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Peter J. Riga

THE IMPERSONAL DECISION MAKER: COURTS OF EQUITY AND THE RIGHT-TO-DIE CASES

PETER J. RIGA*

One of the most important elements of judicial decision-making of the modern period is that of the impersonality of the decision itself. The judge, it is said, does not and must not become emotionally or personally involved in individual cases; he simply must apply the legal (and impersonal) rule to "like cases." In this way, a legal consistency of judicial decisions results, giving the law stability, predictability, and impartiality—all the products of a stable, orderly administration of justice in society. The decision-maker's impartiality stems from the belief that the results must be fair and predictable for all cases of similar fact situations.

By making the decision-making process one of impersonal judgment, however, the judge has become a technician and the law a process of techniques for efficient results. The legal standard or rule is formulated, while the essential function of law—to insure justice—is given only lip service. The process does not demand a man who is wise or has a fine sense of justice, but one who understands the intricate principles of procedure, the technical workings of the law, the legal terminology, and the legal reasoning to derive efficient solutions from set standards. Thus, law is removed from the personal, the particularized and the concrete, so that "like cases can be judged alike."[1] The persons of the law are thereby masked by the application of the set rule which assures the law of its "objectivity" and the problem of justice is no longer one of its concerns.[2]

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* Professor of Law and Associate Dean, Lincoln University School of Law, San Francisco. M.A., Louvain University, Belgium, 1954; M.S., Catholic University of America, 1961; M.A., State University of New York at Buffalo, 1965; Ph.D., Graduate Theological Union, Berkeley, California, 1973; J.D., University of San Francisco, 1976; LL.M., 1978, J.S.D., 1979, University of California, Berkeley (Boalt Hall).

[1] *See A Watchdog Panel Urged for Research,* San Francisco Chronicle, Apr. 18, 1978, at 18, col. 1.

[2] In the words of John Noonan:

> The complex rationality of individuals escapes reduction. As long as it does, the rational rules which speak to them must address them as persons—that is, the rules must be more than stimuli reaching a single locus in the brain, causing fear or inducing

All of this functions well until, like the new life/death cases of *In re Quinlan*[3] and *Superintendent of Belchertown State School v. Saikewicz*,[4] there are no precedents or set legal standards. Only then does the mask drop and we are permitted to see the confusion, uncertainty and agony of the decision-maker. Only then does the law attempt to do justice[5] amidst an ambiguous human situation where there is no clear-cut right or wrong, black or white. Rather, there is an amalgam of grays.

"Objective" decision-making is the product of the development of law in the United States which attempted to deal with a profoundly human, moral and agonizing problem on the American scene: Slavery.[6] It is ironic that modern American judicial decision-making had its origins and principal development in the defense of that inhuman American phenomenon. Its residue is no less inhuman. Nowhere in the annals of American history has the question of judicial discrimination been more torturous than in the area of slavery. From almost the beginning, American jurists took their essential teaching on the morality of slavery from Blackstone, who branded it as against natural law.[7] All the American jurists of the 18th and 19th centuries held this view, almost without exception.[8] At the same time, their analysis of the Constitution and laws of the United States led them to uphold slavery as an institution in every major case of the period.[9]

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pleasure; they must be capable of internalization as standards of conduct and as directions to the achievement of human goods. They must teach more than they coerce.

J. NOONAN, PERSONS AND MASKS OF THE LAW 164 (1976).

[3] 137 N.J. Super. 227, 348 A.2d 801 (1975), *modified*, 70 N.J. 10, 355 A.2d 647, *cert. denied sub nom.* Garger v. New Jersey, 429 U.S. 922 (1976).

[4] ___ Mass. ___ , 370 N.E.2d 417 (1977).

[5] *See* Rothenberg, *Demands for Life and Requests for Death: The Juridical Dilemma*, at 2-8 (1978) (unpublished manuscript).

[6] For a fuller development of this, see R. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS (1975).

[7] Blackstone, in his Commentaries notes:

> [P]ure and proper slavery does not, [nor] cannot, subsist in England; such I mean, whereby an absolute and unlimited power is given to the master over the life and fortune of the slave. And indeed, it is repugnant to reason, and the principles of natural law, that such a state should subsist anywhere.

II W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 423 (1915).

[8] One of America's foremost jurists, Joseph Storey, often used his charges to juries to speak out against the immorality of slavery and the slave trade. He then claimed that the only policy consistent with "the spirit of the Constitution, the principles of our free government, the tenor of the Declaration of Independence and the dictates of humanity and sound policy" was for Congress to abolish slavery in the territories. *See* Salem Gazette, Dec. 10, 1819, at 3, col. 1.

[9] *See* Ableman v. Booth, 62 U.S. (21 How.) 506 (1859); Dred Scott v. Sanford, 60 U.S. (19 How.) 393 (1856); Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842). The Supreme Court's decisions in *Prigg* and Jones v. Van Zandt, 46 U.S. (5 How.) 215 (1847), upheld the constitutionality of the 1793 Act. It has been suggested that the Fugitive Slave Law of 1850 was "sufficiently different from the Act of 1793, which it amended." R. COVER, *supra* note 6, at 175. Interesting to note, however, is that Chief Justice Taney's majority opinion in *Booth*, declaring the 1850 Act to be constitutional, is supported exclusively by authority relating to

How can we account for this? How did an entire legal system uphold an institution as vile as slavery, which was recognized as such by all the major jurists of the slavery period, and conflicted with "higher law," "natural justice" and the "basic principles of government"?[10] The fundamental conflict between some form of "higher law" and human positive law has presented itself. This problem was not new to the 19th century, however, since this argument was at least 500 years old when the American debate over slavery first began.[11] Nevertheless, the way it evolved in American life, aided and abetted by the American legal system, could only and inevitably did lead to the tragedy which ensued.

Moral arguments, of course, are not and cannot be resolved legally or politically; they belong to and are dependent on the moral sense of a people. Only in this way can we begin to understand the fundamental conflict and contradiction in the American legal and political system. The moral cleavage in American society, which developed as a result of the conflicting moral values embodied in the institution of slavery, became so deep that it eliminated "the areas where the judge could move the law in the direction of freedom."[12] Ultimately, it became apparent to the judiciary that they must enforce the infamous Fugitive Slave Laws, not because they were moral[13]—the judges claimed not to be concerned about this in applying the law—but because it was necessary to save the Union.[14]

The situation grew even more difficult by the fact that it could no longer be pretended after *Dred Scott v. Sanford*[15] that the Constitution was not pro-slavery. It was at least possible before that cataclysmic decision to hold that, although slavery was a reality in certain parts of the Union, the fundamental law was not pro-slavery. Now, the heart of judicial formalism was dead. This very idea was expressed by Justice McLean in his

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the earlier Act. *Id.* at 187. *See generally* G. STROUD, SKETCH OF THE LAWS RELATING TO SLAVERY (1968).

[10] This was long the argument of R. COVER, *supra* note 6. Cover's argument concerns the way jurists dealt with the problem, whereas the focus of the present article is to trace the way the conflict between "natural law" and "positive law" was finally resolved.

[11] *See* Riga, *Marsiglio of Padava: Father and Creator of the Modern Legal System*, 29 HASTINGS L.J. 1421 (1978).

[12] R. COVER, *supra* note 6, at 7.

[13] See the remarks of Justice McLean in his charge to the jury: "These laws [Fugitive Slave Laws of 1793 and 1850] lie at the foundation of the social compact, and their observance is essential to the maintainance of civilization. In these matters, the law, and not conscience, constitutes the rule of action." Norris v. Newton, 18 F. Cas. 322, 326 (C.C.D. Ind. 1850).

[14] It was Chief Justice Tilghman of Pennsylvania who was at the origin of the historical-necessity thesis:

> Whatever may be our private opinions on the subject of slavery, it is well known that our southern brethren would not have consented to become parties to a constitution under which the United States have enjoyed so much prosperity, unless their property in slaves had been secured.

Wright v. Deacon, 5 Serg. & Rawl. 62, 62-63 (Pa. 1819); *see* note 9 *supra*. *See also* J. HURD, THE LAW OF FREEDOM AND BONDAGE IN THE UNITED STATES 439 (1858).

[15] 60 U.S. (19 How.) 393 (1856).

dissent in *Dred Scott.*[16]

The abolitionist view—in particular, the Garrisonian view[17] that radical dichotomy existed between natural and positive law, that the Constitution from beginning to end was a pro-slavery document, and that it was *in fine* a compact with the devil—seemed much sounder after the *Dred Scott* decision than in the mid-1840's when these sentiments were first uttered. As the abolitionists clearly saw, however, it was the obligation of the judiciary to faithfully execute the positive law and to disregard natural law when it was in conflict with positive law. It was precisely this reasoning which was followed by Story, McLean, Curtis, Shaw, Taney, and Marshall; in short, all the prominent judiciary of the slave period. They could morally maintain their position as long as they saw some hope in and for the system. These jurists clearly recognized that the Constitution was a compromise document over slavery which kept millions of human beings in servitude.[18] The Abolitionist Wendell Phillips pointed to five parts of the Constitution which irrefutably demonstrated this belief: the three-fifth clauses,[19] the prohibition on Congress for the slave trade until 1808,[20] the Fugitive Slave Clause,[21] the clause affording Congress the power to suppress insurrection[22] and the provision for Federal assistance in suppressing domestic violence.[23] Both abolitionists and judges agreed that the Consti-

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[16] *Id.* at 529 (McLean, J., dissenting). State judges acknowledged this view as well. *See Ex Parte* Bushnell, 9 Ohio St. 77, 228 (1859) (Brinkerhoff, J., dissenting).

[17] See the works of W. PHILLIPS, THE CONSTITUTION: A PRO-SLAVERY COMPACT (1844), where he compiled all of the then available data on the intentions of the framers of the Constitution with respect to slavery. It is ironic to note that Chief Justice Taney used precisely much of the material contained therein to buttress his opinion in *Dred Scott.* Phillips went further the following year. W. PHILLIPS, CAN ABOLITIONISTS VOTE OR TAKE OFFICE UNDER THE UNITED STATES CONSTITUTION? (1845). Therein, he deals with the complicity of abolitionists in a system which is basically corrupt and corrupting. Still one year later, Phillips destroyed the arguments of Spooner who tried to show that slavery was contrary to the Constitution itself. *See* W. PHILLIPS, A REVIEW OF LYSTANDER SPOONER'S UNCONSTITUTIONALITY OF SLAVERY (1847). Phillips also called for the resignation of anti-slavery judges. Yet, there is not one judge on record who ever did. In any event, *Dred Scott* showed whatever judges remained to be convinced that Phillips was correct and the moral question could no longer be avoided. The ameliorist judges simply had nowhere else to turn except to resignation or revolution. The legal system could no longer salvage their consciences.

[18] It is remarkable that throughout the majority opinion of Chief Justice Taney in *Dred Scott,* he never once refers to slaves as human beings, but only as beings. Thus, Taney considered slaves "a subordinate and inferior class of beings," 60 U.S. (19 How.) at 404-05, "beings of an inferior order," *id.* at 407, "this unhappy race," *id.* at 409, "a class of being," *id.* at 416, "a subject race," *id.* at 417, "free persons of color," *id.* at 421, and "property of the master in a slave," *id.* at 451. As Justice McLean said in his dissent: "We need not refer to the mercenary spirit which introduced the infamous traffic in slaves, to show the degradation of negro slavery in our country." *Id.* at 537 (McLean, J., dissenting).

[19] U.S. CONST. art. I, § 2, cl. 3.

[20] *Id.* § 9, cl. 1.

[21] *Id.*, art. IV, § 2, cl. 3.

[22] *Id.*, art. I, § 8, cl. 15.

[23] *Id.*, art. IV, § 4.

tution was a bargain, a price to be paid for the resulting Union.[24] Since the judge was not permitted to apply his own moral vision of natural right or wrong with respect to slavery, however, the anti-slavery judge after *Dred Scott* could not escape into an ameliorist position which was at least a possibility before that landmark decision. To do otherwise, would violate his " 'paramount obligation' " as a member of the judiciary.[25]

I have stressed the example of slavery because it shows very clearly the failure of legal formalism, of "objective," "rational" rule-making. When confronted with a profound moral issue, as in the case of slavery, the judges became technicians of the law because of intolerable moral pressure. Natural law as well as the historical analysis of the common law, wherein slavery had already been declared unlawful, were rejected because it was necessary to conserve the Union. Thus, law became a set of technical norms which judges applied to a mass of human beings because "they had no choice"—they merely enforced law but did not make it. The demands of the consciences of the judges became subordinated to normative procedures since, otherwise, the Union would dissolve and disorder would be rampant. The concepts of order and unity of the Union were substituted for justice as the end and a judicial efficiency developed to meet the crisis. Law now insured *order* instead of *justice,* and nowhere in the pages of American history is the failure of "judicial rational decision-making" more clear or more devastating than in the area of slavery.

Yet, it still must be explained why the personal element of cases is an anathema to judicial formalism and its objective rationality. It might well be because there is a chance for the fortuitous, a possibility of risk and uncertainty, and the same consequences cannot be expected in all like cases—the bane of judicial rationality.[26] For that reason, it is deemed advisable to enclose the judge in a maze of procedural and technical networks where the occasion for personal confrontation is minimal, where justice is ignored, and order, rationality and predictability of results are all assured. Law then assures efficiency since efficiency is order. Moreover, because law is detached from justice (this necessarily follows from its impersonality and "rationality"), it becomes an activity without end and therefore without human meaning.[27] Formalism and impersonal decision-making have made a travesty of the traditional concept of law.[28] Traditionally, each person knew his place in society and functioned therein, and the

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[24] W. PHILLIPS, THE CONSTITUTION: A PRO-SLAVERY COMPACT vi-vii (1844).

[25] W. PHILLIPS, A REVIEW OF LYSTANDER SPOONER'S UNCONSTITUTIONALITY OF SLAVERY 15-17 (1847).

[26] B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 168 (1921).

[27] We have indicated that formal legal reasoning is built on the model of modern science ("formalism") and, therefore, like science, must deal with the general and the abstract; to deal with the individual and the specific opens itself to human meaning which is the very heart of justice and particularly, of the life/death cases of incompetents such as Quinlan and Saikewicz. This cannot be stressed too strongly in this article.

[28] *See* J. ELLUL, THE TECHNOLOGICAL SOCIETY 292-300 (1964).

law gave him the means of functioning in society and saw to it that he fulfilled that function. But modern law no longer poses the problem of the end, purpose and finality of man's function, since law no longer coordinates man's functions in their relation to justice.[29] In other words, the moral foundation of law has been replaced by technique.

Modern medical technologies have thrust on the judicial decision-maker a task for which he is now not prepared. The cadres of legal standards and rules serve well when the judge is dealing with antitrust, contracts, commercial paper, probate, policies, torts, etc. This is less so in the area of the criminal law where the face and story of the defendant are there before him, but even here he is aided by a jury. It is the impersonal judgment of the "community" which condemns or frees the man or woman. On the other hand, there is no escape from the agonizing decision-making of the judge in the area of medical technologies. The court can attempt to allocate responsibility by setting up "hospital ethics committees," as the court did in *Quinlan.*[30] This dodges the issue, however, since it is problematic, at best, as to what such committees are supposed to do in the first place. In these cases, therefore, the impersonal legal standards do not protect the decision-maker and his mask drops for a moment to reveal the human confusion and agony of grappling with a concrete and particular person because justice must be done *hic et nunc.* As John Noonan has stated:

> The paradigmatic form for law, trial in court, reinforces the necessity to exalt the role of rule. In the paradigm, the judge hears conflicting parties and decides upon the evidence which they present. The evidence is related to his decision through his selection of a rule. If the judge looks at who the parties are, he is not looking at the evidence. A judge who takes into account who the parties are will favor one or the other. A biased judge is no judge at all.
>
> If the judge looks at the rules, he is acting in accordance with the paradigm, which requires two persons to be in controversy, and a third person, who prefers neither, to decide. The judge indicates his impartiality, he proves his good faith, by looking not at the persons but at the rule. The rule is neutral, 'above' the contestants and the judge.[31]

Or, in the words of the famous American jurist, Benjamin Cardozo, the human elements of a case ought not to be considered by the judge since the judge may lose respect and confidence by the reminder that he is subject to human limitation. As a consequence, the judicial process must be "coldly objective and impersonal."[32]

It is remarkable how the cases dealing with the life/death issues of medical technologies permit us to see this personal agony precisely because the individual tragedy of this person *here* and *now* cannot be avoided.

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[29] *Id.* at 299.

[30] *In re* Quinlan, 70 N.J. 54, 355 A.2d 647, 671, *cert. denied sub nom.* Garger v. New Jersey, 429 U.S. 922 (1976).

[31] J. NOONAN, PERSONS AND MASKS OF THE LAW 15 (1976).

[32] B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 168 (1921).

There are very few legal standards to guide the judge—on which he could "hang his hat"—as is so often the case in the vast majority of cases in the American legal system. This was explicitly seen by Judge Markowitz in a case involving the refusal of blood by a Jehovah's Witness, mother of six children, after a caesarian section. Her husband sought an order from the court for blood transfusion. The judge ordered the transfusion, but note the agony:

> Never before had my judicial robe weighed so heavily on my shoulders. Years of legal training, experience and responsibility had added a new dimension to my mental processes—I, almost by reflex action, subjected the papers to the test of justiciability, jurisdiction and legality. I read [the Georgetown case decided by Judge Wright] and was convinced of the proper course from a legal standpoint. Yet, ultimately, my decision to act to save this woman's life was rooted in more fundamental precepts.[33]

When he finally made the decision, he stated:

> I was reminded of 'The Fall' by Camus, and I knew that no release—no legalistic absolution—would absolve me or the Court from responsibility if I, speaking for the Court, answered 'No' to the question 'Am I my brother's keeper?' This woman wanted to live. I could not let her die![34]

There are many cases of a similar nature but I shall not burden the reader with a complete recitation of all the cases here.[35] Suffice it to say that these cases show us the contrast between the general, impersonal, legally rational process and its consequent procedures which shield the judge from the existential and moral question and from the personal tragedies before the decision-maker for whom there is little legal and technical cover. The traditional "objective" juridical norm and the personal demand for justice *hic et nunc* are here in all their stark contrast. The specific, individual and concrete human person is before the judge demanding not just law but above all, justice. In fact, that is what courts of equity are all about.

The modern decision-maker, as we have seen, attempts to be "rational," "objective," and "detached" from the particularities of any concrete case. Since many instances in medical technologies involve subjects which are emotionally involved in one way or the other (doctors, family, next of kin), it is believed that the rational and objective court should make the decision to "unplug" the machines or to withhold treat-

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[33] Powell v. Columbia Presbyterian Medical Center, 49 Misc. 2d 215, 216, 267 N.Y.S.2d 450, 451 (Sup. Ct. N.Y. County 1965).

[34] *Id.*, 267 N.Y.S.2d at 452.

[35] For examples of cases where these issues are raised, see *In re* President & Directors of Georgetown College, Inc., 331 F.2d 1000 (D.C. Cir.), *cert. denied sub nom.* Jones v. President & Directors of Georgetown College, Inc., 377 U.S. 978 (1964); *In re* Quinlan, 137 N.J. Super. 227, 252, 348 A.2d 801, 815, *modified*, 70 N.J. 10, 355 A.2d 647, *cert. denied*, 429 U.S. 922 (1976); *In re* Nemser, 51 Misc. 2d 616, 624, 273 N.Y.S.2d 624, 631 (Sup. Ct. N.Y. County 1966). *See generally* Riga, *Compulsory Medical Treatment of Adults*, 22 CATH. LAW. 105 (1976).

ment. Yet, the family's or next of kin's interests are conflicting. They either stand to gain in some way or are emotionally distraught. The hospital or medical facility may wish to put its resources to "better" use.[36] The doctor may be either too involved emotionally with the patient or his family or both, or he may simply wish to follow his own conscientious dictates (which the family usually follows) so that he, too, cannot be entrusted with the decision.[37] This leaves the only fair and objective decision-maker, the court itself, who will decide by neutral principles and objective facts what is to be done with and for the incompetent patient by the norms of public law.[38]

This ethos of objectivity and rationality in the judicial process is an offshoot of the rationality which science has introduced in modern society and which has become all pervasive as a methodology. This rationality is limited since it operates abstractly from concrete human existence and, thus, is incapable of giving total human meaning to any set of facts. As long as we conceive of law as technique for efficiency, or as a model built on science, it has some usefulness. But if law is a search for justice and if justice must always confront the particular, the concrete and the individual, then the traditional "objective" norms are painfully inadequate.

Judges, like doctors, are not machines and, although it maybe true that "laws and not men" rule, it must not be forgotten that in the last analysis men do rule, even when they rule within and through the framework of the law. And since the application of impersonal standards of judgment has as its object to guard against conflict of interests of the parties involved, the judge, it is said, must banish all feelings and personal involvement in the case before him. This problem becomes acute in the compulsory medical treatment cases and in ordering or withholding treatment for incompetents. The judicial decision-maker must not confuse his personal feelings with the person of the defendant-patient. He must perform objectively, rationally, calmly, according to the norms of public law.

It is precisely here that we encounter the basic and fatal flaw of the "rational" and "objective" decision-maker. The lack of that empathetic quality which assures a humane and compassionate result leads to possible brutalizing results. The "profession" of parenting, which is becoming fashionable today, is a good example. Parenthood has developed into a profession with rules to be learned, experts consulted, and expertise to be devel-

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[36] *See* ___ Mass. at ___ , 370 N.E.2d at 419 (testimony in the *Saikewicz* case by the guardian *ad litem* in the case).

[37] For a fuller analysis of the objective disabilities of these different groups, see Robertson, *Involuntary Euthanasia of Defective Newborns: A Legal Analysis*, 27 STAN. L. REV. 213, 214-17 (1975).

[38] *Id.* at 265-67. Although Robertson calls for objective standards and mandatory procedures, nowhere in the article does he specify an adversary proceeding before a court of law. For a more satisfying analysis in this respect, see Kindregan, *The Court as Forum for Life and Death Decisions: Reflections on Procedures for Substituted Consent*, 11 SUFFOLK L. REV. 919 (1977).

oped. The "good" parent does not confuse his interests with that of his child but sees him "objectively" as an individual. Decisions are made in the child's best interest when those objective norms are observed. This view of parenting resembles that of the objective judge overseeing his peers to achieve the goal of a standardized legal system. The "good" parent behaves exactly like the "good" judge and can easily evaluate what a "good" parent would do in a particular circumstance, as, for example, whether a kidney donation should be made from one child to another, or cosmetic and other non-lifesaving operations should be performed. The whole process of parenting has become an objective enterprise with its own rules and regulations by "experts."

The traditional legal rule, however, was originally premised on the common sense observation that parents identified with their children in an intensely emotional way and, therefore, could be expected to do what is best for them. This trust has been turned on its head by the new "objective" parenting and its consequent overview by courts and the state. Now, the identification is deemed "bad," and parents can be more easily overseen and checked by an "impartial" and "objective" court or state agency which has in hand all the rules for "good" parenting. Outside supervision—and second guessing—over parental decision-making is now assured and courts are as capable as parents of insuring the best interests of children. The bringing up of children in a diverse, multi-ethnic culture has now been stripped of its diversity and a standardized sameness has been superimposed by the bureaucratic state and the imperial judiciary in the name of "objectivity."

The same can be said of modern medicine as well. It, too, has become impersonal and objective as it follows a scientific rationality which has come to dominate the whole field of the healing arts, in spite of proven healing powers of non-medical healing, such as faith healing, laying on of hands, acupuncture, diet holistic nutrition. The trouble with these healing arts is that they cannot be controlled by the courts or by the medical profession in an "objective" way. The traditional common sense approach was that unless any of these "unscientific" healing methods were patently injurious, people (and parents for children) had a right to choose them. In point of fact, even though modern medicine has made some strides, most historians and demographers now are inclined to believe that improvements in diet, sanitation, and general standards of living, *not* improvements in medical technology, account for the prolongation of life expectancy since the 18th century. It is a medical myth that the decline in infant mortality or increase in longevity is derived from improvement in medicine, as shown by studies performed by eminent members of the medical community itself.[39] Since we know so little of what is conducive to "good

[39] *See* McKeown & Brown, *Medical Evidence Related to English Population Changes in the Eighteenth Century*, 9 POPULATION STUDIES 119 (1955); T. MCKEOWN, THE MODERN RISE OF POPULATION (1976); Langer, *What Caused the Explosion?*, 24 N.Y. REV. OF BOOKS 3 (1977).

health," observing self-restraint in forbidding any of these "cures," except in the face of imminent injury, seems practical. In any event, only scientific medicine is recognized as legitimate and imposed by courts in the name of "objectivity."

Prescinding from this argument, the logical prolongation of the objective mind-set of scientific medicine is that of medical technology and the dehumanized machine. But it is this very effort that has brought scientific medicine most of its criticism. It has become dehumanized and, while helping the patient, it has forgotten the person.[40] The ultimate irony is that it is this medicine which now seeks a solution to one of its basic moral problems (depersonalization of the patient) by recourse to a court system which prides itself on its impersonality, objectivity and rationality. It is no wonder that we have a bitterly complaining Judge Markowitz who is stuck with the moral question which all the others (family, medical personnel, hospital) refused to consider:

> From the frequently recurring applications to the courts in instances similar to the case at bar, it is evident that in the absence of protective legislation, members of the medical profession, by their repeated insistence upon a written release *in any and all cases* prior to operative procedures, in effect, compel judicial intervention in matters when the necessity or value of a legal opinion alone is highly questionable. Confronted by a situation such as this, I am of the opinion that the time has come for courts to inquire where a continued condonation of such action and where a continued assumption of jurisdiction over such matters lead. Undoubtedly, physicians, surgeons and hospitals, like judges, lawyers and others as well, are often faced with seemingly irreconcilable demands and conflicting pressures. Philosophers and theologians have pondered these problems, and, as is to be expected, different groups evolved different solutions. Religious beliefs and doctrines, for example, complicated equitable solutions sought by courts in blood transfusion cases.[41]

Thus, concludes Judge Markowitz, the courtroom is not the proper place to resolve these problems:

> It is regrettable that the court here is placed in the position of refusing, or what to many may seem the refusal, to act in order to save a life or to ameliorate suffering. The contrary is the fact. It is because of the court's deep concern for [human] life and well-being that it is reminding those whose responsibility it actually is, to act appropriately, not arbitrarily, and without fear.[42]

The judge then made the following suggestion: "[A]n appropriate study should be made by members of the legal and medical professions, hospital personnel, and the community in general, including its spiritual advisers,

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[40] *See* P. RAMSEY, THE PATIENT AS PERSON 239-66 (1976).

[41] *In re* Nemser, 51 Misc. 2d 616, 622-23, 273 N.Y.S.2d 624, 630 (Sup. Ct. N.Y. County 1966) (emphasis in original).

[42] *Id.* at 624, 273 N.Y.S.2d at 631.

to consider problems akin to those raised by this application. *Certainly the social aspects of such problems far outweigh their legal implications.*"[43]

But this is not the solution at all since the problem affects modern medicine as well as law and parenting. The solution lies not in more "objective rationality" but rather in the development of greater personalization. A series of experiments conducted by Stanley Milgram clearly demonstrates this need.[44]

Milgram's subjects were led to believe that they were administering shocks of greater and greater strength to another person, the "learner," in order to induce him to memorize certain word associations. Upon instruction from a laboratory technician, a great number of the subjects proceeded to generate shocks, which appeared to be strong enough to kill, upon the learners. About two-thirds of the subjects so complied when the learners were in another room; apparently, since the subjects could not view the reactions of the control group, more subjects were willing to inflict pain. Even when the learners were in view, however, one-third of the subjects were still willing to obey the orders of a technician and inflict what seemed to be lethal pain on those present. This is astounding evidence of the potential brutality that may exist in some people and may manifest itself even when it conflicts with their consciences.

We are not far removed in this experiment from the objective-rational mind of the 19th century, precivil war judiciary, who were willing to inflict utter degradation on human beings even when it conflicted with their consciences because it was commanded by another—"the law." In believing that their actions did not belong to them, or belonged to "the law," judges acted like obedient subjects of the laboratory technicians in Milgram's experiments. They became objective instruments (Aristotle called slaves "animated instruments") and rule followers in order to quiet their consciences which identified with the ones they hurt by their actions. Thus, full-bodied flesh and blood people were simply not there: they were "learners," just as Chief Justice Taney never referred to slaves in *Dred Scott* as human beings but only as "degraded beings,"[45] just as judges are faced only with an anonymous "plaintiff" and "defendant" who are interchangeable with any other "plaintiff" and "defendant," and just as the judge is fully interchangeable with any other "judge."

Thus, the subjects in Milgram's experiments, the medical personnel who operate the medical machines and the judge who refers to the "rule" for his decision, all share a common experience: no one accepts personal responsibility for their actions, or feels another's pain as if it were truly one's own. Government by laws and not by men reaches its culminating irony and brutalization. The judges in *Quinlan* sought to evade personal responsibility by purporting to solve the problem by having Karen Quinlan

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[43] *Id.* at 624, 273 N.Y.S.2d at 631-32 (emphasis added).

[44] S. MILGRAM, OBEDIENCE TO AUTHORITY: AN EXPERIMENTAL VIEW (1974).

[45] *See* note 18 *supra.*

miraculously return and make her own decision. Of course, the reality was that this was impossible. They could avoid the pain and the responsibility for the decision when they pretended that nothing existed but the "objective rule of law."[46]

Thus, the conflict between traditional and reformist approach produces the great anxiety and turmoil which we see in the legal decisions surrounding the life and death issue of the medical technologies. Perhaps this is desirable since it forces the decisionmaker to find some legal objective norms while at the same time forcing him to look at the person who comes before him in these momentous decisions. To choose one approach over the other will not solve our problem. The confusion, turmoil and anxiety brought about by these cases—on the part of doctors, judges, parents and next of kin, among others—protects everyone, including the incompetent patient. This makes for less efficient decision-making and some disorder. But that is the crux of human existence, and when we encounter and grapple with that, we are beginning to grapple with the essence of law, which is justice. Although jurists do not like confusion and disorder because they have been schooled in the fundamental notion that the objective of law is order, the agony of these decisions is forcing jurists to come back to the concrete, to the individualized, and finally, to a new concept of what really exists, as well as the results of these decisions. The impulse to bring legal rational order into the problem of the medical technologies is not a solution but part of the problem itself since it has brutalizing implications.[47] We should view that impulse, so common among doctors and judges alike in their search for "objective rationality," with grave suspicion because it leads to brutalization. Law is a general concept, but justice is always personal and particularized.

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[46] For a discussion of the reasoning of the *Quinlan* court, see Hyland & Baime, In re Quinlan: *A Synthesis of Law and Medical Technology,* 8 RUT.-CAM. L.J. 37 (1977); Cantos, Quinlan, *Privacy and the Handling of Incompetent Dying Patients,* 30 RUTGERS L. REV. 243 (1977).

[47] *See generally* Appel, *Ethical and Legal Questions Posed by Recent Advances in Medicine,* 205 J.A.M.A. 513 (1968); Gurney, *Is There a Right to Die?—A Study of the Law of Euthanasia,* 3 CUM.-SAM. L. REV. 235 (1972); Comment, *The Right to Die,* 7 HOUS. L. REV. 654 (1970).