

March 1969

The Indispensable Role of Independent Ethical Judgement

Robert C.L. Moffat

Follow this and additional works at: <https://scholarship.law.ufl.edu/flr>



Part of the [Law Commons](#)

Recommended Citation

Robert C.L. Moffat, *The Indispensable Role of Independent Ethical Judgement*, 21 Fla. L. Rev. 477 (1969).
Available at: <https://scholarship.law.ufl.edu/flr/vol21/iss4/4>

This Article is brought to you for free and open access by UF Law Scholarship Repository. It has been accepted for inclusion in Florida Law Review by an authorized editor of UF Law Scholarship Repository. For more information, please contact kaleita@law.ufl.edu.

THE INDISPENSABLE ROLE OF INDEPENDENT ETHICAL JUDGMENT

ROBERT C. L. MOFFAT*

The purpose of this brief comment is to focus attention on the necessary role of ethical discourse in discussions such as the present one, for a number of important ethical issues are raised by the papers of the panel. Some of these issues, indeed, were discussed by the panel, although they may bear further examination. However, consideration of ethical issues, consciously or otherwise, would not seem to require justification in discussing a topic such as *The New Biology and the Law*. Consideration of what a man or a society ought to do must surely be inescapable.

As the papers of the panel illustrate, scientists, medical practitioners, and lawyers all make ethical assumptions. Because they do, it is easy for such professional persons and for their listeners (or readers) to be lulled into the belief that the ethical assumptions advanced *sub rosa* are acceptable and adequate. It is all the more easy when, as in the present case, no participant in the exchange is trained as an ethicist.¹ In such cases especially, it becomes vital to recognize that each profession has certain institutionalized values.² These "professionalized" values are the values by which members of a profession judge the competence and status of a fellow professional.³ They represent the best interests — as the profession sees them — both of society and the profession. Jerome Skolnick, for example, has shown how highly police value the ability to solve crimes while they consider adherence to due process requirements of very secondary importance.⁴ And because these professionalized values are relatively invulnerable to pressure from outside the institution, it is almost impossible to effectuate societal control of such institutions.⁵ A man associates most closely with his professional colleagues and consequently places great value upon their estimation of him. Moreover, the judgment of his fellows usually has profound impact on the success (or failure)⁶ of his career. Hence, professionals are governed most strongly by the internal values of their own professions. To point out this fact is no criticism of a profession. It does, however, raise in a very serious way the question of the right of a profession to make judgments for society based on professionalized values. South African heart transplant pioneer Christiaan

*B.A. 1958; M.A., LL.B. 1962, Southern Methodist University; LL.M. 1966, University of Sydney; Associate Professor of Law, University of Florida.

1. A person whose professional training is in the study of ethics. Such individuals are found primarily in departments of philosophy and religion and colleges of divinity.

2. *See generally* PROFESSIONALIZATION (H. Vollmer & D. Mills eds. 1966).

3. *See, e.g.*, J. CARLIN, *LAWYERS' ETHICS* (1966); M. JANOWITZ, *THE PROFESSIONAL SOLDIER* (1960).

4. J. SKOLNICK, *JUSTICE WITHOUT TRIAL* (1966).

5. *Id.* at 230-45.

6. Professional disciplinary procedures are normally controlled exclusively by the leadership of the profession concerned.

Barnard, for example, is reported to have claimed with regard to transplant ethics that "only doctors have the experience to make such decisions."⁷ The present point argues to the contrary. Impartial judgment of the social interest demands full and free discussion including the participation of individuals who make ethical issues their primary concern. Sir Edward Coke long ago held that one cannot be judge in his own cause;⁸ advocating independent judgment on ethical issues is surely requiring nothing more.

An example of the need for independent ethical judgment is provided by the growing medical emphasis upon research and experimentation that has produced tragedies such as those mentioned by Professor Plant. The reader may properly be shocked by the "physician" who, for experimental purposes, injected live cancer cells into patients not suffering from cancer. Moreover, the aged patients were not told that cancer cells were being injected into them so there was an absence of informed consent. Most astounding, however, must be the lack of awareness of even professional ethical issues demonstrated by the fact that the experimenter felt no difficulty about considering himself in a "doctor-patient" relationship with his victims. This incident demonstrates clearly why the medical "good" of experimentation may not necessarily be equated with social good and why independent ethical judgment is required.⁹ Nonetheless, medicine has moved increasingly toward a scientific outlook of experimentation and added the new industry of research¹⁰ to its traditional concern with care for the sick. Ironically, just when scientific developments have begun to make the cure of patients possible, medicine seems to be in the process of discarding its traditional values.

This rise of scientific experimentation as a professional medical value¹¹ also raises more fundamental ethical questions. For experimentation on humans seems to imply a mechanistic approach that views a person as a mere object, a "thing" to be manipulated. A contrasting approach, generally characteristic of ethical theories, might be labeled "humanistic"¹² because

7. 93 SCIENCE NEWS, Mar. 23, 1968, at 282. Other leading medical practitioners, however, do not agree. See Note, *Law and Life: Organ Transplants*, 20 S.C.L. REV. 765, 779-80 (1968).

8. Ironically, the case concerned a physician who attempted to oppose the professional medical association. *Dr. Bonham's Case*, 8 Co. Rep. 118a, 77 Eng. Rep. 646, 652 (C.P. 1610).

9. One professor of moral philosophy has taken the position that good medicine never regards the patient as an object of experimentation; a responsible attitude converts good medicine into good morality. Wassmer, *Between Life and Death: Ethical and Moral Issues Involved in Recent Medical Advances*, 13 VILL. L. REV. 759 (1968).

10. See John Fletcher, *Human Experimentation: Ethics in the Consent Situation*, 32 LAW & CONTEMP. PROB. 620 (1967).

11. This scientific trend is illustrated by Archambault, *Investigational Drugs and the Law*, 16 CLEV.-MAR. L. REV. 487 (1967); Freed, *Legal Aspects of Computer Use in Medicine*, 32 LAW & CONTEMP. PROB. 674 (1967) (computers used in diagnosis, treatment, and patient simulation); Ruebhausen, *Experiments with Human Subjects*, 39 OKLA. B. ASS'N J. 699 (1968).

12. The usage is not technical and is meant to include both individualist and collectivist approaches to the extent they are not mechanistic or manipulative. Examples of this unstructured use are varied. E.g., P. BERGER, *INVITATION TO SOCIOLOGY: A HUMANISTIC*

an individual would be considered a person, a subject rather than an object. This contrast has been expressed, for example, by Martin Buber as the choice between an "I-it" relationship and an "I-thou" relationship.¹³ The experimenter who injected the cancer cells was in an "I-it" relation with his victim. A humanistic ethical perspective calls for an "I-thou" relationship between doctor and patient. What this means is not that some *special* kind of communication would be required to exist but simply that the physician have due regard for his patient *as a person* (which requires *some* communication). The physician has traditionally expressed this idea in the form of the Hippocratic oath.¹⁴

It would certainly be presumptuous to suggest that a shift in ethical perspectives would provide a panacea for ethical problems. Nonetheless, a humanistic perspective may provide guidance at a fundamental level. For example, it is clear that the experimenter in the guise of treating physician is not treating his patient either medically or with any regard for the patient's humanity. The answer provided by a humanistic perspective may not be popular with the experimenter, but the guideline is provided nonetheless. Another example may be the current *cause célèbre*: When is a person dead?¹⁵ a question most often discussed in terms that really seem to mean: When should the heart-lung machine be turned off?¹⁶ Minds uncluttered by the desire for a potential donor's heart or other organs or by a desire to establish a new record for keeping a patient alive should see the question in terms of treatment that is primarily in the best interests of the patient and his family, and secondarily in the interests of legitimate research.¹⁷ Though such a guideline is far from absolute, it does indicate that a patient should not ordinarily

PERSPECTIVE (1963); Redmount, *Humanistic Law Through Legal Education*, 1 CONN. L. REV. 201 (1968).

13. M. BUBER, *BETWEEN MAN AND MAN* (R.G. Smith transl. 1947); M. BUBER, *I AND THOU* (R. Smith transl. 1937).

14. Wassmer, *supra* note 9, contends that good medicine always regards the patient as a person. A medical professor has expressed similar normative optimism: "Over the years, morality and ethics have been safeguarded because his effort is structured on a disciplined dedication to the cause of humanity." Likoff, *A Perspective for Considering the Moral, Legal, and Ethical Problems Arising from Advances in Medical Science*, 13 VILL. L. REV. 736, 738 (1968); See Elkinton, *The Dying Patient, the Doctor and the Law*, 13 VILL. L. REV. 740 (1968). Dubos in his paper for the present panel, however, expresses misgivings about the Hippocratic oath.

15. See Anderson, *Who Will Decide Who Is To Live?*, THE NEW REPUBLIC, April 19, 1969, at 9. See generally Jos. FLETCHER, *MORAL RESPONSIBILITY* 141-60 (1967) (ethical aspects).

16. A distinction should be made defining the point at which death has occurred, which is a matter of medical judgment, and the method of determining if a patient has reached that point, which is based on ethical and moral principles. Wasmuth, *The Concept of Death*, 30 OHIO ST. L.J. 32, 44-46 (1969). For a comparative discussion of the legal and medical aspects of death, see Comment, *Liability and the Heart Transplant*, 6 HOUSTON L. REV. 85, 86-100 (1968).

17. In one recent case, a boy who had been buried alive was supported by machines although his brain was dead. Doctors ignored the parents' desire to turn off the machines. The expenses to the family were \$200 per day. Note, *supra* note 7, at 773. See also How, *Religion, Medicine and Law*, 3 CAN. B.J. 365, 421 (1960).

be kept artificially "alive" when hope is gone for restoration to self-supporting "life."¹⁸ Any final test must be stated not in mechanistic terms but in terms of the human interests — both individual and social.

There is constant danger in all professions of the development of a mechanistic outlook simply because of the emotional pressures involved in any sympathetic consideration of often overwhelming human problems.¹⁹ Undoubtedly, this is an important reason why the term "professional" has the connotation of detached, aloof, impersonal. The practice of law is certainly as beset by these problems as other professions. The sacrifice of the individual client's interests in package settlement practices both civil and criminal is an example. Failure to counsel clients on how to avoid high-fee situations has caused recent public outcry.²⁰ The lawyer too must be at least as susceptible as other professionals to the danger of permitting ego or financial gratification to interfere with efficient representation of the client.²¹ The lawyer, moreover, is subject to the further dangers that only some persons may be able to afford his fees; consequently genuine and worthy human interests may be left unrepresented. And this predicament is multiplied when he is retained to represent forces that seek to suppress such unrepresented interests. The areas of consumer protection and resource pollution are only two of many examples that could be offered.²² In both cases individual business interests are represented while the public interest is often ignored, thus illustrating the wrong that may be perpetrated by elevating individual concerns above the social good, for human interests are then sacrificed in the name of serving them. It should be clear that neither individual interests nor the social good can be given adequate consideration in isolation one from the other.

18. Adherence to the principle that the physician's duty is to sustain life as long as possible brings grotesque results. Potter, *The Paradoxical Preservation of a Principle*, 13 VILL. L. REV. 784 (1968). See also Elkinton, *supra* note 14.

19. This point has been made with regard to the legal system by G. K. Chesterton: "[T]he horrible thing about all legal officials, even the best, about all judges, magistrates, barristers, detectives, and policemen, is not that they are wicked (some of them are good), not that they are stupid (some of them are quite intelligent); it is simply that they have gotten used to it. They simply do not see the prisoner in the dock; all they see is the usual man in the usual place. They do not see the awful court of judgment; they see only their own workshop." Quoted in Wright, *Criminal Correction and the Law*, TRIAL, Feb.-Mar. 1969, at 27, 46.

20. It has also produced bestsellers condemning the legal profession either implicitly, N. DACEY, *How To Avoid Probate* (1965), or explicitly, M. BLOOM, *The Trouble With Lawyers* (1968).

21. The lawyer is concerned with exacting a "professional" fee, Romell, *The Reasonable Fee and Professional Discipline*, 14 CLEV.-MAR. L. REV. 94 (1965). *But. cf.* Korosec, *Legal Ethics and the Poverty Program*, 15 CLEV.-MAR. L. REV. 225 (1966); Note, *Legal Ethics: Standards for Whose Sake?*, 19 U. FLA. L. REV. 360 (1966).

22. In both instances business interests are able to afford very fine legal counsel in situations involving an opposing public or general interest usually unrepresented or under-represented. The lawyer may prefer to take refuge behind the theory that social good will follow material productivity. See Dall, *Law and Resources Problems*, 53 A.B.A.J. 433 (1967).

Sometimes, however, consideration of the social good is used to justify the exclusion of individual interests altogether. This argument seems to be made most frequently in scientific contexts and inevitably accompanies a mechanistic approach. Examples are provided in the papers of both Professor Dubos and Provost Martin. The latter, while recognizing the existence of important ethical issues such as social control, does not conceal the assumption that man is only an object in his optimistic discussion of the possibilities of operant conditioning and ethology. Similarly, Professor Dubos speaks extensively of a variety of kinds of conditioning in a context that makes clear the deterministic assumptions involved. What may not be so immediately clear to the reader is that both men are espousing theory built upon the philosophic basis of behaviorism. To realize this fact is important, however, because behavioristic assumptions regarding the nature of man, not only indicate the significance of the arguments made by Dubos and Martin, but illuminate the consequences of accepting the mechanistic assumptions offered. For behaviorism not only assumes the invalidity of but explicitly rejects traditional human concepts such as freedom, responsibility, and purpose.²³ The classic example of the theory at work is probably provided by the father of the philosophy, B. F. Skinner, who in one experiment conditioned a pigeon to play ping pong. The irreverent thought that may occur to one who considers this instance might be that while Skinner was saying to himself, "Look how I've made this stupid bird bat the ball with his beak by giving him food," the pigeon may have been saying to himself, "Look how I've conditioned this guy to give me food by batting that silly ball around." Nonetheless, if one seriously rejects freedom, responsibility, purpose, and reason, upon what basis may one decide which of the participants in the experiment is doing the conditioning and which is being conditioned?²⁴

The present point is not, however, to offer a refutation of the behavioristic view of the nature of man. Contrary viewpoints may in fact be found in such diverse sources as Sartre's existentialism,²⁵ Piaget's theoretical psychology,²⁶ and Lon Fuller's theory of natural law.²⁷ The present point, rather, is to clarify the ethical aspects of such behaviorist assumptions and to emphasize the ethical consequences of accepting them. For behaviorism, after all, embodies the mechanistic view of man par excellence not only by denying his existence as a person but by denying even the significance of the faculty man has traditionally called his reason. In this way, ethical issues become irrelevant since the possibility of making judgment in any *real* sense other

23. B. SKINNER, *SCIENCE AND HUMAN BEHAVIOR* (1953).

24. It is important to note that conditioning, as with other manipulation, need not always be anti-humanistic. As Roger Shinn notes: "Such manipulation can serve freedom. But there come points when to regard ourselves, our neighbors, and our progeny as objects to be manipulated for their own good is to destroy humanity by turning persons into things." Shinn, *Christian Ethical Methodology and Questions Relating to Genetics*, Jan. 15, 1969, at 8 (unpublished paper read to the American Society of Christian Ethics, Washington, D. C.).

25. J. P. SARTRE, *BEING AND NOTHINGNESS* (H. Barnes transl. 1953).

26. J. PIAGET, *THE MORAL JUDGMENT OF THE CHILD* (M. Gabain transl. 1965).

27. E.g., Fuller, *Freedom — A Suggested Analysis*, 68 HARV. L. REV. 1305, 1308 n.2 (1955).

than self-deception is denied. Moreover, even if judgment *were* possible, it would be nothing more than a futile pastime, since events are really inevitable anyway. For inevitability and necessariness are surely implied in a rejection of human freedom. Furthermore, if man's freedom is really illusory, then discussion of what he ought to do is not only pointless but rather silly.

In this light the contrast between mechanistic and humanistic ethics could be restated as a contrast between ethics and no ethics. However, to put the issue in that form would obscure the fact that denying the possibility of "doing ethics" is a kind of ethical position. Moreover, there is a danger of being lured by its implicit sense of inevitability into a failure to recognize the existence of alternatives — precisely because the philosophy denies that there are any alternatives! And the tendencies toward these inevitabilist views must be recognized to be widespread and far from confined to Nazi Germany or Stalinist Russia.²⁸ For this reason it is easy to find distinguished scholars in a variety of fields warning against the danger of notions of inevitability. Karl Popper,²⁹ C. West Churchman,³⁰ Julius Stone,³¹ and Roger Shinn³² may be cited as examples. And the importance of the warning is that if it is not heeded, the opportunity for decision is abdicated. Even if one were afraid that the course of events is inevitable, it would still be necessary to act as if it were not in order to salvage any possible opportunity to decide. The mechanistic outlook must not be permitted to win the debate by default.

Science now promises us that in the near future man will alter his genes to produce supermen, and by a variety of means will control behavior, personality, and intelligence.³³ Within a very short space of time it will be not only practicable but easy for parents to determine the sex of their offspring. Such developments underscore the need for social control of implementation of scientific possibilities.³⁴ The social consequences of even such a relatively minor interference with natural processes as sex determination may be quite extensive. And society must not abdicate its responsibility to exercise control over such intervention even if the intervention is ultimately permitted on the grounds that individual decisions in that area do not threaten the social ecology. For social control is a direct implication of humanistic ethics; the possibility of ethics is based on the possibility of decision both individual and group. Social control can exist only if the social group has the ability to decide; the notion of exercising control is inconsistent with the notion of inevitability.³⁵ Talk of "social control" by

28. This point is deftly but emphatically made by Lamborn, *Social Control Through the Reconstitution of Man*, 21 U. FLA. L. REV. 452 (1969).

29. K. POPPER, *THE POVERTY OF HISTORICISM* (2d ed. corrected 1961).

30. Churchman, *On Exponential Change*, CENTER DIARY: 18, May-June 1967, at 52; cf. C. CHURCHMAN, *CHALLENGE TO REASON* 46, 64-65 (1968).

31. *E.g.*, J. STONE, *LEGAL SYSTEM AND LAWYERS' REASONINGS* 3-5 (1964).

32. R. Shinn, *supra* note 24.

33. The wave of the future has even reached *ESQUIRE*, April 1969, at 108-15.

34. R. Shinn, *supra* note 24.

35. *Id.* at 7: "The premise of ethical thinking is that we need not do everything we have the power to do."

those who believe in inevitability must be understood as meaning nothing more than social *implementation* of scientific achievements, since the idea of *control* in such a view would be meaningless. For social control is an outgrowth of human freedom.

The present concern to point out the dangers of mechanistic ethics may have the effect of portraying science as the enemy of human freedom. Nothing could be further from the truth; it is in reality the misuse of scientific capabilities against which these warnings are directed. These capabilities are tools to be used by man, tools that challenge him to enhance his freedom rather than to destroy it. Consequently, man must maintain constant vigilance that these capabilities do not make him their tool. He must refuse to permit scientific method to replace ethics, and in the face of all claims of inevitability, he must insist upon his freedom to exercise true social control. He must use science to become more human.