

- 1) The moral perspectives we will use this semester: Kant, Utilitarianism, Principlism, Virtue , Care, and Professional Codes.

**Natural Law (influential in law)**

- a. St.Thomas Aquinas' religious version: moral laws are God's laws.
- b. Secular version: what is good is a function of what is good for humans [what would lead to a flourishing human life, given the nature of humans].
- c. Doctrine of double effect: one can view killing as essentially wrong even while morally defensible under certain conditions.
  - i. Criteria
    1. Act itself must be morally good or indifferent
    2. The actor may not intend bad effect, and would avoid if could attain good effect without it
    3. Good effect produced directly by action and not by bad effect itself
    4. Good effect must outweigh bad.
  - ii. Example: pain relief
    1. Criticism of double effect in this case
      - a. Created myth that pain relief causes death.
      - b. Assumes that shortening patient's life always a bad thing.
      - c. Intent difficult to assess in practice (subterfuge?)

1/30 Principlism: rules (precepts)/ principles.

- Different versions of principlism
  - Beauchamp: four primary principles: respect for autonomy, non-maleficence, beneficence and justice
    - Derivative rules: tell truth, keep promises, protect privacy of others, obtain informed consent
  - Veatch: beneficence, contract-keeping, autonomy, honesty, avoiding killing, justice
    - Intermediate rules: informed consent
  - Englehardt: principle of permission (autonomy), beneficence (justice can be derived from these) and derivative obligations
- Legal reasoning: In making decisions, judges look to constitution, statutes (and administrative regulations etc.), cases and public policy.

2/4 Abortion: *Roe v Wade*

The issue: Are laws which prohibit abortion at any time during pregnancy except when necessary to preserve the pregnant woman's life constitutional?

Judges appeal to these Constitution principles to answer this question:

- The notion of personal "liberty" embodied in 14<sup>th</sup> Amendment due process clause.
  - No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
- The personal, marital, familial and sexual privacy protected by the Bill of Rights.
  - 1 Freedom of religion, speech, press, assembly, and petition.
  - 2 Right to keep and bear arms in order to maintain a well- regulated militia.
  - 3 No quartering of soldiers.
  - 4 Freedom from unreasonable searches and seizures.
  - 5 Right to due process of law, freedom from self-incrimination, double jeopardy.
  - 6 Rights of accused persons, e.g., right to a speedy and public trial.
  - 7 Right of trial by jury in civil cases.
  - 8 Freedom from excessive bail, cruel and unusual punishments.
  - 9 Other rights of the people.
  - 10 Powers reserved to the states
- The state interest in protecting maternal health.
- The state interest in potential human life.

Holding:

- 1) No state interference in 1<sup>st</sup> trimester.
- 2) State can regulate procedure in 2<sup>nd</sup> trimester under principle of state interest in protecting maternal life.
- 3) State can regulate and/or prohibit procedure in 3<sup>rd</sup> trimester under principle of state interest in maternal health AND potential human life.

## Lecture Notes

### Analysis:

- Pregnant woman has a liberty (including privacy) right that applies in abortion choice.
- State has an interest in maternal health and potential human life.
- State interest in potential fetal life begins at viability because at this point, fetus has “capability of meaningful life outside womb.”

### *Planned Parenthood v. Casey*

### Holding:

PA statute with 4 provisions, only the third is unconstitutional.

- Informed consent: physician must inform, with state info provided 24 hours prior
- Minor must have informed consent of 1 parent (w judicial bypass option)
- Married woman must sign statement that she has notified husband
- Reporting requirements

### Analysis:

- Stare decisis and *Roe v. Wade*
  - Liberty asserted by due process clause
  - Affirms viability
    - Second life at viability
  - 1<sup>st</sup> and 2<sup>nd</sup> trimester division rejected
    - Need to reconcile woman’s liberty with state interest in prenatal life.
- RULE: “Only where state regulation imposes an undue burden on a woman’s ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause.” (73)
  - “undue burden” = “state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.” (73)
- All provisions except marital requirement are constitutional because they do not have the purpose of effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.

*Gonzalez v. Carhart*  
500 U.S. 124 (2007)

Issue: Whether the PBABA of 2003 an unconstitutional violation of personal privacy/liberty afforded to because it failed to include specify the type of abortion the ban applied to and made no mention of an exemption for the ban in the event the mother's life was in danger.

Holding: The Court ruled that the PBABA did not violate patients' rights, because it was not unconstitutionally ambiguous, and because it did not place an undue burden on women seeking late term abortions.

Analysis:

- The Act is not unconstitutionally vague (see general rule about vagueness 86)
- The Act does not violate the holding in *Casey* that the State may not impose an undue burden on women seeking an abortion before viability.
  - There are 2 types of second trimester abortion: D&E and D&X
  - The ban only applied to D&X, which was rarely performed, and not D&E, the more common procedure.
  - Since physicians can perform second trimester abortions by D&E instead of D&X, there was no undue burden.
  - D&X is never necessary to save the mother's life.
- The State has a legitimate interest in protecting maternal health
  - Some women "come to regret their choice to abort the infant life they once created and sustained. Severe depression and loss of esteem can follow. (evidence? Emotionally laden language 89)
- The Act expresses Congress' profound respect for the life of the unborn.

Justice Ginsburg's dissent:

- Failed to respect personal autonomy
- Allowed legislators to tell doctors how to practice. Many medical experts testified that D&X was safer and necessary to protect woman's life in some circumstances. (93)
- The Court inappropriately injected 'moral concerns' (94) and anachronistic views about women. (94)
- The Court ignored stare decisis.

Judicial philosophy

- Judges must appeal to legal authority
  - Constitution, statutes, stare decisis (principle that past decisions should not generally be overturned), public policy
    - Facts
      - Empirical, scientific data generally accepted by experts in field
  - Tone
    - Calm, measured, unemotional

Moral positions on abortion: Abortion and Personhood

Centrality of person question in abortion debate: The pregnant woman is a person who has rights, but is the fetus also a person who has rights?

What makes a person?

Member of human species answer.

- Problem
  - Extraterrestrial (130)
  - Upper brain destruction (131)
  - Transferred brain (131)
  - Germ cell (144-5)

Cluster of properties answer: Discuss: which one(s)? Necessary? Sufficient?

- Sentience (pleasure and pain)
- Emotions
- Consciousness
  - Self-conscious
  - Capable of rational thought
- Sense of time
- Memory
- Can envisage a future
- Interests
  - Reflective and prioritized
  - Desires regarding interests
- Moral agency
- Ability to communicate and interact with others

Is potential personhood morally significant?

- When is a fetus a potential person?
  - Conception
    - Can't assume "soul" because not everyone agrees and religious views shouldn't play a role in debate. (1<sup>st</sup> amend)
    - Why not go back to germ cells?
    - But early fetus "undifferentiated cells" (144) that may or may not develop into individual.
    - Not until late in 2<sup>nd</sup> trimester does fetus have the neurophysiological structure necessary for conscious experience.
  - Viability
    - When fetus can live outside the womb.
      - What happens as technology moves this up?
      - Why?
        - Because fetus is a person now.

- This is irrelevant to the issue of the moral significance of potential personhood.

### **HCL Assisted Repro Tech (113)**

- Technologies
  - AI
    - Usually using frozen sperm so screening can be done
    - AIH (art insemination homologous) sperm source and father same
    - AID (donor)
    - Cost: \$250 to prepare for cryopreservation, \$70 month for storage, \$250-\$400 to buy vial.
  - IVF
  - IVP (in vitro pregnancy)
  - Cloning

### **Uniform Parentage Act 1973 (119-)**

- AIH: no legal questions.
- AID:
  - Husband is treated in law as natural father if
    - Under supervision of physician
    - With written consent of husband
    - Wife inseminated with donor sperm
  - Donor is not treated in law as father

### **Uniform Parentage Act 2000 (120)**

(As of 2013, only 8 states adopted this version, 133)

- 201 Parent-child
  - Mother-child relationship established by.
    - Woman's having given birth (unless surrogate)
    - Adjudication
    - Adoption
  - Father-child
    - Unrebutted presumptions
    - Effective acknowledgement of paternity
    - Adjudication
    - Adoption
    - The man's having assisted in assisted reproduction by his wife which resulted in birth of child.

*In the Interest of K.M.H* 285 Kan. 53 (Supreme Ct of KS 2007)

F: Mother, unmarried lawyer sought aid of friend (non-lawyer) and they made oral agreement, but no formal contract re donation of sperm, AI, or parental rights. Donor alleges he had agreement with mother to act as father to the twins born of this AI.

- I: Does KS requirement that opt-out of donor not father be in writing violate equal protection or due process?
  - Equal protection rule: “In order to pass muster under the fed and state equal prot, a classification that treats otherwise similarly situated individuals differently based solely on the individuals’ genders must substantially further a legitimate legislative purpose; the government’s objective must be important, and the classification substantially related to achievement of it.” (129)
  - Held: Statutes’ gender classification substantially furthers and is thus substantially related to legitimate government objectives.
    - Purpose of KS law: encourage men to donate sperm; protect women from potential claims of donors to parental rights.
    - Writing requirement enhances predictability, clarity and enforceability.
  - Due Process: statute does not cut off parental rights, but ensures no attachment of them.
    - SCOTUS has found married woman is sole arbiter, regardless of husband’s wishes in abortion decision.
  - Public policy would be better served by maximizing availability of two parents, but this is a legislative decision, not for Court. (130-1)

Dissent: Justice Caplinger: parental right is a fundamental right and fundamental rights must be “actively waived, rather than passively lost due to inaction.” (132)

Dissent: Hill: “Who speaks for the children...” Child’s best interest not served.

**Problem: Sperm Donor’s Obligation to pay child support. (138)**

Marotta, Married man answered Craigslist ad from lesbian couple looking for sperm. All three agreed in writing that he would make no claims of parentage and have no financial obligation. After couple broke up, mom became ill and lost her job and child support. She went on welfare and state KS Dept of Children and Families sued for child support. Update 1/23/2014 District Court ruled he must pay because they didn’t use physician (KS law mostly 1973 UPA.)

*Davis v. Davis* 842 S.W. 2d 588 (Tenn. 1992)

F: Mary Sue Davis and Junior Davis created 7 cryogenically-preserved products of IVF (“frozen embryos”). MS filed for custody of embryos in divorce. Later both remarried and MS no longer wanted to implant them into her womb but to donate them to a childless couple. J wanted to destroy them.

PP. Trial Ct held they were human beings and awarded custody to MS, who planned to implant them into her womb. J objected on grounds that he did not want to be parent. Ct of Appeals remanded finding that J had a “constitutionally protected right not to beget a child where no pregnancy has taken place.” MS sought review.

Analysis:

- Court adopts: we must weigh the interests of each party
  - Embryos not either persons or property, but “interim category that entitles them to special respect because of their potential for human life.” (145)
  - There is a right to individual privacy in both Tenn and fed law.
    - This privacy right encompasses the right of procreational autonomy.
      - Two rights of equal significance: right to procreate and the right to avoid procreation.
  - Thus, decisional authority rests in gamete-providers alone. (147)
  - State’s interest in abortion context do not become sufficiently compelling till end of first trimester, so “sure there is no state interest in these pre-embryos which could suffice to overcome the interests of the gamete-providers.” (147)
    - In the instant case, J’s interest in not being parent (his boyhood trauma) outweighs MS’s interest (knowing her IVF efforts not futile, pain of knowing embryos would never become children.) (149)
- Rule: 1) look to preference of progenitors. 2) If conflict or don’t know their preference, look to prior agreement. 3) if no agreement, relative interests of parties. 4) ordinarily interest in avoiding procreation should prevail, assuming other party has a reasonable possibility of achieving parenthood by means other than use of the pre-embryos in question (if not, using them for pregnancy should be considered. 5) if party merely wants to donate them, the objecting party has the greater interest. 6) rule does not create an “automatic veto.” (150)

Introduction of care ethics.

- Care based on basic human capacity AND
- Moral imperative to commit to and exercise this capacity.
- Moral attention, sympathy understanding, relationship awareness, accommodation and harmony.
  - Role of empathy
    - Failure of empathy: blame victim, hear and now bias, familiarity bias
  - Centrality of relationship
    - In self-understanding
    - In addressing problem
      - Need to be aware of existing supportive relationships
      - Need to work with and/or create relationships to resolve issues
  - Communities, and not just individuals, have moral standing
- Care ethics differs:
  - Principles
  - Whether care is a virtue
- Care and principlism in health care ethics: patient autonomy, beneficence (do no harm), and justice
  - Combination of
    - Beauchamp: respect for autonomy, non-maleficence, beneficence and justice
      - Derivative rules: tell truth, keep promises, protect privacy of others, obtain informed consent
    - Veatch: beneficence, contract-keeping, autonomy, honesty, avoiding killing, justice
      - Intermediate rules: informed consent
    - Englehardt: principle of permission (autonomy), beneficence (justice can be derived from these) and derivative obligations

Individual Morality	Health Care Professional Ethics (HCPE)	Law: Judges
Principlism Care ethics	Principlism: what Beauchamp, Veatch and Englehardt have in common: patient autonomy, benefit patient (do no harm), justice AND Care ethics	Statute: Family law (UPA) Licensing Funding Tort Criminal

## Reproductive Technologies and Practices

### IVF (H not morally problematic) Donor

- Who is the legal parent?
- Who pays child support?
- Who gets custody?

### Genetic Testing

- Preconception
- Post conception
  - PGD (preimplantation genetic diagnosis)
  - IVF: post implantation
  - Non IVF: post conception

### PGD: Which embryo gets implanted?

- Sex selection?
- Disability?
  - Inherent model?
  - Social model?
- Genetic disease?
- Desirable characteristics?
  - Intelligence?
  - Athletic ability?
  - Skin and hair color?

### Questions to discuss: (PGD as example)

- Should we leave it to the market?
  - With individuals constrained only by individual morality?
    - Principlism (K1, K2)
    - Care
  - With health care professions constrained by principlism: HCPE--patient autonomy, beneficence (do no harm) justice and care?
- Should we regulate ART?
- As we move to regulate, should we take individual morality into account?
  - If so, what would it look like for K1, K2 and care for each technology above.
  - What would it look like for HCPE?

## 2/25 Maternal Fetal Decision Making

As we discuss issues, we will always ask these questions:

1. What is the central moral issue?
2. What are the options?
3. What is the moral assessment of each option: (note that we started by separating individual morality from the moral perspective we would want to see applied in health care settings. At this point, we can combine them unless there seems to be a reason for separating them—i.e. they conflict in some way.)
  - Patient autonomy (Kant included here)
  - non-maleficence, beneficence (utilitarianism)
  - justice
  - care (relationship, community, moral attention etc.)
4. Who's the patient? Are there other parties we should consider?
5. What are the legal issues?

### The model applied to maternal-fetus conflict

1. What is the central moral issue?
  - When there is a conflict between the wishes of the pregnant mother and what the health care providers think is best for the fetus.
2. What are the options?

Respect patient autonomy when patient is competent

  - When patient is not competent,
    - Advance directive or other evidence of patient's wishes
    - Surrogate decision maker.
      - Who? What if they disagree?

Balance the wishes of patient and health care team assessment of best interest of fetus.
3. What is the moral assessment of each option:
  - Patient autonomy (Kant included here) ,
  - non-maleficence, beneficence (utilitarianism),
  - justice,
  - care (relationship, community, moral attention etc.)
4. Who's the patient? Are there other parties we should consider?

5. What are the legal issues?

- In re A.C.
  - Informed consent: Who has the right to decide the course of treatment for a patient near death with viable fetus? (note the narrowness)
    - Court: Patient (or surrogate expressing patient's interests/wishes)
    - Dissent: Court, balancing interests of pregnant woman and viable fetus' interest in living, and state interest in protecting human life. (Does dissent limit this to dying mother?)
      - As long as danger to mother's life of health is and her religious beliefs are included in balancing.
  - Substituted Judgment: How should the decision be made if the patient cannot make it for herself?