

COMMENT

Social dilemmas – judicial resolutions

The Hon. Justice A.B. Handler

Editor's Note: The following address was given by The Honourable Mr. Justice A.B. Handler of the Supreme Court of New Jersey to the Faculty of Law of the University of Manitoba October 6, 1988.

DEAN TREVOR ANDERSON:

I SHALL BE BRIEF, TOO BRIEF INDEED to do justice to the career and achievements of our distinguished visitor, Mr. Justice Handler of the Supreme Court of New Jersey, which is the highest appellate court in that important state. Mr. Justice Handler is a graduate of Princeton University and of the Harvard Law School. He served in a number of important offices in the Dept. of the Attorney-General of New Jersey. He was first appointed to the New Jersey Superior Court Trial Division, subsequently sat in its appellate division, then after an interval as counsel to the Governor of New Jersey, was appointed to his present position in New Jersey's highest court. The New Jersey Court as you may be aware have recently in recent years dealt with some of the most important and perplexing of those cases which have brought before the courts social and, you even might say, philosophical questions raising from medical and scientific advance, some of the best known of course being the *Quinlan* case and the *Baby M* case. Mr. Justice Handler has himself written decisions in a number of cases in that character. It is now a pleasure for me to present him to you, and to ask him to speak to you.

MR. JUSTICE HANDLER:

THANK YOU VERY MUCH DEAN. Students and faculty of the Law School, I'm happy to be here. It's been a nice experience for me to come up here and visit, and it's given me an opportunity perhaps to think about, in a somewhat different light, some of the things that we have been doing in our own court. I have had second thoughts about what I would talk about. I notice that the published title to this talk is called "Social Dilemmas – Judicial Resolutions." I think it was taken from an article that I had written recently and the title has changed somewhat. The

name of the article was "Judicial Dilemmas, Judicial Irresolutions." The change shouldn't suggest to you however that I've come up with any answers. I haven't. I also thought once I got here that maybe I had concentrated on a subject matter that you wouldn't find topical. Perhaps I should have given some more thought to whether or not there ever could be a defence to the use of anabolic steroids, or maybe I should have concentrated a little bit more on free trade. But I decided to stick with that with which we're becoming somewhat familiar although I'm not certain we're becoming that expert.

If I were to have been given a clean slate with respect to this event, I would have given a different title to this talk. I think I would have called it "Individual Worth." Of late we have witnessed many judicial decisions that separately and collectively have sparked a lot of attention. The cases have presented very poignant but current human dramas. What is unusual is not these human experiences, but that they are the subject of litigation. The cases that have presented these dramas probe some of the most sensitive and intense and deep concerns that can affect an individual. Consequently the decisions purporting to resolve these issues have necessarily dealt with matters of individual morality as well as social policy. Among the cases that have thrust courts onto this stage are the right-to-die cases – but there are others: the so-called wrongful life and birth cases, those involving artificial procreation and parental surrogacy, informed consent, organ donation, and sterilization of the handicapped. In a traditional sense courts have done no more in these cases than to decide particular controversies that are properly brought before them by contesting litigants. In this setting we act on our belief that law embodies a societal consensus on how certain factual situations should be handled. This way of looking at what courts do is stood on end when the facts of a case go beyond existing societal consensus. And in such cases courts find themselves acting alone in an atmosphere of uncertainty and disagreement.

In the cases that have attracted our attention, courts have decided disputes with strong moral overtones, the solutions of which purport to settle questions that society itself has not yet answered. And the broad questions posed by these cases are: have courts in dealing with such issues reached legal solutions that fall beyond the bounds of established law? Have courts in dealing with such issues, acted as a social arbiter deciding matters of morality that policy and are better left to others? I will suggest that courts in dealing with these cases, have drawn on established law, but have been forced to concentrate on concepts of individual worth and to develop distinctive legal principles designed to protect individual worth. I will also indicate that in articulating and applying a doctrine of individual worth on a case by case ba-

sis courts have addressed issues of morality and public policy, but have assumed a role that is conducive to the broader institutional treatment of these difficult moral and social issues.

I have mentioned cases that have come to be called the right-to-die and wrongful birth and life cases. An initial focus on these two groups of cases as examples of our themes – cases involving the right to create life, and those involving the right to end life – should not be surprising. As observed by Lawrence Tribe of the Harvard Law School, of all decisions a person makes about his or her body, the most profound and intimate relate to two ultimate questions. First, whether, when and how one's body is to become the vehicle for another human being's creation. Second, when and how (this time there is no question of whether), one's body is to terminate its organic life.

In two recent cases from New Jersey, *Berman v. Allan* and *Procanik v. Cillo*, a physician failed to exercise reasonable care by not informing his patients, an expectant mother and her husband, of the need to undergo amniocentesis, a testing procedure that would serve to determine whether the foetus was congenitally defective. Ignorant of the availability of such a test and the information it would yield, the respective couples allowed the pregnancy to go to term. The baby in each case was born with profound defects. In another case, *Schroeder v. Perkell*, the attending physician failed to advise his patients that because their child suffered from cystic fibrosis, there was a genetic risk that any other child they might have could be born with the same disease. Without this information, the parents chose to conceive, and they had another child, which tragically but predictably developed cystic fibrosis. In these cases the court ruled that through the negligence of the physician, the mother had been denied the opportunity to decide whether or not to avoid or terminate a pregnancy. In concluding that the negligent deprivation of this opportunity was wrongful, the court stressed that the critical personal interest that had been violated was that of individual choice, and its deprivation should be compensated, at least with respect to the claims of the parents.

Many jurisdictions have not recognized such a cause of action, but all that have considered it have struggled mightily with its perplexing legal and moral issues. The significance of the decisions that have allowed recovery is their unmistakable identification of personal choice relating to procreation as the singular individual right that was at issue, and that its violation demanded redress. With this thought we can shift our attention to the right-to-die cases. One of the first modern such cases is that of Karen Ann Quinlan. This addressed the issue of the individual's right to continue life itself. The court considered the plight of a young woman in an irreversible comatose vegetative condi-

tion as a result of a drug overdose. Her life was sustained by a respirator. The question arose as to whether at the request of the woman's parents, the doctor and hospital could disconnect the respirator without incurring criminal or civil liability for the patient's inevitable death. The court addressed the issue in terms of the patient's right of privacy. In this formulation of the issue, the court was influenced by the decisions of *Griswold v. Connecticut* and *Roe v. Wade*, in which the United States Supreme Court ruled that an individual had a constitutional right of privacy that included the right of self-determination and personal choice over matters concerning procreation and pregnancy. The court in *Quinlan* concluded that the individual's constitutional right of privacy extended to a personal right over one's body and included the refusal of medical treatment that related directly to survival. The court then concluded that the right of choice could be protected only if it were exercised. Because the individual herself could not exercise any choice, the court in effect delegated that individual's privacy right to her parents, and in that way vindicated the patient's right of choice.

As later cases and commentary have pointed out, in *Quinlan* the court spoke of the individual right in terms of constitutional privacy, privacy primarily as personal choice or self-determination. In a succeeding case involving *Claire Conroy*, the court also viewed the critical individual interest to be that of self-determination. The patient there was an aged woman in an unconscious state. Her death was imminent. Her life was being sustained by forced feeding. The court prescribed a comprehensive standard designed to preserve a patient's fundamental right of personal choice or self-determination. The standard focused on the kinds of evidence that would be relevant in determining the wishes of an incompetent patient so that the life or death decision would reflect her personal choice. The court determined, however, that this individual right was not the constitutional right of privacy, but the basic common law right of self-determination with respect to one's own body.

In three more recent cases, the courts thinking about individual worth was clarified further. In *Farrell* a competent dying middle-aged woman whose existence was totally helpless and hopeless, sought to die naturally and not to prolong her life artificially. Although in fact Mrs. Farrell died before the court could consider her appeal, the court nonetheless ruled that she would have had the right to terminate her life support medical treatment. The court's holding is predicated squarely on the individual interest of self-determination. In another case involving *Helga Peters*, the incompetent patient was an old woman whose comatose condition was irreversible although death

was not imminent. She had expressed her will to have another person make the life or death decision for her, through the execution of a durable power of attorney. The court permitted the discontinuance of life support at the direction of the designated person.

In the third case, *Jobes*, the court, dealing with a young woman in an irreversible comatose state but whose death was not imminent, again emphasized self-determination. It permitted the termination of medical treatment, which involved artificial respiration, hydration, and nutrition. In effectuating the person's right of self-determination, the court relied on the evidence of the patient's general values or ideas as revealed through family members and family friends. It is evident that in these cases, the right-to-die and the wrongful birth and life cases, the courts have singled out the right of self-determination as the critical individual interest at stake. It would be wrong, however, to believe that these decisions reflect an idiosyncratic doctrine invoked only to elucidate special or narrow, albeit troubling, areas of human concern. Other cases arising in different contexts have also invoked a similar perception of individual worth. In one case involving informed consent, the New Jersey court recently redefined the standard applicable to a physician in advising a patient and in effect ruled that the duty that is owed to the patient must reflect the reasonable patient's wishes with respect to medical treatment rather than what a reasonable physician would have deemed appropriate. In the *Baby M* case the court was drawn into a vortex of reassessing individual rights and interests, particularly those of a natural mother, and balancing that individual interest with the conflicting interest of the natural father, and with the independent and potentially conflicting interest of her newborn child. The court held that the rights and duties of the parties were governed by the adoption laws, and that the circumstances of artificial procreation and the contractual attempt of the parties to settle these matters did not render these laws inapplicable.

But it would not do to exaggerate the significance of the perception of individual worth evident in these cases. The view as we have seen is not novel. We know that the concepts of self-determination and personal autonomy have early common law origins. Rather the significance lies in part in the courts' crystallization and application of this doctrine in these several cases. Moreover, there is another aspect of individuality or individual worth that is also significant. In *Conroy* the court acknowledged that health care providers could be confronted with a patient whose wishes were unknown. No decision on whether or not to continue life support treatment could ever be shown to mirror or approximate that individual's personal wishes. In no real sense could any decision on behalf of such a patient effectuate the patient's

personal choice. Hence the court, to predicate a life or death determination, found it necessary to posit another standard based on factors and considerations other than those related to the patient's personal choice. This standard, called an objective test, was a best interest standard to be applied in the absence of any knowledge of the patient's wishes or desires. The court attempted to define this standard in terms of balancing the benefits of continued life against the burdens of continued treatment, stressing, however, that the individual interest to be protected by this standard was not one based on quality of life as such. In the more recent *Jobes* decision, the record in that case foreshadows the situation of an individual who was unknown and unknowable, a true stranger. The decision intimates that when an individual is in that plight, the interest to be protected is that of essential privacy, in the sense of the right to be left alone, to be free from intrusion, a right to preserve personal integrity and dignity.

An understanding of individual worth as involving privacy and dignity is not peculiar to the right-to-die cases. In an unusual case called *Strachan v. The J.F.K. Hospital*, the court was presented with a situation in which parents were denied the right to reclaim the body of their dead son, a sudden suicide. They were denied this while the hospital endeavoured to secure their permission to remove the organs from the body for purposes of later transplant. The court concluded under all of the circumstances that the hospital, its physicians, and administrator acted unreasonably and negligently. In explaining the tortious conduct, the court recognized that a dead body could wrongfully and without legal justification be subject to abuse and improper treatment. It acknowledged the potential conflicting interest between the legitimate removal of organs for future medical use and the reasonable and proper treatment of the dead. However, it determined that withholding the body to enable the defendants to obtain consent to remove its organs could not under the circumstances be excused once permission was firmly withdrawn. The court therefore concluded that the parents could recover compensatory damages for emotional distress. The court understood the anguish and suffering of the parents, forced to view their son's dead body attached to machines that maintained it in an artificial life-like condition. Was this not an indignity inflicted on the boy's dead body? The severity and genuineness of the parents' emotional distress in this context reflects, I think, our common belief in the essential dignity of the individual, a residuum of which endures even in death.

Another case, *In Re Grady*, involves sterilization of the handicapped. The case, factually, is not unlike the one decided by the Canadian Supreme Court, *Re Eve*. The decisional result, however, is differ-

ent. The New Jersey court was required to determine whether a handicapped youngster should be sterilized. It ruled that what was at stake was the constitutional right of privacy but defined this to mean the right of personal choice much as it had done in the *Quinlan* case. However, because of the youngster's mental incompetence, she simply was unable to make any kind of intelligent choice. Accordingly the court prescribed standards under which such a "choice" could be made, though by others. In effect, the court adopted an objective or best interest standard. I suggest that implicit in this decision is the belief that at stake was not the young woman's right of autonomy, or choice or self-determination as such, but her individual dignity and integrity. As perceived by the court on the record before it, sterilization, if later authorized under the standard it prescribed, would not so much fulfill the girl's right of personal choice or self-determination as free her from the terror and burdens of a pregnancy and childbirth with which she could not cope. Sterilization would improve her opportunity to live a better life, one with as much dignity, personal esteem and self-worth as nature would allow her.

The cases thus suggest a developing, perhaps clearer if not different, judicial perception of individual worth. The perception of individual worth is conceptualized both in terms of personal autonomy and self-determination, and in terms of personal privacy and dignity. Autonomy is perhaps the most important or recurrent strand of individual worth. It is understood primarily as involving at its core the right of self-determination and personal choice. Individual worth expressed in terms of privacy invokes the notion of the right to be free from intrusion and the right to dignity and personal integrity. The element of personal worth that has to do with privacy and personality has escaped precise definition, although it has not escaped labelling as such. It has been referred to as "privacy", and as "personhood". Perhaps what has sought to be captured by the apt label, is the idea traceable in part to the classic treatment of privacy by Brandeis and Warren of the "inviolable personality". Others have described this idea of fundamental personality or personhood in other ways, for example as the individual's "moral autonomy", or "moral title to one's self".

Traditionally privacy has been used as an umbrella for a number if not most of the vital personal interests that are essential to individuality. Indeed in the watershed cases of *Griswold v. Connecticut* and *Roe v. Wade*, the different elements of individuality may be seen as fused or overlapping. These cases emphasize privacy and sense of choice and autonomy, but they did so in a context that involved matters of extraordinary personal concern and physical intimacy, namely sexual relations, reproduction, pregnancy, and childbirth. The kinds of things

most associated with our need and expectation of both privacy and personal dignity. It is therefore understandable in light of the continuing influence of these decisions, that the separable strands of individual worth are frequently intertwined. Privacy, it seems to me in our contemporary decisional law, is reacquiring its ordinary and commonsensical meaning. That is, the privacy is the right to remain private, to be left alone, to be free from the intrusion of others. This right is an integral and essential aspect of individuality. Privacy in this sense also implicates or encompasses notions of personal dignity. While the right to be left alone has most to do simply with not being bothered, or interfered with, at its core is the notion that each individual has personal dignity, his sense of personal specialness that is unique. It is this aspect of one's person or personality that should be inviolate. Privacy preserves and protects our personalities. Intrusion violates the personality. Freedom from intrusion and personal dignity are thus dimensions of the same intrinsic value. The difficulty we encounter in defining privacy in its sense of personal dignity is not simply a linguistic obstacle or a puzzle of semantics. It has to do with conceptual complexity. But the inability to understand and define privacy as a dignity concept imperils our ability to devise standards by which we can both identify and protect this aspect of individuality. It may therefore be instructive to consider dignity through negative examples.

Like the air we breathe, personal dignity can perhaps be appreciated when it is lost or jeopardized. Thus the subjection of a person to a body search, the public exposure of a person's private diary, the scrutiny of personal stuff like one's records or writings or possessions, the unsolicited gaze into a living room or bedroom window or even a backyard, the overhearing of an intimate conversation, the unpermitted opening of personal mail – all of these things are examples of the invasion of privacy that violates one's personality and diminishes one's dignity. These kinds of experiences and the universality of our reaction to them prompted Professor Blaustein, President of the Rutgers University, to characterize such intrusive conduct as "an insult to the individual, an affront to individuality, and to human dignity."

I think it is also important to appreciate that personal dignity is something that we attribute to – that we invest in – each individual. Each of us may have different feelings about dignity, measured by our own levels of embarrassment, by how thick-skinned or thin-skinned we may happen to be. There is however, an expectation of privacy that can be subjective. Everyone has basic dignity, and an irreducible entitlement to privacy. Thus we can understand that a private room does not have to be occupied to be private, nor does one's personal mail have to be read by another in order to be private. We do not have to be

aware of the peeping Tom in order for privacy and dignity to be violated any more than does the falling of a tree in the empty forest have to be heard in order to create sound. These considerations suggest that dignity, as I mentioned, is not subjective. Ferdinand Schoeman observed that we regularly can and do attribute rights of privacy and dignity to other persons. Stanley Benn pointed out that there are things that are inherently private, indeed, that the principle of privacy itself should be grounded on a broader principle of respect for persons.

With this perception of individual worth, we can return to our illustrative cases to examine in what way these ideas have influenced these decisions. If individual worth imports the notions of privacy and dignity, how are we to recognize and protect this? Attempts to answer this perplexing question I think are embedded in the court's attempt in these cases to articulate and apply a best interest standard in dealing with the fundamental interest that is at stake when the individual's right of self-determination itself cannot be effectuated. We see this in *Conroy* and in *Jobes*, and I think we see it in the *Grady* sterilization case. I would nevertheless be misstating the matter were I to indicate that these particular characterizations of privacy have clearly entered into our decisional law.

Courts assuredly have not codified morality. Professor Tribe has pointed out that a best-interest test is but another form of substituted judgment, and that the difficulty of such a test inheres in the fact that it imposes highly contested social values paternalistically on the individual. What I believe, however, can be extrapolated from these cases are not judicial views that serve to dissipate highly contested social values; rather, the cases suggest a somewhat different and clearer perception of the interests that serve to define individual worth.

It is against this backdrop of the doctrine of individual worth that I think it may be useful to consider further how courts have come to treat individual worth and what this suggests about the role of courts in dealing with broad concerns of public policy. In the wrongful birth and life cases, it was recognized that where there had occurred a wrongful deprivation of the right of personal choice, that this wrong should be redressed. In providing a means for compensation the courts' actions might not be considered remarkable. But the action takes on some significance when we consider the redress afforded by the court against the historical refusal of the court to provide such relief. In these cases the judicial role can readily be reconciled with traditional judicial functions.

But we can also detect some redefinition of the judicial role. Courts have come to appreciate that the problems posed by conflicts, such as in the right to die cases, impose intractable – perhaps insoluble – dilem-

mas. Courts have come to concentrate then on the allocation of decision making responsibility. It may be more important to discover the right decision maker than to reach the right decision. Courts have started down this road. In these cases, they have begun to look to the persons or institutions that are most familiar with these issues, and have actual day-to-day responsibility for dealing with these problems. It is not inaccurate to characterize this decisional approach as a form of judicial deregulation entailing the delegation of decisional responsibility. In the right-to-die area with respect to a fully competent patient, such as the *Farrell* case or the California *Bouvia* case, the patient herself is entitled to be the decision maker. The identification and selection of the right decision maker becomes more difficult when we deal with the incompetent patient. If the patient is incompetent but knowledgeable as in the *Peters* case, the court can effectuate that patient's right to self-determination by delegating decision-making to the person selected by the patient herself. With respect to the incompetent probably knowable patient, such as arguably we had in *Quinlan* and *Jobes*, resort must be made to those most likely to have this knowledge of the patient and who can best understand the patient's wishes. The problem of structuring sound and reliable decision-making is infinitely more complicated in dealing with the incompetent barely knowable patient, and finally, the search for the right decision maker must take a completely different turn in dealing with the incompetent, unknowable person.

The difficulty posed in this last setting is that the individual interest in terms of self-determination simply is not at stake and cannot be vindicated. Knowledge of the patient's wishes is irrelevant. Yet we cannot conclude that that patient has no individual worth. The individual interest at stake is that of privacy and dignity. The questions courts are or should be asking are: who can best protect this interest?; how in this situation can we determine the right decision maker? In its promulgation of standards and its placement of procedures, the court's decision can be viewed as a cautious withdrawal of judicial oversight from the decisions of private parties. The court, instead of arrogating decisional responsibility, has delegated that function to others. The process requires an environment in which a dialogic community can flourish; that is, one in which the full participation of interested parties is assured, the expression and exchange of all views are encouraged, and in which mutual respect is required. Perhaps in this kind of setting, the courts will be able to foster a basis for trust and confidence.

Judicial deregulation as an aspect of the judicial world has taken another form. The cases underscore the role of the courts in relation to other branches of government and social institutions. I believe courts

have come to understand that, although it is necessary for them to act in a given case or controversy, the subject of these disputes have social implications that eclipse the interests of the individual litigants. The dilemma that confronts the court is in the exercise of its authority: it is confronted with a legal dispute that presents both the conflicting claims of litigating parties, which must be settled, and the broad issues of public policy, which are most suitably addressed by others.

By way of conclusion, we can ask again the question whether we are witnessing the crystallization of a distinctive legal doctrine of individual worth. You may conclude from my remarks that we are witnessing the emergence of a distinctive doctrine. The distinctiveness of the doctrine does not inhere in its originality or novelty but rather because its perceptions of individual worth are becoming better understood, or more clearly explained, and effectively used and applied. The cases that relate to individual worth in its sense of privacy and dignity have not, however, yet been fully explained or crystallized. The cases for the most part have given primary emphasis to the interests that have been inherited in individual autonomy and self-determination. We accept the proposition, however, that if that interest cannot be vindicated because the individual is a true stranger among us, there is individual worth that nevertheless must be protected.

Courts have expressed their willingness to give such individual interests greater protection, perhaps modestly, in the wrongful birth and life cases by the awarding of compensatory damages. In other respects, judicial deregulation reflects the notion on the part of the court that there are others who are more competent and trustworthy in terms of reaching the right decision, one that will be more protective of the individual. And courts in similar fashion have acknowledged that other branches of government as well as social institutions can more suitably deal with the broader range of policy concerns that attend these cases.

Do we see any direction or guidance for the future? The right to die cases involving the incompetent and unknowable patient, the true stranger, will impel courts to deal with notions of individual worth, personal dignity and fundamental humanity. These notions will be presented by other cases as well. Consider, for example, the troubling issues that are being generated by the survival of profoundly impaired newborns, and by the biological advances that have engendered new forms of artificial procreation, gestation and parental surrogacy. Courts will be required in these cases to ponder whether there can be a collective judgment or an objective assessment of the intangible values that give us our sense of individual worth.

The challenge continues to grow. Courts, I believe, will conscientiously try to deal with the challenge, mindful that it is one that is to be taken up by all society.