is a tendency to confuse the available scientific knowledge with the legal doctrine to be formulated by the court.

The old infanticide doctrine of England, and the majority rule in America are both examples of this confusion. The courts in these cases discuss the legal requirement of "life" for a homicide charge in the same breath with the supposedly medical requirement of "independent circulation" for a live birth. In so doing, the courts manifest a lack of understanding of the different fundamental natures of medicine and of law. Medical science is an attempt at describing as conceptually as possible the biological aspects of nature, in order to improve efforts at

[68] 40 C.J.S. *Homicide* § 2(a) (1944).
[69] *See, e.g.*, Note, 48 MICH. L. REV. 1199 (1950).
[70] 26 AM. JUR. *Homicide* § 104 (1940).
[71] ST. JOHN-STEVAS, LIFE, DEATH AND THE LAW 263 (1961).
[72] 48 MICH. L. REV. 1199, 1200 (1950).
[73] Kallen, *An Ethics of Freedom: a Philosopher's View*, 31 N.Y.U. L. REV. 1165, 1168 (1956).

combating disease and saving human life. Medical terminology merely provides a system of somewhat arbitrary labels that facilitate the communication of these descriptions and concepts. The law, on the other hand, is an attempt to prescribe and control the conduct of men according to continually evolving principles of judicial evaluation.

Medical science is interested in learning how to increase the number of live-births, not in deciding the legal meaning of the term. That is a question for the law. It is no wonder that the medical expert in the *Benett* case, when asked if the decedent child had established an independent circulatory system, replied: "What do you mean by independent circulatory system?"[74]

Medical science can not be asked to make legal decisions. It can, however, be asked to describe and explain what is currently known of the phenomena about which the court must decide. In this role, medical knowledge can be of great use to the courts. New developments in post-mortem enzyme analysis, for example, may soon make it possible to pinpoint every detailed biological fact surrounding a peri-natal death,[75] but once these facts are explained to the courts, only the courts themselves will be able to attach legal significance to them. Medical science can help the court to better understand the problems before it, but it can not make the moral, evaluatory, and judicial opinions that comprise the law.

A few courts have seen this distinction. Fifty years ago, the Wisconsin Supreme Court realized that "the medical or scientific recognition of the separate entity of an unborn child [does not] aid in determing its legal rights."[76] But for the most part, the infanticide doctrine has evolved as a confused mixture of medical knowledge and legal judgment.

The English infanticide legislation and the *Chavez* rule in America resulted partly in response to this confusion. Their approach was to avoid the medical-legal interaction altogether, by establishing doctrines that could ignore whatever medical knowledge might be available. This may be a workable solution for the time being, but future problems of biological life will not be so easy to by-pass. Some of the auxiliary doctrines mentioned in this paper, such as the timing of birth in "survival" disputes and the determination of "final" death, already require a clear understanding of the relationship of medicine to law. Only when the courts start to comprehend the proper role of scientific knowledge in legal problems of this nature will they be ready to deal intelligently with the biomedically advanced world of the future.

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[74] 377 P.2d 634 (Wyo. 1963).

[75] Majorska, *The Determination of Time of Death in a Case of Suspected Infanticide,* 5 J. FORENSIC SCIENCE, 33, 34 (1960).

[76] Lipps v. Milwaukee Electric R. & L. Co., 164 Wis. 272, 159 N.W. 916, 917 (1916).