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# George P. Smith, II's Law and Bioethics - Intersections along the Mortal Ciol

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# Book Review: George P. Smith, II's *Law and Bioethics—Intersections along the Mortal Coil*

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## I

Professor George P. Smith is an alumnus of Indiana University. He has taught medical law and ethics in universities in the United States, Britain, Australia, and many other countries. His upbringing in Indiana has kept his feet firmly planted on the ground. In a field of discourse where it is easy to get carried away with theory and speculation, Professor Smith has based his analysis, ultimately, on the wisdom of ordinary folks.

This is not to say that he is uninterested in, or unaware of, the philosophical, theological, and theoretical writings relevant to his chosen topics. This new book is replete with evidence of his deep research into the writings of great scholars in the fields of law, economics, political science, philosophy, and theology. However, he is not content with purely formalistic and verbal analysis of the quandaries presented to humanity by advances in biological knowledge and connected technologies. In his chosen field, above all, there are human beings who are disabled, disadvantaged, sick, and dying at the end of the discourse. For Professor Smith, this basic reality demands, ultimately, a principled but compassionate stance on the acute problems with which he has been struggling for over nearly four decades of his professional life. This book of essays is the latest in a series of impressive monographs, articles, and other contributions that explore the puzzling problems of medical law and its insistent stimulus by "The New Biology."

The book is divided into eight chapters. Gradually, the chapters take the reader through a journey of the mind that explores

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contemporary bioethical challenges. The book searches for stable and reliable criteria to tackle and answer these challenges. It embraces as highly relevant and helpful the universal principles of human rights that have emerged since Eleanor Roosevelt's *Universal Declaration of Human Rights* (UDHR).[1] It then concludes with a number of specific chapters on particular problems. The last of these chapters focuses on aspects of death and dying and explores the ultimate puzzle of human consciousness and existence: the end. It does this from the standpoint of the added dilemmas that are presented to us by modern life-saving technology.

For those who are searching for simple, cut-and-dried solutions to the problems of medical law and bioethics, this book will be a disappointment. It does not gloss over the problems, uncertainties, and legitimate differences that exist in this area of discourse. Professor Smith's considerable mind, now enriched with vast experience in his field, disdains such simplicities as unworthy of the human moral sense and incompatible with the complexities of contemporary biotechnology. In this respect, early grounding in the highly practical attitudes and approaches of the common law comes to his aid.

In the common law, there is never, ultimately, a *lacuna* in the law. If there is a gap, unfilled by the norms of a national or subnational constitution; untouched by federal, state, or other legislation; and upon which the common law is silent, judges have the authority and duty to fill the gap. They do so by applying logic and analogy to any relevant legal principles. They use their common sense and their perception of justice to impose a legal solution that best fits a detailed understanding of the facts. It is because the facts relevant to decisions on medical law are constantly changing, in terms of human knowledge in basic biology and human acquaintance with new technology, that medical law and bioethics are so disputed and contested. Different observers simply see different facts or regard different principles as relevant to those facts. Professor Smith has written his latest book to untangle some of the ensuing debates.

## II

The first chapter is an introduction and overview. It begins dramatically enough with what the author calls "synthetic biology." Synthetic biology is the development of new life forms by human intervention. One particularly tantalizing development is a "synthetic

1. *The Universal Declaration of Human Rights*, UNITED NATIONS, http://www.un.org/en/documents/udhr/ (last visited Mar. 17, 2013).

cell" controlled entirely by a bacterial genome. Dr. J. Craig Venter boldly claims this is "the first self-replicating species we've had on the planet whose parent is a computer."[2] With inventions at this level of originality, it is little wonder that new and completely unexplored problems are presenting for bioethicists and lawmakers. In order to provide appropriate bearings, Professor Smith invokes the basic norms that were included in the United Nations Educational, Scientific and Cultural Organization (UNESCO) *Universal Declaration on Bioethics and Human Rights* (Bioethics Declaration) (2005),[3] the UNESCO *International Declaration on Human Genetic Data* (2003),[4] and the UNESCO *Universal Declaration on the Human Genome and Human Rights* (1998).[5]

As Professor Smith points out, these instruments are not binding international treaties. In that sense, they do not afford a strictly legal foundation for analysis. They are more analogous to the *Universal Declaration of Human Rights,* which was nonetheless extremely influential in its appeal to the moral sensibilities of humanity. V.I. Lenin, once general-secretary of the Communist Party of the Soviet Union, declared that the person who writes the minutes of an organization ends up controlling it. To some extent, the same can be said of the UNESCO Declarations. By the power of collective human wisdom encapsulated in these instruments (and in default of other equivalent and competing statements of universal status), these documents have begun to chart the way ahead, at least until something better is devised. An important contribution of this book is the way Professor Smith weaves the themes of the UNESCO Declarations into the larger dialogue about global human rights and the way he then invokes the principles in these instruments to suggest solutions to some of the puzzling ethical and legal dilemmas the new technology presents.

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2. Nicholas Wade, *Researchers Say They Created a 'Synthetic Cell'*, N.Y. TIMES, May 20, 2010, *available at* http://www.nytimes.com/2010/05/21/science/21cell.html.

3. *Universal Declaration on Bioethics and Human Rights*, UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION: SOCIAL AND HUMAN SCIENCES, http://www.unesco.org/new/en/social-and-human-sciences/themes/bioethics/bioethics-and-human-rights/ (last visited Mar. 17, 2013).

4. *International Declaration on Human Genetic Data*, UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION: SOCIAL AND HUMAN SCIENCES, http://www.unesco.org/new/en/social-and-human-sciences/themes/bioethics/human-genetic-data/ (last visited Mar. 17, 2013).

5. *Universal Declaration on the Human Genome and Human Rights*, UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION: SOCIAL AND HUMAN SCIENCES, http://www.unesco.org/new/en/social-and-human-sciences/themes/bioethics/human-genome-and-human-rights/ (last visited Mar. 17, 2013).

Professor Smith asserts, as is self-evident, that human actors have to realize that ethical, socio-legal, economic, and medical conflicts are now being presented to national governments and international organizations in ever increasing number. How, in these circumstances, can "collective decisions" be made that represent a viable foundation for rational and democratically approved law?

Professor Smith analyzes differing approaches to the resolution of these issues. They range from the invocation of religious principles, through concepts of distributive justice to the invocation, and use of the broad concepts of universal human rights. Towards the close of the introductory chapter, he identifies the fundamental purpose of his book:

> The central question presented in this book is, thus: how do bioethics, public health, and human rights law unite to provide a framework for rational decision-making at the legislative, judicial, executive, administrative, and clinical points of health care service and—thus—thereby seek to validate and safeguard the claim that all citizens are to be respected as autonomous individuals, be treated with beneficence and without non-malfeasance or undue risk or with harm, and have a fair opportunity to receive the benefits of medical resource allocations?[6]

I take his passage to be concerned with promoting beneficence, avoiding malfeasance, and avoiding undue risk or harm to the individual and the community. The author makes it clear that the search for ethical solutions is designed to afford "quality assurance" in the delivery of health care resources. The search looks at individual cases, but it extrapolates from the individual cases to how they operate generally. The objective, as Professor Smith puts it, is to afford "an appreciation of and sensitivity to the complexity of the whole process of informed decision-making, as well as a framework for reaching principled yet practical, rational judgments and for determining health policies."[7]

It is in the search for "principled judgments" that Professor Smith reveals himself as a respected theoretician and conceptualist. But, it is in the search for "practical, rational judgments" that he manifests both his early "Hoosier" origins and his workable legal objectives.[8] Bioethics is no doubt a worthy profession, but a bioethicist who is concerned with

6. GEORGE P. SMITH, II, LAW AND BIOETHICS: INTERSECTIONS ALONG THE MORTAL COIL 10 (2012).

7. *Id.* at 11.

8. *Id.*

the manifestation of broad principles in the form of *law* must have a practical and rational approach. Nothing else is likely to survive the scrutiny of judges, politicians, and administrators who operate in the real world. Unless this approach is adopted, it is likely that the real world operations will see the problems as too difficult and put the problems aside while other, easier questions are addressed in the limited available attention span of the community and lawmaking representatives.

## III

The second chapter addresses the setting of acceptable parameters for bioethical challenges. This chapter too begins with the story of a dramatic scientific development. In November 2007, a group of Oregon scientists announced that they had not only created, but also harvested, stem cells from fully-formed monkey embryos that were created from a skin cell of a single monkey. This demonstrated that primates were biologically capable of being cloned.

Scientists immediately expressed concern as to whether the biological technique could be applied to human beings. Cloning of the human species has been a controversial topic in ethical and legal discourse over the past twenty years, accompanying the scientific advances that appeared to make the technique feasible in humans. Put broadly, most (but by no means all) ethical studies have been prepared to countenance the advance of cloning techniques for *therapeutic* (e.g. drug development and treatment) purposes but not for *reproductive* (e.g. entire human copy) objectives.

Bearing out this generality, Professor Smith describes the controversies that have emerged in the United States concerning stem cell research during the successive administrations of Presidents George W. Bush and Barack Obama. The latter condoned scientific research for therapeutic purposes. The Obama Administration approved new lines of human embryonic stem cells for research and experimentation with seventy-six stem cell lines presently approved and more planned for later approval. However, the liberalization by the Obama Administration ran into practical and ethical controversies because millions of dollars had been spent on the original twenty-one stem cell lines authorized for use by President George W. Bush. To many outsiders, this appeared to be an unstable posture. Either stem cell use was unethical of itself and should be prohibited altogether, or stems cells should be seen as simply another pluripotent human tissue available for all the scientific experimentation and speculation.

Professor Smith describes the controversies in U.S. courts concerning the use of stem cells, having regard to the state of congressional legislation. Ultimately, he turns from this unsatisfying speculation to an analysis of the generic problem at hand by referring to what he calls the 'three foundational principles' of bioethics: autonomy (self-determination), beneficence, and justice.

Against this background, Professor Smith poses the basic question: how can a participatory democracy resolve such issues? He predicts that bioethics will continue to evolve and will defy any permanent resolution of its dilemmas. Issues surrounding abortion, the use of assisted reproductive technology, and the beginning and end of life will "continue to change."[9] Reconciling the form of lawmaking in a complex modern democracy, with the countless puzzling dilemmas presented by science and technology, is a challenge. And, according to Smith, the major challenge of contemporary bioethics is "to express complex arguments in a way comprehensible to a broad public."[10]

Of course, this is easier said than done. It requires a "new thoughtful and questioning attitude."[11] At least in a democratic community, scientific discovery cannot be allowed a completely free rein. Still, unless bioethicists can engage the public and explain their dilemmas, the problems arising will be "just too painful, technical, complicated, sensitive and controversial for our institutions of government."[12] This instrumental quandary is one that this current reviewer has likewise examined over the past thirty years. Adapting the willingness and capacity of our lawmaking institutions to address and resolve the new dilemmas is a painful challenge. It is one by no means certain of success. However, the dangers inherent in the failure of democratic lawmaking to adapt to the complexities of the current age are now starkly revealed. Either our governmental mechanisms will capitulate and thereby surrender to whatever the clever scientists like Craig Venter and his colleagues decide to undertake. Or under populist pressures of noisy, opinionated groups who want to "ban" experiments (usually in the name of religious beliefs), an impasse will be reached that involves serious opportunity costs for potentially beneficial, even lifesaving, experiments. These experiments will then simply move off shore to laboratories and countries, operating under different cultures and laws, which do not see any relevant moral impediment but only the relief of suffering and substantial profits.

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9. *Id.* at 25.
10. *Id.* at 26.
11. *Id.* at 28.
12. *Id.*

## IV

This conclusion presents a timely jumping-off point to the third chapter dealing with law, religion, and medical science. This chapter begins with a reminder of the many circumstances, old and new, where those of particular religious beliefs have invoked the courts and other lawmakers in the hope of securing legal support to impose their beliefs on the entire community.

Professor Smith instances cases involving the placement of the Ten Commandments of the Hebrew Bible in public buildings in the United States and the efforts of President Jacques Chirac in France to ban overt religious symbols from all public institutions. Somewhere between the strongly religious and strictly secular attitudes in society lies the space where most modern democracies frame their law. In countries like the United States, Britain, and Australia, there is no getting away from the cultural power of Judeo-Christian traditions and morality. By the same token, there is often a reaction, sometimes sustained by constitutional texts and doctrine, against simplistic attempts to convert disputable religious convictions into positive law. Nowhere is this more true than in the puzzling new dilemmas of bioethics.

Professor Smith attempts to define a middle ground with an aphorism: "Without religion law degenerates into little more than a mechanical legalism; and religion without law loses its social effectiveness." Nevertheless, perfectly law-abiding states have survived by adopting, and enforcing, strong principles of secularism. The ordinary experience of life for most teaches us that many of the most moral people that we know (using that word in a general sense) are secular humanists. The recent experiences of humanity and displays of fanatical religious intolerance risk giving religious morality a bad name.

Professor Smith grapples in the U.S. context, with a paradox that "the majority of the citizens believe themselves obligated by a prior divine morality despite the fact that most of them are unable to argue for it theoretically."[13] He examines the notion of humanism and the Darwinian thesis of evolution and its impact on creationism. In an extended section, he addresses classifications and caveats issued in successive encyclicals by Popes John Paul II and Benedict XVI, Pope Emeritus.

There is one matter of delicacy in this section of the book that I cannot forebear mentioning. It is Professor Smith's description of the Popes as "Holy Father." I suspect that this description derives from the fact that the chapter first saw the light of day as a contribution to an

13. *Id.* at 45.

ethical discourse in a Roman Catholic institution. Professor Smith's day job, after all, is as a long-term scholar and teacher at the Columbus School of Law of the Catholic University of America in Washington DC. Although he is not himself a Roman Catholic, Professor Smith's native politeness might make it occasionally prudent to assign the deferential religious title to the Pope as reproduced in this chapter. His university is not only Catholic, but also pontifical in its foundational charter.

Nevertheless, in a text which is otherwise scrupulously impartial and universal in outlook (and ultimately embraces principles adopted by the relevant secular international agency of the United Nations, UNESCO), references to the Pope as "Holy Father" grate, at least on this reviewer. Holiness is an accepted honorific. But "Holy Father," repeatedly used, is a bow too far. Because of the large number of adherents to the Roman Catholic denomination of Christianity, the expressed views on morality, as relevant to bioethics, of that church's leaders are clearly relevant and appropriate for academic study and examination in the context of this book. However, it might have been better if it had been undertaken without words of religious deference that hint at the assignment at a semidivine status to the Pope's opinions. Test it this way: how would we feel if similar words of deference were applied to the Mufti of Cairo? Or to a venerable religious figure of Hinduism?

Papal encyclicals are famous for their obscurity.[14] The most notorious instances can be found in those by Pope Pius XII during the Second World War, which did not explicitly, and in plain terms, condemn by name the genocide of the Jews and other minorities. Professor Smith describes the endeavours of Pope John Paul II to "chart a middle position between the creationists and the evolutionists . . . foster[ing] not only dialogue but openness to truth."[15] However, Pope Benedict XVI is also recorded as expressing his unhappiness with evolutionary science, which he claimed seeks to discount "creative reason . . . which has created everything, without a form of supernatural guidance."[16] The most that can be allowed, according to the Pope Emeritus's approach, is "the possibility that the creator used evolution as a tool."[17] Many readers, however, will continue to question why it is necessary or self-evident to interpose a "creator" at all. Pity the poor

14. *See* Colin Tatz, *Naughts and Crosses: The Silence of the Churches in the Holocaust Years*, *in* GENOCIDE PERSPECTIVES IV: ESSAYS ON HOLOCAUST AND GENOCIDE 166, 170, 177-80 (Colin Tatz ed., 2012), *available at* http://epress.lib.uts.edu.au/scholarly-works/bitstream/handle/2100/1349/GenocidePerspectivesIV_Tatz.pdf?sequence=1.

15. SMITH, *supra* note 6, at 47.

16. *Id.*

17. *Id.*

author of a book on contemporary bioethics who must address all relevant audiences at once.

Evidence of the power and influence in the United States of the contemporary movement that embraces intelligent design appears in an extended discussion in the book of the role of an intelligent agent (not necessarily using the word God) which has guided the history of the Earth and its surrounding universe. Creationists believe that the Bible is true, inerrant, and infallible, affording both a necessary and sufficient set of rules by which to resolve contemporary bioethical problems. This section of Professor Smith's analysis takes the reader through the many court decisions in which religious (creationist) groups have battled with educationalists and secularists (evolutionists) over the teaching of evolution and creation in United States public schools. Whilst these cases and their resolution are obviously important for the mindset of a population that has the responsibility of making bioethical decisions of profound significance for the entire world, it is probably fair to say that no such debate or court case could likely arise in any other western country. Doubtless, similar issues might have to be decided by the courts in Islamic, Jewish, and other communities. Still, this is an exotic insight into Americana that Professor Smith recounts in an admirably dry, restrained, and factual way.

In the end, as he concludes, it is organized religion that is mainly presented with serious challenges by the new biology. At least some of the concerns of religion involve explaining the problem of suffering and supporting the alleviation and prevention of suffering. This is comparatively easy for medical scientists and physicians, as Professor Smith points out, because their mission is generally to attempt to cure or relieve pain. To this extent, the purposes of religion and medical science are substantially the same: to minimize or alleviate suffering. However, where biotechnology presents the possibility of human cloning, religion becomes anxious that man is presuming upon the sole prerogative of God as the creator of all living things. Still, where cloning, at least of the therapeutic variety, might reduce pain and suffering and open up the potential of hugely beneficial treatments and cures, religion faces a challenge. It does not always resolve that challenge quickly, easily, or persuasively.

The same can be said of condoms and HIV. How easy it would be for the churches to draw a distinction between the use of condoms solely to permit promiscuous sexual activity outside marriage or to prevent the risk of passing HIV to others or oneself? In this purpose might be found a simple solution to an acute moral dilemma. Yet by embracing a moral absolute and forbidding condom use altogether in the midst of the AIDS pandemic, religions are made to appear insensitive to human problems,

disjoined from reality, and indifferent to the huge toll of death and suffering. Professor Smith, once he passed beyond his polite deference to the "Holy Father," might have made this point a little more emphatically and critically. It is the absolutism of organized religion (rather than of the evolutionists) that has partly played religious institutions out of a leading role in contemporary technological bioethics. This is the reason why the universal principles of human rights, as elaborated by the recent UNESCO Declarations, have now entered the field to fill the gap.

## V

Thus begins the fourth chapter of Professor Smith's book. It is concerned with "Human Rights, Health Care and Bioethics." This is a natural step in his argument. From the limited and sometimes negative role of religion in contemporary bioethics, we move to a new plain comprised of the modern manifestations of natural law theories. This is a level of discourse that can be traced, as Professor Smith demonstrates, to the English *Magna Carta* of 1215,[18] the English *Bill of Rights* of 1689,[19] the U.S. *Declaration of Independence* of 1776,[20] and the French *Declaration of the Rights of Man and of the Citizen* of 1789.[21] Whilst the importance of the earlier progenitors is acknowledged, the high significance of the French Declaration is properly recognized in Professor Smith's analysis. The French Declaration led eventually to the *Universal Declaration of Human Rights* (UDHR) of 1948 and to the subsequent treaties, including, most especially, the *International Covenant on Economic, Social and Cultural Rights* (1966) and the *International Covenant on Civil and Political Rights* (1966).[22]

The brilliance of Eleanor Roosevelt's UDHR can be seen in the way it embraces not just civil and political rights (the usual business of Western civil rights), but also the deeper and broader notions of economic, social, and cultural rights, including, most critically, the right of access to the best available health care. It is the elaboration of these

18. MAGNA CARTA (Eng. 1215).

19. *English Bill of Rights 1689*, THE AVALON PROJECT, YALE LAW SCHOOL, http://avalon.law.yale.edu/17th_century/england.asp (last visited Mar. 17, 2013).

20. THE DECLARATION OF INDEPENDENCE (U.S. 1776).

21. DECLARATION OF THE RIGHTS OF MAN AND OF THE CITIZEN (Fr. 1789).

22. *See The Universal Declaration of Human Rights*, *supra* note 1; *International Covenant on Economic, Social and Cultural Rights*, UNHCR, *available at* http://www.unhcr.org/refworld/docid/3ae6b36c0.html (last visited Mar. 24, 2013); *International Covenant on Civil and Political Rights*, UNHCR, *available at* http://www.unhcr.org/refworld/docid/3ae6b3aa0.html (last visited Mar. 24, 2013).

notions of that has led to problems of justiciability and attempts to detail humanity's health care concerns in the modern era.

When the United Nations needed to perform this elaboration, it turned to the UNESCO, created in 1948, as its intellectual think tank. Most of the balance of this chapter is addressed to the three UNESCO Declarations named at the opening of this review. Transparency requires this reviewer to acknowledge not only a long time association with UNESCO and its general conferences, but also participation in that body's International Bioethics Committee (IBC) and, specifically, in the drafting group established by the IBC to prepare the most significant of the named Declarations, namely the *Universal Declaration on Bioethics and Human Rights*.[23] This was adopted by the member states of UNESCO at its general conference in October 2005 without dissent.

Professor Smith describes the way this Bioethics Declaration seeks to marry the basic principles of the traditional discourse on bioethics with the emerging principles of universal human rights that have grown out of the UDHR. Correctly, he acknowledges a number of uncertainties in the language used in the Bioethics Declaration. He accepts that the so-called "right to health" in international law involves a duty of imperfect obligation.[24] As yet, it is not one that is universally and individually enforceable for obvious practical and economic reasons. It is contestable, but it is certainly making headway and beneficial circumstances have helped it along.

Professor Smith's analysis performs a service to a U.S. audience by drawing these international developments to a wider attention. Until lately, the United States has largely rejected a communitarian approach to a "right to health," being one of the few developed countries without a general, national, publicly-funded health care system. It is this fact that causes Professor Smith to conclude that "[i]n point of fact, the United States may be seen as probably violating the right to health—surely not because it spends too little on health care and public health, but rather because its resources are distributed inequitably."[25] The adjustment to this type of ethical thinking may, in the future, derive some stimulus from the international discourse on the subject, including the UNESCO Bioethics Declaration described in this book.

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23. *Universal Declaration on Bioethics and Human Rights*, *supra* note 3.

24. *See* Universal Declaration of Human Rights art. 25, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) ("Everyone has the right to . . . medical care . . ."); International Covenant on Economic, Social and Cultural Rights art. 12, Dec. 16, 1966, 993U.N.T.S. 3 (recognizing "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health").

25. SMITH, *supra* note 6, at 80.

At the very end of his analysis, Professor Smith suggests that "the self-defeating enforcement structure of the United Nations instruments derives from their reliance on a voluntary system of compliance and self-policing efforts by individual states."[26] There is a lot of truth in this conclusion. However, it may understate the gradual way in which ideas, propounded as universal, can come to influence the thinking of humanity. The UDHR, largely an American idea insisted upon at the birth of the United Nations, has come to play an extremely important role in the development of an ideology for humanity and expectations on the part of disadvantaged people everywhere. Moreover, although imperfect in content and enforcement, the United Nations' machinery does provide some supervisory and monitoring enforcement mechanisms. Thus, the United Nations Human Right Council has appointed a Special Rapporteur on the Right to Health. Presently, this is Mr. Anand Grover, a senior Indian advocate with great experience in the global response to HIV/AIDS.[27] He enjoys competence, as does the Human Rights Council, to examine member states' compliance with the universal principles to which the United Nations adheres. The United Nation's universal principles proclaim a universal principle relating to health care.

The road ahead is long and, as Professor Smith says, "uncertain." But at least the journey has begun. Measured against the millennia of neglect, progress has certainly been made. Lawyers and bioethicists now have broad statements of principle, adopted by the United Nations, to afford some guidance. The influence of these statements is likely to expand as awareness is enlarged. This is why Professor Smith's book is a useful and timely contribution to the project.

## VI

The succeeding chapters of the book may be dealt with more briefly. They tackle particular instances of bioethical and biolegal concerns. They do so with the benefit of the preceding discourse on matters of history, religion, law, economics, principle, politics, and international declarations.

Chapter five is concerned with allocating health care resources. This examination is written against the background of the British and other

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26. *Id.* at 82.

27. *See Mr. Anand Grover: Special Rapporteur on The Right of Everyone to the Enjoyment of the Highest Attainable Standard of Health*, UNITED NATIONS HUMAN RIGHTS, http://www.ohchr.org/EN/Issues/Health/Pages/SRBio.aspx (last visited Mar. 17, 2013).

health care systems and the adoption in the United States of the *Patient Protection and Affordable Care Act* and the *Health Care and Education Reconciliation Act of 2010*, introduced by the administration of President Barack Obama.[28] As Professor Smith notes, "a very public conversation is being conducted throughout the nation on this issue."[29] As a result of the re-election of President Obama for a second term in November 2012, the health care system known as *Obamacare* appears assured to be upheld by the Supreme Court and endorsed by the majority of the people in the democratic process.

Professor Smith offers useful commentaries upon issues of intergenerational justice in the matter of health care; gate-keeping issues; and the controversies of resource allocation. These large questions are necessarily addressed in all advanced countries. For most foreigners, the fact that these questions present difficult quandaries, large issues of controversy, and perplexing puzzles is not a reason for failing to provide a universal publicly-funded health care system.

Chapter six also addresses public health emergencies. Many recent occasions illustrate the successive crises that need to be tackled by any modern state recognizing, as Justice Robert H. Jackson of the United States Supreme Court once vividly put it, "[t]here is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact."[30]

The chapter looks at a range of national crises, including the responses to HIV/AIDS, responses to the disaster in the wake of Hurricane Katrina, and the challenges presented by the avian flu H5N1 virus. Self evidently, challenges of this kind summon up the vital role of modern government to protect and sustain the people in circumstances of unexpected disasters. Obviously, a triage principle must be invoked to ensure an adequate response whilst maintaining the other, and sometimes competing, activities of government. As HIV and the avian flu instances demonstrate, at the outset of public dangers of this kind there will often be a terrifying uncertainty about the nature and extent of the challenge. It is at such moments that community leadership is vital and only slightly less important than having trusted mechanisms in place and people that can make informed choices and guide democratic leaders.

The seventh chapter on autonomy, decisional capacity, and "informed consent," tackles a foundational principle of medical bioethics,

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28. 42 U.S.C. § 18000 (2010); Health Care And Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010).

29. SMITH, *supra* note 6, at 100.

30. Terminiello v. Chicago, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting).

which is also reflected in the UNESCO Bioethics Declaration. In all western countries, there is a large developed jurisprudence on the meaning and application of informed consent to medical treatment. Given the enlargement of public education and the ongoing character of technology-enhanced treatment, even the content of informed consent has changed in recent times. Whereas once it involved a single decision by a patient to surrender all subsequent choices and decisions to medical staff, today the notion usually involves ongoing dialogue that is continuously respectful of patient autonomy. The belief that "nanny knows best" is not as fashionable now in the law as once it was. Yet, involving patients and their families in difficult and painful decisions, particularly at the end of life, adds to the stress of decision-making and time taken in decision-making, which once could effectively have been left to the doctors concerned.

Finally, Professor Smith offers an eighth chapter on "An Easeful or Troubling Death." He presents these adjectives as alternatives. And as usual, he opens the chapter with a surprise. Opinion poll surveys appear to indicate that significant numbers of U.S. citizens find medically-assisted suicide to be morally acceptable and indeed part of the inherent moral right that citizens enjoy "to end their lives if they are in great pain with no hope of improvement."[31]

Professor Smith is one of the foremost experts in examining this troublesome area of discourse. For many years he has been thinking and writing about it. His chapter on it for this book is a masterful examination of themes that he has explored elsewhere. In a sense, it represents a distillation of his thinking, a kind of pure essence of the ongoing dialogue that most developed societies have concerning end of life decisions.

The dialogue arises out of the simple fact that modern medicine and medical technology ensure that increasing numbers of us live into very old age, surviving childhood and midlife illnesses that once would have carried off most of the population. With the growing lifespan have come increased instances of dementia, Alzheimer's Disease, and other long-term disabilities that place enormous demands on personal and national budgets for patient care and maintenance. Obviously, brutal termination of the lives of the old and frail is not an option compatible with national law or universal human rights. But when does a duty arise not to administer futile treatment? When does the pain relieving advantage of palliative care merge into a known and deliberate strategy to bring a painful life peacefully to a close? When does the patient's control of the palliation allow the patient, technologically, to hasten a

31. SMITH, *supra* note 6, at 160.

much desired end to suffering? Should control over end of life decisions go beyond the current compromises, and if so, what checks and balances are necessary to prevent unethical conduct by the unscrupulous?

There is probably no one writing today who has a greater insight into these quandaries and who offers a more assured approach to his solution than does Professor Smith. The parameters of the problem are now well-known. The absolutists, once again, are out of harmony with most ordinary folks. Various solutions are offered for our consideration. Professor Smith takes us into the often unwelcome contemplation of the journey that many of us, perhaps most, will eventually take. In every land, the law must be obeyed. But in the uncertainty of its fuzzy principles, the law will often lie reasonable and rational solutions, grounded in the autonomy and dignity of the central actor in the final drama: the patient approaching "that sleep of death" that Shakespeare describes in the passage from *Hamlet*,[32] with which Professor Smith opens this book.

## VI

So, this is a work of reflective and beautifully written chapters in a timely and well-informed book. Its author is undogmatic and always thoughtful. He portrays a reverence for the human person that is, in a sense, spiritual. But his basic approach, whilst well informed on religious doctrine, is humanist, practical, and rational. In that sense, it is a reflection of the law at its best, as manifested in the United States and in other countries with like legal traditions. Here is the work of a master craftsman who has spent a lifetime puzzling over, and writing upon, these topics. Indiana University can be proud that he is one of its own.[33] But more than this, he is a scholar who has engaged with lawyers and ethicists close to home and far away, including in Australia where he is often an honored guest, admired by legal faculties and students for his wisdom, expertise, and reflective insights.

Few will read this book without finding some opinion or point of view with which to disagree. But that is the very nature of this field of discourse. No one could read the text without closing the last page and

32. WILLIAM SHAKESPEARE, THE TRAGEDY OF HAMLET, PRINCE OF DENMARK act 3, sc. 1.

33. *See* Michael D. Kirby, *The New Biology and International Sharing-Lessons from the Life and Work of George P. Smith, II*, 7 IND. J. GLOBAL STUD. 425 (2000); Raymond C. O'Brien, *The World of Law, Science, and Medicine According to George P. Smith, II*, 8 J. CONTEMP. HEALTH L. & POL'Y 163 (1992) (digging into some of the main themes of Professor Smith's major law review articles and explaining the recurrent themes in his scholarship).

being aware that he has been in presence of a wise and generous spirit. In the end, for all the doctrine and the formal rules the encyclicals of Popes and the laws of civilian society, a loving spirit is what is generally needed to guide human actors to the ethical resolution of the quandaries of law and bioethics. For that journey, Professor George P. Smith, II, has now provided a stimulating and most agreeable text as a trusty companion for us all.