

Tribute to Professor Karen Rothenberg

Jack Schwartz

Follow this and additional works at: <https://digitalcommons.law.umaryland.edu/jhclp>

Recommended Citation

Jack Schwartz, *Tribute to Professor Karen Rothenberg*, 22 J. Health Care L. & Pol'y 173 (2020).
Available at: <https://digitalcommons.law.umaryland.edu/jhclp/vol22/iss2/8>

This Tribute is brought to you for free and open access by the Academic Journals at DigitalCommons@UM Carey Law. It has been accepted for inclusion in Journal of Health Care Law and Policy by an authorized editor of DigitalCommons@UM Carey Law. For more information, please contact smccarty@law.umaryland.edu.

TRIBUTE TO PROFESSOR KAREN ROTHENBERG

JACK SCHWARTZ, J.D.*

If the life of the law is experience, as Holmes wrote¹, what is a life *in* the law? To be exemplary, a life must consist not of experience in itself but rather experience catalyzed by learning, vision, and practical wisdom. This is Karen Rothenberg's life in the law, embodying the standard of excellence. It's been my good fortune to have participated in some key parts of her astonishingly broad range of accomplishments.

I'll begin with Karen's vision about how to reshape the law on end-of-life medical care in Maryland. The basic story is that, prior to 1993, Maryland law was an ungainly combination of common law informed consent doctrine, living will legislation, a family "substituted consent" statute of uncertain scope, a general durable power of attorney statute, and the not-quite-law of a couple of Attorney General opinions. Especially after the Supreme Court's *Cruzan* decision² and the Maryland Court of Appeals' *Mack* decision,³ a sense developed among key actors – judges, lawyers, physicians and other clinicians, advocates for the elderly and for people with disabilities – that a reform of the state's health care decision-making law was badly needed. The concept was to produce a comprehensive statute that would address both planning documents and in-the-moment decision making for the seriously ill.

Some would-be reformers – me, for instance – were very cautious. We wanted to fix what we could but were worried that seeking too much change too soon, against what was sure to be strong opposition, would not survive the legislative process, leaving us stuck with the unsatisfactory status quo. This cautious approach, while defensible given the ethical debates of the time and the uncertain politics of the issue in the General Assembly, led to a proposal with only narrow changes on especially contested issues like the scope of family decision-making authority when the patient lacked capacity and hadn't prepared an advance directive. But Karen, with her brilliant partner Diane Hoffmann, had

©2019 Jack Schwartz, J.D.

* Former Chief Counsel for Opinions and Advice and Director of Health Policy Development, Office of the Maryland Attorney General.

1. Oliver Wendell Holmes, Jr., *The Common Law* 1 (1881) ("The life of the law has not been logic: it has been experience.").

2. *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261 (1990).

3. *Mack v. Mack*, 329 Md. 188, 618 A.2d 744 (1993).

the vision to see that a broad-based, activist, and tenacious coalition could achieve a more sweeping reform.

Two bills emerged in the 1993 legislative session. One bill, largely drafted by circumspect insiders, reflected wariness about expanding advance directives and surrogate decision making. The other was bolder in its policy objectives and more capacious in its drafting. It was the work of a coalition, orchestrated by Karen and Diane, that benefited from its energy and diversity – important advocacy organizations like the Alzheimer’s Association and AARP, extraordinary Legal Aid lawyers, clinicians, legal and ethical scholars, and individuals with emotional stories to tell about their ill or injured loved ones. Karen had a better reading of the legislative and public mood at a time when end-of-life policy making was in flux, and the coalition bill became the template for the ultimate compromise, which brought all of us together to push for enactment of what became the Maryland Health Care Decisions Act of 1993. She also foresaw how once-controversial provisions, like allowing advance directives and surrogate decision making to address treatment choices during the downward slope of serious illnesses even before the time of active dying, would become an accepted part of the way medicine is practiced in Maryland. Consequently, for a quarter-century the Health Care Decisions Act has been the legal armature for patient-centered care in the state and has influenced policy makers elsewhere who seek to make the law an ally of those providing excellent care near the end of life.

The foundation of Karen’s health policy advocacy, as of her teaching, has always been her scholarship. Sometimes the audience for her scholarship is not peers in the academy or law school students but appellate judges. Here my favorite example is the stern lecture Karen and Diane delivered to the Maryland Court of Appeals after its egregious decision in *Grimes v. Kennedy Krieger*,⁴ a case involving alleged negligence in a research project to compare methods of ameliorating lead exposure in inner-city housing. Venturing far beyond the needs of the case or the court’s institutional competence, the court majority provided an account of the research enterprise and the duty of researchers that was tendentious, inexact, and troubling. Karen and Diane produced a “deconstruction” of the opinion that laid bare its frailty and offered an alternative understanding of a researcher’s duty that would both reduce the threat to public health research caused by the court’s lax reasoning and protect research participants.⁵ (This was far from the only sin against judicial modesty in the *Grimes* opinion, but Karen and Diane would have had to write a novella to deal with all of them.)

4. 366 Md. 29, 782 A.2d 807 (2001).

5. Diane E. Hoffmann and Karen H. Rothenberg, *Whose Duty Is It Anyway?: The Kennedy Krieger Opinion and Its Implications for Public Health Research*, 6 J. Health Care L. & Pol’y 109 (2002).

Practical wisdom: a good example is Karen's approach to Maryland's funding of stem cell research. In 2006, the Maryland General Assembly, responding to stringent limitations on federal grants for embryonic stem cell research, created a fund to support what was then an infant biotechnology. Karen was first a member and then chair of the commission to superintend the distribution of the funds.

Maryland wasn't the first state to fund stem cell research. Two years earlier, the California Institute for Regenerative Medicine (CIRM) was created. From its inception, CIRM supporters made lofty promises about cures. When the slow pace of basic and translational research did not yield the predicted breakthroughs, CIRM was dogged by controversy. Karen had the discernment to know that the best path forward for the Maryland effort would be, by contrast, quiet and steadfast professionalism – a scientifically sound grant review process, free of conflicts of interest and political agendas, with criteria to encourage young scientists and not just already established figures. No hyperbole, no culture war rhetoric. Working with other members of the Maryland Stem Cell Research Commission and the staff of the Maryland Technology Development Corporation, Karen assured that Maryland would become a leader in supporting this leading-edge research domain. Although funding has waned since the early years, the path Karen set has resulted in a stem-cell research community among the best in the country.

These three aspects of health law and policy are only a few fragments of Karen's career. Others can better speak of her law school leadership; the range of her scholarship, especially on genetics and women's health; the creativity of her publicly oriented pedagogy, including her recent foray into playwriting; and her building of bridges to other institutions, notably the National Institutes of Health and the John Hopkins Berman Institute of Bioethics. But these examples, chosen from decades of collaboration, illuminate the qualities that have made her a preeminent figure in Maryland and nationally – an exemplar of life in the law to the fullest.