# MORAL FACTS AND OBJECTIVE LAW

## Challenges for the Court in Bioethical Issues

We may think that moral wrongs like "killing" ought to be universally condemned, but we rarely get any universal consensus on morality and law. Not only is killing accepted by some religious laws, it is also accepted in the courts of some secular states. The reason why debates continue as to what constitutes a moral wrong is the same as for the debates as to what constitutes a legal wrong – the inability thus far of finding a meta-norm – the Rule that rules them all – that will determine how such wrongs are identified. This article explores some of the epistemological problems and examines the impact of a materialist science on the idealist ethical sphere. Finally, this article also examines the difficulty of ascertaining facts objectively. It emphasises the difficulties facing a court that has to adjudicate on a bioethical issue because of the fundamental problems – finding the facts objectively and discovering the rule that governs them.

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1 In 1981, Raymond Carver published a short story entitled *What We Talk About When We Talk About Love*.[1] It is a story that entices his readers into self-reflection even though the conversation that takes place in it appears at first reading to be very ordinary. In 2007, Haruki Murakami published *What I Talk About When I Talk About Running*[2] in which he talked about marathon runs; he alluded to indefatigable energy even as he talked about exhaustion, and he talked about Raymond Carver; we are left wondering where in our psyche he had hoped to reach. Here, we might ask what we talk about when we talk about bioethics. The last lines from Carver's story reads:

> I could hear my heart beating. I could hear everyone's heart. I could hear the human noise we sat there making, not one of us moving, even when the room went dark.

1 Raymond Carver, *What We Talk About When We Talk About Love* (Vintage Books, 2003).

2 Haruki Murakami, *What I Talk About When I Talk About Running* (Harvill Secker, 2008).

2 His words remind us of how paralysed we can be when we talk with neither substance nor form; on the other hand, were we to convince ourselves that reaching the right depth in talking ethics is too daunting, no progress can be made, and we might as well stop talking altogether. Even as old issues are still unresolved – abortion is one – new problems and questions continue to be raised. Only four months ago this year, the US District Court in the Southern District of New York handed down a judgment in a case known as the "*Myriad* case".[3] The court rejected the claim by the defendants that the isolation of human genes (known as BRCA1 and BRCA2 DNA) and the comparison of their sequences are patentable subject matter. One of the defendants, Myriad Genetics, claimed patentable rights on its product involving the identification and sequencing of two genes that indicate a predisposition to breast cancer in the patient tested. This case demonstrated that bioethical issues can concern and involve people from every strata of society. The parties in this action who opposed the defendants' claim in the action included research institutions, scientists, doctors, counsellors, and housewives; the defendants included the US Patent office as well as the Myriad Group, a large commercial corporation whose laboratories charged what the plaintiffs claimed to be expensive fees for the sequencing of the genes. Judge Robert W Sweet was of the opinion that "the isolation of the BRCA1 and BRCA2 DNA, while requiring technical skill and considerable labor, was simply the application of techniques to those skilled in the art".[4] The court concluded that the "isolation and sequencing of DNA from a human sample, even if incorporated in the claims-in-suit, would represent nothing more than data gathering steps to obtain the DNA sequence information on which to perform the claimed comparison or analysis".[5] The *Myriad* case was, as most patent cases often are, decided along technical legal lines. Nonetheless, there are interesting bioethical implications in that case that were not relevant to the decision of the court, but are highly attractive to the bioethicists amongst us.

3 The court's decision in the *Myriad* case[6] was reached on an analysis of analogous cases, and how unique efforts and inventions can be distinguished from what have always been naturally available for discovery. The ethical aspects of granting or refusing to grant a patent in such cases, and whether it is ethical to have patent laws at all, were not relevant for the decision in that case and lay, undisturbed, beneath the

3 *Association for Molecular Pathology et al v United States Patent and Trademark Office et al* Case 1:09-cv-04515-RWS.

4 *Association for Molecular Pathology et al v United States Patent and Trademark Office et al* Case 1:09-cv-04515-RWS, at pp 134–135 of the unreported copy.

5 *Association for Molecular Pathology et al v United States Patent and Trademark Office et al* Case 1:09-cv-04515-RWS, at p 146 of the unreported copy.

6 *Association for Molecular Pathology et al v United States Patent and Trademark Office et al* Case 1:09-cv-04515-RWS.

surface of the manifest issues. Judge Stewart's meticulous naming of the parties and their roles was itself an act hinting at the ethical implications of granting such a patent. The list of plaintiffs included women who needed to know if they were predisposed to breast cancer. Myriad's laboratory could have helped them find out but the fees were high and insurance policies did not include payment for such tests. The *amicus curiae* who filed their interests in the suit included scientists and laboratories as well as Greenpeace, the environmental organisation. The fact that Myriad Genetics was cast as a profit-making corporation was a subtle point that may be relevant in an assessment of ethical issues in that case. The case itself was decided without discussing such issues. Perhaps they were irrelevant in Judge Stewart's analysis of the case, but the ethical implications remain and may be discussed elsewhere, although outside the scope of this article on the role of the court. The theme of this article is that judicial decisions will not provide the true answers to bioethical issues that are argued before the courts unless the law and the facts, including moral facts, can be objectively obtained.

4 The process of sequencing and identifying cancer genes is incontrovertibly a boon to mankind and it should not be preserved as a private right without public access. That seemed to be the strongest reason for rejecting Myriad Genetic's claim; but that was not the way the court saw it. The problem with moral reasoning as the basis for a judicial decision is that moral philosophy cannot be extracted from some formulae the way scientific inventions can. The diversity of opinion in moral and ethical issues complicates the search for a definite principle because conflicts in views and values arise not only between different cultures, religions and nations, but also between different groups within any society and, therefore, historical, religious, and cultural differences can be involved. Whether they are relevant to a bioethics debate is part of the debate. In the *Myriad* case,[7] the interests of the public consumer clashed with that of the corporate inventor. There are also products and inventions whose desirability is questionable from an ethical point of view – should we, for example, endorse the sequencing of genes that will make all human beings 2m tall? Should scientists be prohibited from commencing or continuing with research in aspects of science which are deemed immoral? These questions lead to many others concerning the rights not only of living beings but also of lives-to-be and our obligations to them. If we were to design our children to grow into 1.9m adults, we might be asked not just whether we ought to have so designed them, but also why we had selected 1.9m and not 2m or 2.5m. Conversely, the child who grew up loving gymnastics might feel hampered by his/her pre-selected height.

7 *Association for Molecular Pathology et al v United States Patent and Trademark Office et al* Case 1:09-cv-04515-RWS.

5 Arguments over what is moral and ethical tend to fall into two main categories.[8] One category holds that what is right or wrong is a purely normative abstract, representing a universal and immutable rule or principle. The adherents to this school of thought generally hold the view that "good" is a matter of duty in the sense that what we discern to be good represents the goal and focal point for moral agents (human beings). There is also the ancillary duty on the moral agent to strive unwaveringly for that goal. There is no universal consensus, however, as to the means or standard by which we discover such norms, and we also often hold opposing views as to what counts as a moral norm. Some of us might argue fervently that abortion is immoral while some others might not think so. Should we incline therefore to conclude that moral judgment depends on cultural diversity, accepting the claim that "man is the measure of all things"? Within this set of arguments is the dispute between those who believe that what constitutes right and wrong is a matter of fact and is thus ascertainable and those who do not think so. To those who do, morality is independent of our judgment and what we believe. This category of arguments will remain abstract and indeterminate unless there is an objective standard by which moral facts may be known.

6 Enmeshed in normative arguments about moral facts is an obligation to distinguish between what is and what ought to be. Unfortunately, there is an element of circularity in the endeavour which can be broken only if we are able to know for certain what the fact is when we talk about moral norms – how are we to know what a fact is if we also hold that a fact is only a fact if it can be independently, that is to say, objectively, ascertained? It is not sufficient to say that we can be objective by getting out of our mind and planting ourselves, as it were, in the mind of another person to contemplate the world from that person's point of view. That does not work because in doing so we merely replace our own subjective view with that person's. Thomas Nagel punched a deep hole in the claim that we are able to ascertain anything objectively in that way. The problem itself opens up in the title he gave his famous article, "What is it like to be a bat"?[9] Since all human experience is subjective, we can only postulate what a bat feels when it flaps about in the dark but we can never know what the bat feels unless we are bats. Nagel argued that this is not how we derive knowledge of things objectively. And, of course, no one seems to know how our bat impressions can be verified. Hence, when we talk about objectivity in ethics (and in law), we often merely grasp what appears to be most widely accepted, if not universally, then, at least within the community, and pass that off as an "objective" view. For the purist, this is naturally

8 Although philosophers may find distinctions between "morality" and "ethics", that issue is not material here as the problems under study apply to both.

9 Thomas Nagel, *Mortal Questions* (Cambridge University Press, 1979) at p 165.

not acceptable, but there is no objective test at the moment to determine how objectivity is attained.

7 At another level of abstraction, the problems facing the ethicist and lawyer are no less daunting. Aside from the question of ascertaining the true moral norm, we are also faced with a practical question of what to do when two norms or moral values conflict with each other – how do we determine which is superior? The problem with conflicting norms can be illustrated with this old, but useful example: a man runs into my room and hides in the closet from an assailant who wants to kill him. The assailant runs in and asks where the man is. Should I lie and tell him that the man he was looking for has run out the back door, or should I tell the truth and let the man be killed? In the face of conflicting duties – the duty to tell the truth and the duty to save a life – what am I to do? What is clearly needed here is a way in which we can determine how such conflicts are resolved. How do we find the moral solutions to such problems?

8 The second major theory in moral theory is founded on consequentialism (of which utilitarianism is the most common version) – the belief that an act is right if it will lead to the best possible result, "best" being defined as the highest or greatest good possible in the circumstances. It is a formidable argument, if only because we tend to behave like consequentialists in our daily lives. By the consequentialist yardstick we measure good results by inclining towards pleasure and avoiding pain. What counts as pleasure and what as pain, and how we give weight to close, compatible items has long stymied the consequentialist's quest to promote consequentialism as the universal solution to moral problems. We often get into a quandary precisely because we cannot always sort out whose pleasure will be keener or whose pain worse. What is pleasure to one may be pain to another. In this regard, pleasure and pain are regarded as good and bad respectively, and right and wrong are identified with the maximisation of goodness and the failure to do so respectively. But what is good? And conversely, what is bad? Are they mere abstracts that cannot be ascertained much less defined? Most philosophers reject the notion that good is reducible and claim that any attempt to do so is a fallacy. Good is like "yellow" – how does one define yellow?[10]

9 The consequentialist approach to morality invests in choosing the path that leads to the greatest good or pleasure and away from that which induces pain and suffering. The object in this approach in so far as it strives towards human happiness as its end, is not different from that of those who hold that morality cannot be adjusted according to what is at stake. Implicit in this consequentialist goal is the assumption

10 G E Moore, *Principia Ethica* (Cambridge University Press, 2nd Ed, 1993) at p 62.

that the happiness sought counts only if it is also good. In this regard, it is troubled by the same problems as those who perceive what is good and moral in terms of norms because the means and the standard by which good and morality are identified are still unclear; and philosophers and ethicists continue to argue about them.

10 The third path is taken by those who believe that morality, and right and wrong, are measured by the value of virtues – that is to say, we look for the reasons to act in a way in which we think life is best lived. This was intended, perhaps, as a practical way of living the moral life without having to find the precise metaphysical answer to morality. The seemingly straightforward proposition becomes complicated when the same difficulties that trouble normative and consequentialist thinking on morality are brought into contrast with it. The main one being the question, what are the characteristics of virtues? Identifying virtues may not be difficult – honour, loyalty, compassion are examples. But what does one do when, say, his loyalties are in conflict? How does one determine what is the ethical choice? The uncommitted amongst us, judges in particular, park in neutral and sometimes beat our breasts wondering if the relativists might be right in thinking that many of the conflicting values in ethics are irreconcilable.

11 Whether we are looking for "good", "pleasure" or "virtue", the quest for a definitive standard for making moral judgments will stall unless words like these have a uniform meaning. Thus linguists turn to philosophy in search of how meaning is derived from words and how words cohere to reality; and philosophers turn to language to convey notions and conceptions of truth and meaning. The monumental quest is to determine what must be in place for a statement to be true. What do statements like "Zeus is the king of the gods" and "Humpty Dumpty had a great fall" mean? We may comprehend the connected words in each of these sentences and also the sentences as a whole, but how do we tell whether the statements are true or false? We intuitively, and without difficulty, discern the difference between those sentences and statements like "my brother bought a car". But here are two examples of statements that can lead to conflicting interpretations: "life is sacred"; and, less abstractly, "medical treatment cannot be imposed on a person without his consent". These are issues that philosophers and theologians seek to comprehend and resolve. All these enquiries tend towards finding not just whether there are moral facts, but whether truth and fact generally can be ascertained at all. If a man says "the chair is red", how does he prove that that statement is true? One main school of thought (in the philosophy of truth) postulates that a statement is true if it corresponds with reality. The chair is red if, and only if, the chair is red.[11] A rival claim postulates that a statement is true if it coheres with all other

11 Correspondence Theory.

statements and evidence that present it as true.[12] Whether that is sufficient to count as truth or just an approximation of truth is a matter of debate in the same way the first theory has the problem of how reality can be objectively proven – how do we know that what we think we see as a red chair is indeed a red chair and not that the human eye, as constructed, inevitably sees it as red? Neither of those theories, or any other, can satisfactorily help us determine whether theories about truth and objectivity are capable of universal application. A related problem arises from our inability to define and prove the intrinsic value of worlds and lives, and what makes one world or one life intrinsically more valuable than another. When judges talk about the truth or objectivity of a statement of law they would not likely be talking about its truth in the same way as they would about red chairs. Propositions of law are abstract. Hence, for a court to decide a bioethical issue, it has to overcome, first, the problems in ascertaining facts, including moral facts, and secondly, the correct principle in law; and the most formidable challenge in both cases is to know how that can be achieved objectively.

12 The connection between truth and meaning, and their connection with language, has become an important subject in modern philosophy and law mainly because discussions about norms and principles, right and wrong, good and bad, cannot be meaningful or even coherent unless they can be shown to be true. How we can find truth and meaning becomes a matter of importance. In the context of bioethics, therefore, all arguments ought ultimately to lead the enquirer to the true meaning of "life", not just what biological life is, but also the implications of such a life and whether the word "sacred" has any relevance to the definition of life. There are opposing views, but the central issue is the issue of what life is, biologically; and whether there is any basis for the claim that it is "sacred". Many arguments in bioethics would be settled. There is one more dimension to the difficulty in ascertaining facts in moral values. That is the complication of man's dichotomous mind – we are governed in turn by emotion and reason. That, in part, explains why people sometimes hold dogmatic views that cannot be rationally justified.

13 In spite of rival claims, the state of human knowledge presently seems to incline many to pluralism (which is not the same as relativism), the view that there are different values diversely held, notwithstanding that there are common views regarding some aspects of morality, for instance, the view that it is wrong to kill. Even so, there are disagreements as to whether legally sanctioned deaths are moral. Pluralism appears to be an attractive and practical interim position; but it does not, however, mean that in truth there are no objective positions in moral judgments, and so the fact that we cannot reach them does not

12 Coherence Theory.

mean that they do not exist. Pluralism condemns us, therefore, to a state of intermediacy – as we seek the finality of truth. The truth of the matter will continue with the philosophers' debates, but in the current state of scientific, philosophic and theological impasse, the big questions of life are not likely to be answered. Some of these moral and ethical issues could have been argued before the court in the *Myriad* case[13] but they were not. For example, the court could have been invited to determine whether information as to human genetic codes generally can morally and ethically be made a commercial product; secondly, whether it is morally and ethically permissible to use an individual person's genetic code without his consent; and thirdly, whether an individual has a moral, leading to legal, right to all his genetic material and information? Having set out the major problems concerning the theories and our knowledge of morality, we may now turn to the nature and function of the judicial process.

14 One vital mark of the doctrine of the Rule of Law is that a distinction is drawn between the personal views of the judge and the role of the court as an institution. There is a tremendous responsibility on the part of the judge to constantly remind himself that judicial decisions are not made on the basis of the judge's personal fancies. Some judges think that moral truths can be objectively discovered and some do not, preferring instead to hold the view that moral values are subjective and that there are diverse paths, all acceptable, to moral judgments. The range between the one and the other can be extreme and thus results in the same impasse that currently prevents a consensus among bioethicists. While philosophers and ethicists are chiefly concerned about moral rights, in litigation, the court will be asked to determine legal rights. However, in bioethics more so than in say, contract law, the legal and the moral are intertwined. If philosophers and theologians cannot agree, how is the court to determine which is the moral fact? As Mill would say, a test for right and wrong must be the means by which we ascertain it (the right or wrong) and not by the consequence of having attained it. What should be avoided is that the courts do not make decisions in sympathy with partisan concerns, dressed in the language of objectivity but lacking in it in substance.

15 Even as philosophers wrestle with the existence of objectivity, the language of the courts assumes its existence in locating the rights of the case in question or the standard by which laws must be interpreted. The common legal parlance concerning objectivity that judges and lawyers have in mind is of the kind defined by Rescher. He describes objectivity as an exercise that "calls for putting aside one's idiosyncratically personal and affective predilections and inclinations,

13 *Association for Molecular Pathology et al v United States Patent and Trademark Office et al* Case 1:09-cv-04515-RWS.

by doing what any reasonable person would do in one's place".[14] Rescher was here talking about judicial objectivity, not moral or epistemic objectivity. Impartiality is an attribute quality that is universally expected of every court, but because the judge rationalises subjectively, he has constantly to ask himself how much personal bias should be suppressed, and how much should be allowed to count as part of his stock knowledge and experience? This is one of the difficulties faced by the court particularly when it has to adjudicate on a bioethical issue. A judge who studies Mill and utilitarianism will have in stock and force the vast array of consequentialist arguments, but is he learned or just being biased? Similarly, a Natural Law judge might incline towards another result by reason of his specialised area of learning. It is crucial thus for a judge to remain impartial at all times. However, impartiality requires that a judge ought to have received views from all sides. Isaiah Berlin once wrote that a fox knows many things; a hedgehog knows one big thing.[15] That proposition draws a thick curtain between those (foxes) who are pluralists, believing that there are diverse values, all equally true, and those (hedgehogs) who believe that there is only one big truth.

16 Apart from objectivity in the sense of impartiality, the court has to meet the challenge of finding objective propositions of law, that is to say, finding the right answer in law. Whether that is possible is a matter of great debate among the best jurists. Hence, in practice, the word "objective" is sometimes employed in judicial language with a hint of vagueness; sometimes it is used as a synonym for yet another vague phrase, "the reasonable man", when in fact actually being used to convey the views of the judge. The judge sometimes finds it necessary to declare a view to be objective and reasonable only as a reminder to all – himself included – that the views he expressed had been shorn of bias and prejudice. It is an expression of the judge's duty to put aside his private personal views and accommodate opposing views so that the result is one which the judge might not personally prefer, but which suits the circumstances of the case. There may be occasions in which the court takes public opinion into account – such as when it wishes to take into consideration what it might think to be in the public interest. But here the court should warn itself against the dangers of handing down a judgment based on popular sentiments. Popular approval is a suspect strategy because the popular view is judicially acceptable only if it coincides with what is right and just, for the court owes a duty to the minority as it does to the majority.

17 Bioethical issues such as abortion, for example, can be fervently debated without achieving headway and often with both sides leaving

14 Nicholas Rescher, *Objectivity* (University of Notre Dame Press, 1997) at p 45.

15 Isaiah Berlin, *Two Concepts of Liberty (Four Essays on Liberty)* (Oxford University Press, 1969).

through the same door that they entered. In some areas, changes in attitude and law have taken place and developments in science continue to force even old issues to be re-examined. An example of change has been in the idea of physician-assisted suicide. This idea has gained ground in some countries although it is still unlawful in most. When controversial bioethical issues arise in judicial proceedings, they raise a number of concerns. First, how competent is the court to judge those issues? A judge will find it immeasurably helpful if he is familiar with current thinking in bioethics as well as other areas of philosophy, especially in language and epistemology. An understanding of psychology helps round up the peripheral areas of knowledge that are essential to a proper understanding of bioethics. The diversity of views and the intensity of debates in bioethics compel the court to be even more mindful of its jurisdiction. The court, unlike the Legislature, has no constituency to account to and, in an area where there is often no legislative enactment or precedent, it is required to exhibit innovation, restraint and courage all at once. The decisions of the court, moreover, are open to the scrutiny of the public. While it is important and apt to take the public view into account, it must be remembered that the court's ostensible role is wider than that – it has to administer justice according to law. That duty is a heavy and difficult one when the court deals with tough questions like "what is justice" and "what is law?" The judge has to ascertain the facts and the law while steering between his conscience and the public's wishes, unravelling as best as he can the difference between the public interest and the public's wants. For example, genetic manipulation for cosmetic purposes might become popular but it might not be in the public's interest to have such procedures legalised. For this reason, it is important that the court is *au fait* with moral philosophy, epistemology and jurisprudence so as to understand more palpably that faint line between the limits of the court's jurisdiction and the point where legislative intervention becomes necessary. When a claim is both controversial and plausible the court might opt to maintain the *status quo*.

18 In bioethics, where clashes of personal values are divisive and intractably so, the court may be compelled to adopt a strategy that will yield the most neutral result. The question is how is that strategy to be formulated? It bears the danger of creating two wrongs instead of making a right. In bioethics there is often no feasible middle path (where principles clash) whereas in litigation, a court may adopt a holding position. One way that is done is to maintain the *status quo* and not make changes in the law in the absence of clear principles. Another way is to decline a ruling in favour of legislative intervention especially if the issue involves public policy, and the parliamentary pulse is the better gauge for public policy. On the other hand, it may fulfil the utilitarian ideal of the perfect balance between pleasure and pain. Hence, the foremost question that concerns the court is whether the

issue is one that requires a ruling in favour of one or the other litigant, or whether it is one in which the court can and ought to choose a neutral solution. Liberty and freedom of choice are attractive values that a court, faced with a collision of equally plausible ideas, may assume as a fair and just solution. Man in all societies has a tendency to yearn for liberty – even though he may often think nothing of preventing others from exercising it. If liberty of thought is indeed the highest form of liberty, then one should be able to choose and act freely without restraint. However, even the strongest advocates of liberty would not support the idea of unrestrained liberty. One such advocate, John Stuart Mill, accepted that interference with liberty is warranted only in cases of self-protection. Hence, the form of liberty and freedom of choice has to be tempered to produce the least harm and, conversely, produce the greatest good; otherwise, we would need some other principle to achieve a just result because total freedom carries with it the danger Tawney warned of when he wrote that: "Freedom for the pike is death for the minnows".[16] The contest between freedom and restraint is markedly exemplified in the debate between those who hold that there is a realm of private morality which is none of the law's business and others, like Lord Devlin, who believed that the realm of public morality entitles society to impose its values on everyone. The thinking person (lawyer, litigant, as well as judge) must first enquire and determine how much of this aspect of the debate is policy and politics and how much of it is philosophy. Debates on ethics and morality will be more meaningful if the protagonists are able to agree what boundaries should mark their debate. Therein lays the reason why a judicial decision in bioethics is distinctly different from a philosophical debate concerning the same question – a judicial decision is one that is made within fixed boundaries even though the borders may not always have been demarcated clearly. Boundaries in the law are marked out by statutes, judicial precedents and fundamental judicial conventions that form the common law adversarial system. These are conventions that cannot be altered for one case without causing instability to the structure. In this regard, it will suffice to say that the common law system runs on consistency and predictability, which, in turn, are dependent on the adherence to precedence.[17] The impartiality of the court is maintained, at least outwardly, by a judge that does not participate in the arguments (other than to seek clarification) and thus finding himself defending his own views even before the case is concluded.

19 The questions of liberty and choice lead to one other philosophical conundrum which we must now address. When we talk about freedom and choice, we make some assumptions that emanate

16 R H Tawney, *Equality* (Allen & Unwin, 1931) at p 238.

17 How a court stays with a precedent and when it needs to break new ground are the subject of a discourse well outside the scope of this article.

from the idea of free will. Free will is not a problem-free idea. It is usually discussed alongside that other difficult concept – determinism. Determinism and its opposite, indeterminism question whether things happen as a matter of necessity. To say that an event was necessary in this context is to say that the event was inevitable. When something happens, we will ask what caused it. Sometimes it is easy to see that the first event necessitated the second event such that no blame is attached to anyone or anything except the first causal event. When a tree falls and hits a man who was waiting for the bus, the tree was the cause of the man's injury. The man was blameless. When the tree fell on the man, the event was a "necessity" – in the sense that it could not have been avoided – because the tree fell and the man was there. We can trace the events all the way back and still show that the event accident was a necessity. He could be waiting for the bus because his friend invited him for a drink. His friend invited him for a drink because they met a month ago after many years out of touch. Further back, they met when they were in school. The fact that they met in school was a necessary event the moment the man enrolled in that school. We can go on tracing the events of the man from his birth to show that one event led to another. We often say that we cannot predict the future because the future is unpredictable. However, this assumption must be qualified. It is true that we cannot tell the future but that does not mean that the future is indeterminate. By tracing backwards we can tell from hindsight that the tree falling on the man was inevitable and from the moment of the first cause, the result was already determined.

20 We attribute causes to various things. Some of us attribute them to God and some to fate. The fact is, if events are predetermined, what place is there for the idea of truly "free" will? Some thinkers believe that although life is largely predetermined, there is a small but critical area in which man exercises his will freely and that imposes ultimate responsibility on him for his actions. On the other hand, to those who believe in the idea of indeterminism, the issue of ultimate responsibility has to be examined carefully. It does not follow that there is free will just because nothing is predetermined. This is because if nothing is determined, then things must happen purely by chance. In such circumstances, how do we identify a person's culpability by attributing his conduct to a free will? A man might have chosen suicide because he was, by chance, educated in a school of philosophy that considered suicide to be the ultimate act of control, but his being influenced by that school might be by chance because of how he was brought up, again, a matter of chance. He could also have been psychologically predisposed to that act but that would be just as much a chance due to his genetic makeup. There is another opposition to the libertarian idea of absolute free will on the ground that that notion implies that the moral agent has to be a *causa sui* – a self-creating cause, which is an impossible act. Hence, when we ask questions about moral responsibility, we cannot

avoid thinking about our ability or inability to act as a moral agent. The question of how much responsibility the personal self has is an example of where science, philosophy and law meet, and the answers to it may be differently shaded depending on how close to the truth we think we can bear to go. These questions arise in ethics and discussions of bioethical issues are not exempt from dealing with them. Consequently, they will find their way into the courtroom that has to deal with those bioethical questions especially when one needs to understand more deeply what one means when he makes claims from the argument of individual liberty and free will.[18]

21 The critical question that a court faces in respect of bioethical issues is this: what should its role be? As shown in the preceding paragraphs, when a bioethical matter comes before a court, it will be an intersection where science, philosophy, religion and law cross paths. How qualified is the judge as the arbiter of such a formidable conglomerate mass? Knowing when intervention is necessary and when to exercise restraint is probably one of the more sublime aspects of judicial work. Whichever course it chooses, the court will be mindful that in resolving bioethical issues, a court has to overcome the rigours of culture and the diversity of personal values. To that end, as mentioned, the judge himself must first overcome his own bias and prejudice. He may have to hold a position with which he might not himself agree. That is the sting and paradox of objectivity, the exercise of which is imbued with inherent contradictions and conflicts for the decision maker. There are few solutions to this difficulty. It is always helpful if the judge reminds himself that he should not throw his personal stakes into the trial – he must accept that he might have to arrive at a decision that he may not personally like, and not tweak the facts and the law to suit his personal beliefs. That is the underlying problem of achieving objectivity through one's subjective self.

22 The decision at hand will naturally be the immediate concern, but the court will need to take into account the impact of the decision as a precedent or a point of reference for other cases. Given the importance the judge's reasoning has in the determination of the case at hand and as a guide to future cases, the court has a number of distinct obligations in writing its grounds. Firstly, its reasoning should be consistent for consistency is one gauge of soundness, and that, in turn, will help ensure the judgment's longevity. Secondly, it should be accurate, precise and clearly written. The presumption that everyone is taken to know the law

18 In so far as morals and ethics are concerned, a commercial case is no different from a bioethics case or a criminal case. What is moral must stand firm irrespective of the nature of the case. The only difference lies in the facts that create the issue before the court. Bioethics facts are not likely to bear any semblance to facts in a banking case.

would be an unfair one if the law as explained in the judge's grounds is not clearly expressed. If the court sees it as part of its responsibility to formulate the moral position in a given case, it has a duty to establish a discernible image of the moral value it considered relevant and objective as opposed to one that is too obviously a reflection of the judge's subjective values. The force of a judgment lies not only in the writing style of the judge, and not entirely on the force of its reasoning or the authority cited in its support; it also comes from an appreciation of the foundations of the common law adversarial system. The common law system is a successful legal system as a result of the longstanding doctrines and features of the adversarial system, and these include the court's sense of the importance of consistency, without which it would be even more difficult to identify moral principles. In that regard, the appreciation of the narrow kernel of a decision becomes acutely important because it is that kernel that forms the substance of authority on subsequent cases. What the nature of a judicial precedent is, however, is a different and complicated issue that is outside the scope of this article. There is much to be said and studied about the nature of judicial precedents and the trap that consistency may pose if there were no room for flexibility. On the other hand, when the law is freely flexible, the weight of the authority of precedent will be reduced. It is therefore necessary to appreciate that the application of a moral principle may not lead to a fair or just result. Thus, a court may rule that it would not be moral or ethical to force a person to accept a blood transfusion against that person's religious beliefs, even though the result is that that person would die. What is just or fair in that instance is subject to a separate inquiry from the inquiry as to what is the moral or ethical stand the court ought to make.

23 How then should a court determine the law in cases involving bioethical issues? How is the law to be determined? We are driven back to the elusiveness of objectivity. There are two aspects to the notion of objectivity. The first concerns the moral agent, which in this context, is the judge. He is required to be impartial and not have his personal interests stand in the way of his decision. A judge will rarely have any tangible personal interests in the outcome of the case, but it remains a personal struggle to put aside his own bias and prejudices for the sake of objectivity. How does a judge achieve that without rendering himself a robotic artificial being since the very same education and experience that enriches his judgment are the same forces that colour his perception of the case? It may be that the quality one think about least often is the one most needed here – the quality of humility. If one holds the view that one is always right, there is little room for the contrary view to take root, and it is fair to say that one cannot be right all the time. The reasoning faculty of the mind is not, and should not be an autonomous enclosure. It must receive knowledge and views freely and dispassionately. The second aspect of objectivity in this regard is linked

to the question of the determinacy of law, a matter almost as vexing as the question of how truth of moral values can be objectively determined. In many instances, the court will have little difficulty ascertaining what the answer is to the given question of law. Questions such as whether a motorist may park his vehicle beside double yellow lines on the road will draw a quick determinate answer. Even questions that contain substantive moral content such as whether a man has a right to intentionally kill another may also draw easy answers. However, when a complex legal question involving a controversial moral value such as the right of physician-assisted suicides arises, the legal question will not be so easily determined. Are there always answers to all such legal questions? For that we need to consider how a court goes about its business of judging – an exercise in manoeuvring cautiously through the Humean injunction that we must not confuse "is" from "ought"; and all the more when "ought" implies "can".

24 In ethics, one is compelled to "practical reasoning" which Nagel described as "the justification of action once we expand our consciousness by occupying the objective standpoint".[19] Reasoning is also the work process of the lawyer and judge. Legal reasoning typically comprises of deductive and inductive reasoning as well as reasoning by analogy. In deductive reasoning, the court proceeds from the general to the specific; in inductive reasoning, it proceeds from the specific to the general. In reasoning by analogy, the court finds a close example as part of one's definition of the issues and result at hand with the view of treating like cases alike; hence, it proceeds from a specific to another specific. The accretion of new cases similar to established ones will add authority to the existing cluster. That, in turn, strengthens the common law because it gives weight, consistency and thus, predictability, to the law. The reliance on reasoning by analogy has deep roots in law. The common law doctrine of precedence is built on it, and it has its advantages. Indeterminacy of law can thus be overcome to some extent in this way. One shortcoming in this method is that it can become a misused tool in judicial craft and enables a court to distinguish cases in order to avoid the result it does not want – that is, to avoid, rather than to determine an objective conclusion. Reasoning by analogy loses precision because its content is largely based on generalisation. There is one other factor that complicates the decision-making process. An objective decision implies that the court is bound to find the right answer. That, in turn, implies that the decision would be the same no matter which court decides. In practice, there are many areas in which the court has the discretion to determine the result. Discretion is personal, and thus, is anathema to the notion of the objectivity (not in the sense of impartiality) of a legal proposition or law and it is the greatest obstacle to the notion that there is always a right answer in law.

19 Thomas Nagel, *The View from Nowhere* (Oxford University Press, 1986) at p 139.

Hence, we must not mistake what a court might call a "reasonable" answer to be the "right" answer.

25 We thus reach the point at which it would be apt to consider what the court can do to fulfil its obligations as impartial adjudicator in the moral and legal mix that is bioethics. But what principles can the court rely upon to fashion reliable responses to the challenge of a difficult bioethics issues? Science seems to have progressed far more quickly than philosophy and law can catch up at the moment, and at the same time, it has not progressed so far that some troubling questions regarding morality and ethics can be said to be settled. So, until clearer and more universal solutions can be found, we may have to be satisfied with interim positions. Some, like Dworkin, think that judges will have to resort to the political morality of the source country whenever they encounter a hard case. Legal positivists tend to deny a necessary connection between law and morals. Implicit in both these two approaches is the concession that no answers have yet been found to the questions concerning the objectivity of law and morals. Given the diversity of values and views in bioethics, the most appropriate and efficacious precept may be the one known in various cultures and under different names (such as "the Golden Rule" and "the categorical imperative"): to "act only in accordance with that maxim which you can at the same time will that it become a universal law".[20] Unless we are clear as to what we mean when we talk about justice, these precepts will probably have greater value than the drowsy beat of the sound of "justice".

26 We have seen how disagreements over what is good and moral lead to the question of how a moral agent's position can be objectively verified, and the importance of the role of language in the determination of truth and meaning. We have also seen the parallel problem that courts have in respect of the determinacy of law and its connections with moral issues, and also how a judge expresses his views in the form of the court's decisions. All these aspects of truth finding are connected, and the enquiries they engender spread to fill the wider frame so that we can begin to appreciate what it is that we need to talk about when we talk about the role of the court in bioethics. When litigants appear before the court they each seek justice, but usually only the successful party will think that justice had in fact been done. The other parties are likely to disagree. The word "justice" is often sounded vainly in jingoistic refrain, but people who respect it and think it a worthy instrument for getting things right and righting wrongs will likely be slow to make claims in its name. Let the protagonists, clashing over bioethical issues seek justice, but let the court seek wisdom.

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20 Immanuel Kant, *Groundwork of the Metaphysics of Morals* (Mary Gregor ed) (Cambridge University Press, 1998) at p 31.

## Suggested Further Reading

*Essays on Moral Realism* (Geoffrey Sayre-McCord ed) (Cornell University Press, 1988)

*John Stuart Mill and Jeremy Bentham: Utilitarianism and Other Essays* (Alan Ryan ed) (Penguin. 1987)

*Mill's On Liberty* (C L Ten ed) (Cambridge University Press, 2008)

*Moral Relativism* (Paul Moser & Thomas Carson eds) (Oxford University Press, 2001)

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Barry Stroud, *Understanding Human Knowledge* (Oxford University Press, 2000)

Adrian Vermeule, *Judging Under Uncertainty* (Harvard University Press, 2006)