

Defending the Public Interest: The Role of the Professions

BRIAN TRAINOR

T WAS not so long ago that the welfare of the poor was seen as a special province of the professions. In recent decades, however, the role of the professions in contributing to the welfare of the poor seems to have declined somewhat and is now widely regarded by professionals more as a matter of conscience or private choice than as a requirement of professional life as such. I wish to suggest that this decline is linked to, and reinforced by, a parallel decline in recent decades of the role of the professions as ‘bearers of the common good’ into everyday life. The professions were once expected to be ‘reconcilers of public values’ in key realms of social life, but the fact that they are no longer expected to perform this role has produced undesirable public consequences, especially in the lives of the poor. To show the kind of desirable role that the legal profession once played, I will look at the case of divorce. To show the crucial, beneficial role that the medical profession currently performs—and that it should continue to perform in the public interest—I will look at the case of voluntary euthanasia.

In 1972, Max Rheinstein (*Marriage Stability, Divorce and the Law*), one of the most admired and influential writers on marriage and divorce laws, surprised his colleagues by speaking favourably of the kind of divorce laws that operated in most Western jurisdictions in the 1950s and 1960s. Aware that many at the time were concerned about the discrepancy between ‘law on the books’ and ‘law in action’, he justified this discrepancy by pointing out that

there was a kind of ‘democratic compromise’ in place; conservatives at the time, he pointed out, were reassured by the strictness of the divorce laws on the books, whilst liberals were pleased at the ease with which divorce could be secured in practice. The great advantage of this ‘democratic compromise’, he believed, was

***The professions
were once expected
to be ‘reconcilers of
public values’
in key realms of
social life ...***

that it had ‘preserved the peace in respect of an explosive issue’. (*Ibid.*, page 245)

What the law, and the legal practice of lawyers and judges, was able to achieve at the time was a balance, and an effective practical reconciliation, between conflicting public values and concerns, between more specifically (i) the ‘liberal value’ of freedom for spouses to exit from intolerable marriages and (ii) the ‘conservative value’ of stable family life and the well-being of children. The law at that time, and the way in which it was ‘professionally practiced’, served to enfold, so to speak, the ongoing tension between these values within the wider public interest; in so doing, the legal profession

managed to assign each value its proper place and function in public life. Lawyers and judges, then, were the ‘frontline forces’ who ensured this practical reconciliation of values; lawyers represented the ‘relevance claim’ of one of these values (family stability or individual liberty) in the interests of their divorce-seeking or divorce-resisting clients, and judges made difficult judgment calls concerning which public value should be uppermost in the judicial mind in each particular divorce case. Thus judges at the time, through a careful examination of the details of each divorce case, served as ‘reconcilers of public values’. What the law and professional practice did *not* do at that time was to allow one major public value to permanently triumph *at the expense* of the other.

The abandonment of the ‘democratic compromise’, with the introduction of no-fault divorce, has had profoundly undesirable consequences—the high divorce rate, the poverty experienced by divorced women and their children (part of the ‘feminization of poverty’), the anguish of divorced men deprived of effective access to their children and the sadness of children themselves, who want and need, more than anything else, to be reared by both of their divorcing parents. The rich, of course, can be cushioned to some extent against the adverse consequences of divorce, or at least its economic if not its emotional consequences. In the case of the poor and vulnerable, there is very little protection against the full economic impact of divorce—the need to support two households, severely reduced income,

children having to leave the family home to settle in cheaper accommodation. All of this adds to the pain and trauma of the whole divorce experience for the less well-off.

Could, one wonders, we (our families, our communities) have been spared a lot of this pain if judges had continued to be professional arbitrators in complex divorce cases, as they were in most Western jurisdictions in the 1950s and 1960s? At that time, of course, divorce was not a right, but was only permitted on certain specified grounds, such as adultery. As soon as it was made a *right* through the introduction of no-fault divorce laws, however, the conservative concern for marriage and family stability virtually ceased to have any expression in law and, thereafter, judges largely ceased to be 'representatives of the public interest' in difficult individual divorce cases. Likewise, as soon as divorce became a right, it was no longer necessary to publicly justify each divorce; judges could no longer use their powers of discretion to act as 'frontline reconcilers of important public values' (individual freedom on the one hand versus family/community stability on the other) but were reduced to the role of merely administering the law. Since those seeking divorce no longer had to provide any sort of justification for the dissolution of their marriage, the courts in turn were no longer required to adjudicate on *claims* to be allowed to divorce, but were required instead to merely supervise the process whereby the right to divorce (the 'absolutised' value of freedom to divorce) could be routinely administered.

Just as the 'right to divorce' effectively eliminated the vitally important role played by the legal profession in the public interest, so too the 'right to die' advocated by supporters of voluntary euthanasia would have the same kind of effect on the health professions. There is an important and revealing parallel to be drawn between the situation facing the legal profession in the early

1970s, just prior to the widespread introduction of no-fault divorce and the situation currently facing the medical profession with regard to euthanasia. Once again, we find a strong tension in the public mind between the 'relevance claims' of two major public values, on this occasion between the value of preserving human life and the value of relieving human suffering. We also find that this tension is reflected in the minds of frontline health professionals (those dealing with dying patients) in a manner reminiscent of the way in which, as we have seen, judges and lawyers once professionally resolved

What the law and professional practice did not do was to allow one major public value to permanently triumph at the expense of the other

a similarly serious tension in the public mind over divorce.

Once again, two key values are at stake; they need to be held in balance (Rheinstein's 'democratic compromise') by medical practitioners and they each need to be acted upon as and when deemed to be professionally appropriate. Once again, too, the consequences are liable to be disastrous if one value triumphs permanently at the expense of the other or if, through the introduction of legal voluntary euthanasia, one value is given *sole* legal expression and force in a manner that silences the 'voice' of the other.

At this point, readers sympathetic towards voluntary euthanasia may object that, in the case of 'mercy killing', the voice of the principle 'Life ought to be preserved; intentional killing is wrong' should be silenced, for in this realm it has no proper place or application; surely, it is claimed, an act of mercy killing committed by a doctor on a dying patient is simply too different from a callous act of murder (of a healthy person) to be included in the same class of acts (intentional acts to kill or murder). However, it is important to understand here precisely what is being proposed and what, as a result, is at stake. There is, of course, a very important difference between these two acts, but if it is important not to lose sight of the manner in which they are different, it is equally important to properly acknowledge the respect in which they are the same, for they are *wholly identical* as acts of intentional killing. The element of identity is not dissolved by the difference; indeed, the two acts are different (that is, different from one another) *as* acts of intentional killing. The danger in saying that 'mercy killing is not really killing' is that, especially if we say it often enough, we may remove or severely diminish the aura of illegality and criminality that *should* attend every single act of intentional killing.

It could indeed be argued that in Holland it has virtually disappeared altogether with the full legalization of euthanasia (April 2001) and the institution of what would appear to be a 'right to die'. Before April 2001, it could at least be said that there was a weak residual form of the democratic compromise operating in Holland. Under parliamentary guidelines established in 1993, voluntary euthanasia, though still technically illegal, was nevertheless deemed to be permissible only under certain specified conditions; it was not a patient's 'right', for each 'euthanasia claim' had to be assessed on its merits by the medical profession, just as 'divorce claims' used to

be considered on their merits by the legal profession. Though under the new legislation strict conditions apply, at least in principle, still an important threshold has nevertheless been crossed in Holland with the full legalization of voluntary euthanasia, for the law is widely seen as conferring a *right* to die on Dutch citizens which virtually eliminates the mediating role that *should* be played by the Dutch medical profession.

Just as, with the introduction of no-fault divorce, the legal profession largely ceased to operate as arbiters of the claims of different values in particular cases, and thereafter became mere administrators of the law or executors of the client's right to divorce, so too with the full legalization of voluntary euthanasia, medical practitioners would likewise cease to be public, professional arbiters of the competing claims of 'rival' values in particular cases, and become mere instruments or 'professional administrators' of the patient's right to die. Likewise, just as the legalization of no-fault divorce meant that the value of stable and secure family life disappeared as a legally acknowledged and effective *public* value, one that was universally acknowledged and reinforced in law, so too the legalization of voluntary euthanasia would mean that the value of preserving all human life and acknowledging its dignity until the moment of natural death would cease to be a legally acknowledged and effective public value, universally shared by all members of the political community and enshrined in law. In both cases, key public values would be reduced to *private* values entertained by particular individuals and become a matter of 'private choice' towards which the law is indifferent.

At the present time, in most Western countries, it is health professionals who are ultimately vested with the responsibility for deciding the quantity of a pain-relieving drug to be administered to a dying patient. In many cases, they decide to

administer a quantity which, whilst relieving the patients suffering, may have the effect (hence the principle of 'double effect') of ending the patient's life. In each such case, medical practitioners will attempt to weigh in the balance the importance of preserving human life, the patient's chances of recovery, the need to allow a 'natural' death with dignity, the distress of the patient and of the patient's relatives and friends, and many other factors. The responsibility is an awesome one and, for that precise reason, it should

**In both cases,
key public values
would be reduced
to private values
entertained by
particular
individuals and
become a matter
of 'private choice'**

continue to be assumed by those professionally equipped to shoulder the burden and professionally 'positioned' (that is, having a degree of emotional distance and professional objectivity) in relation to such life-and-death situations.

The consequences of relieving health professionals of this responsibility by legalizing voluntary euthanasia are entirely obvious and highly undesirable. As in the case of divorce, everyone would lose, but the poor would lose most. Everyone would lose in so far as every dying elderly person capable of doing so

would have to decide not just whether or not their own pain had become too much to bear, but whether or not the emotional, physical and financial burden was becoming too much for relatives and friends to bear. In cases where the dying elderly are not in a position to give formal consent to their own death, those legally vested with the right to make this decision on their behalf can never be sure that they acted out of the right motives. The legalization of euthanasia puts almost 'humanly impossible' demands on the dying and their relatives. However, once again, it is the poor who suffer most. In a jurisdiction where voluntary euthanasia is legalized, dying patients in general may feel personally responsible for the financial burden being placed on relatives and friends but, obviously, this will be a matter of greater concern for the poor than for the rich. Where voluntary euthanasia is illegal, the timing and extent of medical intervention in the lives of dying patients is more a matter of 'professional judgment' than of 'personal choice' and this means that the health professions are able to protect the poor and vulnerable from pressures of this kind.

The professions, then, have an important role to play in ensuring that one important public value does not triumph at the expense of another, that the tensions generated by diverse values and beliefs do not degenerate into disruptive divisions, and that all of us, but especially the poor, are protected from the inhumane consequences of legally 'absolutised' rights (the right to divorce and the right to die) and legally 'disempowered' public values (a deeply felt concern for family well being and the preservation of human life).

Dr Brian Trainor was a lecturer in Humanities and Social Sciences at the University of South Australia. He is author of the book Gender, the Marriage Contract and the State (World Heritage Press, 1998).

I P A