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Introduction

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THE MEDICAL, MORAL, AND LEGAL IMPLICATIONS
OF RECENT MEDICAL ADVANCES —

A SYMPOSIUM

INTRODUCTION

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FOR THE FOURTH CONSECUTIVE YEAR the *Villanova Law Review* has sponsored a Symposium held at the Law School. As in previous years, the principal purpose of the Symposium was to promote active, vigorous exchange between members of diverse professions on a current problem of legal significance and of great mutual concern. This year it was our pleasure to have doctors, philosophers, and theologians join with judges, lawyers, law professors and students in approaching the numerous questions presented by recent medical advances which challenge our traditional concepts of life and death, and our concepts of the ethical practice of medicine. Again, papers were presented by various panelists and extended discussion encouraged from the audience, and again in order to promote free and open exchange no transcripts were made of the proceedings, but the principal speakers were asked to submit manuscripts based on their remarks for publication at this time.¹

A symposium perhaps has never been held that did not end with the remark that more issues have been raised than could be solved, and that the real value of the symposium was in getting its participants *started* on thinking about questions that must be answered. This Symposium was no exception. Ideas, assumptions, theories, and questions flew about with molecular frequency and velocity. As moderator I had that somewhat thankless task of trying to pick out common threads in the rich fabric of the discussion. I shall make no attempt to summarize all of the various points of view advanced at the Symposium, but I should like to outline briefly the major lines of discussion and the important questions which were raised. Of course, many of the questions are dealt with more thoroughly and thoughtfully in the published papers, but a sketch of the problems may be of some interest.

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1. William J. Curran, Professor of Health Law, Harvard Medical School, was a member of the panel, but failed to submit a paper.

The major problems considered in this Symposium were suggested by the activity in heart transplants and were discussed first in relation to the donor of the organ, and then in relation to the donee.

The most critical problem concerning the donor of a heart was the question of when he was to be considered "dead" so as to justify the transplant. The necessity of quick transplants and the certainty that the death of the donor would be caused by such a transplant has made the question of a rapid and accurate determination of death crucial. Much of the discussion on the day of the Symposium and in the following Articles dwells upon this problem. The doctors looked to the lawyers for a sufficiently precise definition so that they could proceed without fear of legal sanctions in this area. The lawyers replied that the consequences of death may be of great legal significance, but the fact of death must necessarily be determined by medical criteria and, therefore, the doctors must develop and be able to justify the criteria so as to warrant the determination of the existence of death. The feasibility of using different concepts of death such as "brain death," "heart death," or "physiological death" or some variants on these concepts was extensively considered. Moreover, the idea of death as a process rather than an event was advanced. All seemed agreed that the concept of death was no mere mechanical determination, but was a profound reflection of the concept of life, and the duty to sustain life.

Among the other questions considered were the legal and ethical distinctions between the duty to sustain life in some circumstances, but not in others; the possible difference in treatment of those who are potentially donors and those who are not; the possible differences in treatment between the poor and the rich, the young and the aged; the purely legal question of the power to donate organs of those who are dead, and many refinements on this problem. It was suggested that advances made in the development of artificial organs and the preservation of live organs might reduce the urgency of the determination of death. It was also noted that although the recent heart transplants made the problem much more visible, the evaluation of what kind of care should be given a terminal or questionably "dead" patient has been an ever present one involving patients in great pain, or advanced years, or who have lost irrevocably reasoning powers or the power to act as complete persons. The necessity of developing reasonably clear ethical standards which do not expose the doctor to legal liability was made apparent. Although countless decisions of this nature will be and have been made quietly, privately, and without any possibility of legal or professional consequences, it was agreed that standards cannot be just personal to the doctor, but must be evolved by the pro-

fession in the light not only of medical values but of general community values concerning the right to life.

The problems concerning the donee were of a different nature. The critical question seems to be how far can a doctor go in applying a new procedure which is of very low probability of success to a person who, although seemingly hopelessly ill, is not in immediate danger of death, when it is fairly clear that if unsuccessful the new procedure will almost certainly result in death.

One question raised was whether the donee has consented to such an operation. The problem of consent in this area is but a highlighted aspect of the problem of consent in many medical circumstances, and in fact of the law generally. Can the young, the poor, the ignorant, the imprisoned, those desperately in pain or deeply under the influence of a professional man's greater learning, be said to have the ability to "voluntarily" consent? Can a doctor rely on such consent? Are the criteria developed by the law in determining whether a man has "consented" to a search of his house or given a voluntary confession relevant, or should we use concepts of consent which are relevant to the ability to make a will or a gift? How much disclosure is necessary, or how much independent advice?

Another point that was vigorously discussed was how to determine whether a procedure should be considered experimental or therapeutic. Is the possibility of success the touchstone? Does *any* possibility of success indicate that a procedure is therapeutic? Or should we consider the fact that the investment in time, personnel, and money is so great that it could not possibly be justified for the particular therapeutic effect on one person? If there is consent, should there be any distinction made between "therapeutic" and "experimental" procedures? Are there significant differences between procedures which are potentially lethal and those which may affect the body in some other fashion? The tension between the doctor's role as a healer of his particular patient and his role as one who advances medical knowledge was felt by all, and there were suggestions of possible ways to reduce this tension such as procedures to separate out the functions in a particular situation to assure that the "curative" doctor and the "experimental" doctor would never be the same. The fact that the doctor whose primary role was therapeutic was consulted in a particular operation also might be relevant to a finding of informed consent.

Other serious problems concerned the selection of potential donees when the number of donors is severely limited, as well as the general value of allocating limited hospital and research facilities and assets to dramatic procedures which, even if successful, could be applied only in a very minimal number of cases.

In our 1-day Symposium all of these questions could hardly be resolved or even considered at any great length. But they do suggest the excitement and the involvement that the Symposium generated. We are very grateful to all of the participants for making the Symposium possible, and in particular I am grateful to the *Villanova Law Review* and the panelists whose papers are printed herein for making their ideas available to those who were unable to attend the Symposium.