

LAW, RELIGION AND MEDICINE: CONJUNCTIVE OR DISJUNCTIVE?

GEORGE P SMITH, II*

PRELUDE AND DEDICATION

MAKING A DECIDED DIFFERENCE: THE JUDICIAL PHILOSOPHY OF JUSTICE
MICHAEL D KIRBY, AC, CMG

From virtually the beginning of his public career in the Australian Law Reform Commission, Justice Michael Kirby was called upon to address vital and complex issues in health law and ethics. Indeed, it may be seen that the whole national debate of how best to renew the legal system in order to ensure its fairness accessibility and continued relevance in the Age of The Biomedical Technology was begun on his 'watch'.¹

Dealing first in 1977 with law reform in the field of human tissue transplants, he was forced – of necessity – to study the need to re-define death, the feasibility of adopting a regime of donation or one of taking, with an opting out privilege, the acceptability of payment for body parts, the availability of donations by minors, the rights of relatives to override the wishes of a deceased to donate body parts for either research or organ donation, together with legal and ethical issues of the then rather novel process and procedure of *in vitro* fertilization and the scope of genetic engineering. Medical confidentiality and privacy in medical information, child abuse reporting and other cutting edge issues were studied later.²

More recently, Kirby J has applied his nearly boundless energies and keen interests to tackling ethical and legal questions surrounding the HIV/AIDS pandemic, UNESCO's work on the Human Genome Project and the need for protection of

* BS, JD, Indiana University-Bloomington; LLM Columbia University; LLD, Indiana University-Bloomington. Professor of Law, The Catholic University of America. The research and writing of the essay began in Spring, 2005, when the author was a Visiting Fellow at the Emory University Center for the Interdisciplinary Study of Religion and continued while was a Visiting Fellow at Wolfson College, University of Cambridge, in June. Some of the ideas in this essay had their genesis in the author's book, *The Christian Religion and Biotechnology: A Search for Principled Decision Making* (2005). Finally, Professor Smith expresses his gratitude to Dean Rosalind Coucher and her colleagues on the Faculty of Law during his stay as a Visiting Professor at Macquarie during July – August, 2005.

¹ Michael D Kirby, *Reform the Law* (1983) 24.

² Ibid 32.

human rights for homosexual and bisexual men and women, drug users and drug dependent persons and those infected with HIV/AIDS and, finally, shaping ethical principles to be used as guides for charting health care allocative schemes through the application of cost-benefit analysis.³ Indeed, as Kirby J has cautioned, this issue of rational and principled apportionment of scarce medical resources, or what has been termed distributive justice,⁴ is a foundational issue facing Australia⁵ and the United States in this 21st century.⁶

A *The Kirby Informing Principle or Ethic*

The Informing Principle or Ethic that emerges from Kirby J's work as a judge, lawyer humanitarian and scholar – and, more often than not from his lectures and papers delivered *ex cathedra* (or away from the High Court bench) – is, in one, both visionary and futuristic and anchored in a value system that may be termed, 'Transcendent Idealism'. This set of values draws on humanism and moral realism and represents a synthesis of what are regarded as the three primary value systems: the human individual, society and transcendent purpose.⁷

In order to consider and evaluate the vexatious problem of balancing individual rights against social authority, transcendent idealism, then, acknowledges 'God's transcendent purpose which is concerned with the dignity and salvation of each human soul'.⁸ While not providing an exacting template for resolving all socio-legal issues, it seeks to posit a 'body of shared values through which problems can be mediated'.⁹

The Kirby Ethic builds upon this value system and clearly embraces the foundational principle or quality of love set forth in St Paul's letter to the Corinthians.¹⁰ Indeed, it is not only the cornerstone of the Ethic but also the yardstick by which the effectiveness of any discourse or implementation on human rights is measured. Without its acceptance, there can be no real appreciation or understanding of the very essence of human relations.¹¹

³ See Michael D Kirby, *Through the World's Eye* (2000). See also Michael D Kirby, 'The Human Genome Project – Promise and Problems' (1999) 11 *Journal of Contemporary Health Law and Policy* 1.

⁴ See George P Smith, II, 'Distributive Justice and Health Care' (2002) 18 *Journal of Contemporary Health Law and Policy* 421.

⁵ Michael D Kirby, 'Bioethical Decisions and Opportunity Costs' (1986) 2 *Journal of Contemporary Health Law and Policy* 21.

⁶ George P Smith, II, 'Setting Limits: Medical Technology and the Law' (2001) 23 *Sydney Law Review* 283, 288.

⁷ A James Reichley, *Faith in Politics* (2002) 47.

⁸ *Ibid* 52.

⁹ *Ibid*.

¹⁰ 1 Corinthians 13:8.

¹¹ Michael D Kirby, 'The New Biology and International Sharing – Lessons From the Life and Work of George P Smith, II' (2000) 7 *Indiana Journal of Global Legal Studies* 425.

Achieving a new world order which recognizes the centrality of human rights calls for a recognition of an individual responsibility to advance the virtues of honesty, compassion, kindness, justice and nobility of life purpose – together with an abiding respect for human goodness and dignity together with a tolerance for diversity:¹² all qualities found inherently (or at least ideally) within all of us. Recognizing the dignity of one's very own existence demands, in turn, a witnessing of that humanity and dignity within the polity for all.¹³

In order to lead and support the advancement of human rights, one must be informed and educated to the hard issues which shape current debate.¹⁴ To this end, participatory democracy – an obligation for all citizens in democratic free countries¹⁵ – must assist in promoting rational discourse in all aspects of law, health and biotechnology; for it is only through informed discussion that a level of perception can be set which allows for solutions to vexatious issues to be resolved.¹⁶

With the obligation to be informed is a co-ordinate responsibility, as citizens, to dissent (when necessary) and remember further that powerful dissenting ideas may not be seen as either persuasive or valid in the time in which they are expressed but – over the course of history – may well be recognized and even accepted ultimately as new contemporary bases or vectors of positive force in the social order of that day.¹⁷

As pilgrims all, Kirby J bids us to be forever optimistic¹⁸ – maintaining an idealism as not only to the future but a measured respect for that of the past.¹⁹

Where there are changes in social circumstances and community attitudes, in turn, make old rules anachronistic, then the Kirby Ethic holds those rules must bend in order to accommodate change.²⁰ In order to achieve an openness of spirit to change, interdisciplinary outreach is needed.²¹

¹² Kirby, above n 1, *Reform the Law*, 6, 13, 40. See also Kirby, above n 3, *Through the World's Eye*, 202.

¹³ Kirby, above n 1, *Reform the Law*, 13.

¹⁴ Ibid 6. See also Kirby, above n 3, *Through the World's Eye*, 202.

¹⁵ See generally, Michael D Kirby, 'Teaching Australian Civics' (1997) 13 *Queensland University of Technology Law Journal* 149.

¹⁶ Michael D Kirby, 'Health, Law and Ethics' (1997) 5 *Journal of Law and Medicine* 31, 35. See also Kirby, above n 1, *Reform the Law*, 13.

¹⁷ Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 394-396. See generally, Cyrille John Radcliffe, *The Law and its Compass* (1961); Michael D Kirby, 'Tradition and Diversity – Twin Strengths of The Judiciary' (2004) 42 *New South Wales Law Society Journal* 76.

¹⁸ Kirby, above n 1, *Reform the Law*, 78.

¹⁹ Kirby, above n 3, *Through the World's Eye*, 202, 238.

²⁰ Kirby, above n 3, *Through the World's Eye*, 395. See Michael D Kirby, 'Are We All Nominalists Now?' (2004) 9 *Deakin Law Review* 523.

²¹ Kirby, above n 3, *Through the World's Eye*, 238.

In order to implement the Kirby Ethic judicially, it – of necessity – must morph into a principle of judicial interpretation which holds that in cases of ambiguity, it is not only permissible, but indeed essential, to construe Australian Statutes and the Constitution in a manner utilizing the norms of universal human rights law so that a reconciliation of international law and municipal law can be effected and thereby witness the enforcement of Human Rights as a universal phenomenon.²² This reconciliation will, in turn, allow the law to be viewed ‘from the outside’ or through the world’s eye as progressive instead of regressive.

The Kirby Ethic eschews a rigid and almost mechanical application of case decisions over conceptualism (or that way of considering law as a set of preferred values).²³ Indeed, normative values must be set forth in all cases of determinative decision making,²⁴ with efforts taken to go beyond categories of indeterminacy such as ‘fair’ or ‘just’ or what is rational and supportable.²⁵

If integrated into the fabric of informed decision making by the courts, legislative bodies and the polity, the Kirby Informing Principle or Ethic will set new parameters for discussions, action and mediation in the perplexing issues of the New Age of Biotechnology. In a word, the Ethic will advance a more comprehensive framework for principled analysis grounded in honesty, compassion, kindness, humaneness, justice and nobility of life purpose.

I INTRODUCTION AND OVERVIEW

Faith, religion, spirituality and prayer have a current focused outreach and easy parlance in the market places and public squares throughout America.²⁶ News stories²⁷ and court cases abound of dramatic challenges to the placement of monuments to the Ten Commandments in public buildings and grounds,²⁸ the use of

²² Michael D Kirby, ‘Seven Ages of a Lawyer’ (2000) 26 *Monash University Law Review* 1, 10. See also Michael D Kirby, ‘Judicial Activism: Authority, Principle and Policy in the Judicial Method’ (2004) 90, 91, *The Hamlyn Lectures*; Michael D Kirby, ‘The Impact of International Human Rights Norms: A Law Undergoing Evolution’ (1995) 25 *University of Western Australia Law Review* 1. See generally, Howard Davis, *Human Rights and Civil Liberties* (2003).

²³ Lord Cooke, xv in Kirby, above n 3, *Through the World’s Eye*.

²⁴ Kirby, above n 3, *Through the World’s Eye*, 20.

²⁵ Kirby, above n 3, *Through the World’s Eye*.

²⁶ See generally Hugh Hecló, ‘An Introduction to Religion’ in Hugh Hecló and Wilfred McClay (eds), *Religion Returns To The Public Square: Faith and Policy In America* (2003); ‘Symposium on Religion in The Public Square’ (2003) 17 *Journal of Law, Ethics and Public Policy* 307.

²⁷ Larry Copeland, ‘Church-and-State Standoffs Spread over USA’ (2003) *USA Today* 15A.

²⁸ See eg, *Glassroth v Moore*, 229 F Supp 2d 1290 (MD Ala, 2002), aff’d 335 F 3d 1282 (11th Cir, 2003); *Van Orden v Perry*, 125 S Ct 1240 (2005). On 1 October 2004, the United States Supreme Court granted review of *Van Orden v Perry*, 351 F 3d 173 (6th Cir), 72 USLW 3702, and will address the question of whether a six foot high, three foot wide monument presenting

God's name in school pledges of allegiance,²⁹ the teaching of Darwinian or evolutionary science in public education,³⁰ the role of faith and religion in health care healing,³¹ the value of affirmations of religious faith on the political hustings,³² and – internationally – the efforts of French President Jacques Chirac to ban 'overt religious symbols' in public schools in France in an effort to maintain secularism throughout the educational system.³³

the Ten Commandments and located on a stretch of state owned property between the Texas State Capitol and the Texas Supreme Court promotes the establishment of religion in violation of the First Amendment. On this same date, the High Court granted certiorari to review *McCreary County, Ky v American Civil Liberties Union of Kentucky*, 354 F 3d 438 (6th Cir), 72 USLW 1389. Here, essentially, the Court will review a lower court ruling barring an exhibition of displays of the Ten Commandments in court houses and public school buildings together with other secular documents (eg, The Declaration of Independence and the Magna Carta) and symbols which have had a significant role in shaping the American legal system, as a violation of the First Amendment's Establishment Clause. On 27 June 2005 in *Van Orden*, a 5-4 court held a valid secular purpose was to be found in the display of the Commandments donated by the Fraternal Order of Eagles over some 40 years ago, as but one of seventeen sculptures on the State Capitol grounds – and, as displayed, they have a dual historical and religious meaning and did not promote a significant religious message which violates the Establishment Clause: 73 USLW 4690 (28 June 2005). In *McCreary*, decided the same day, a 5-4 court held that was no valid secular purpose on courthouse displays of the Commandments. The crucial difference in the two cases is to be found in the origins of the displays – for, in *McCreary*, the Commandments were displayed first, by themselves, on the courthouse walls in Kentucky by county officials. Other historical documents were not added to the displays until the American Civil Liberties complained that – standing alone – the Commandments promoted religion: 73 USLW 4639 (28 June 2005).

²⁹ See eg, *Nedow v United States Congress*, 328 F 3d 466 (9th Cir, 2003), cert granted in part *sub nom*, *Elk Grove Unified School District v Nedow*, 124 S Ct 2301 (2004). On 14 June 2004, the US Supreme Court held that Michael A Nedow had no standing to sue the school district where his daughter attended elementary school, on her behalf, to ban the words, 'under God', from the Pledge of Allegiance: 124 S Ct 2301 (2004). Interestingly, an April 2004 Gallup Poll revealed only 8% of the public wanted the 'under God' clause removed from the Pledge – with 91% wishing to retain it. See Charles Lane, 'Justices Keep "Under God" in Pledge', *Washington Post* (Washington, USA), 15 June 2004. See generally Martin J McMahon, *Constitutionality of Regulation or Policy Governing Prayer, Meditation or 'Moment of Silence' in Public Schools* (1992) Annotation, [110 ALR Fed] 211.

³⁰ See generally James Moore, 'Charles Darwin' and Peter J Bowler, 'Evolution' in Gary B Ferngren (ed), *Science And Religion: A Historical Introduction* (2003).

³¹ Claudia Kalb, 'Faith and Healing', *Newsweek*, (New York City, USA), 10 November 2003.

³² Jim VandeHei, 'A Spiritual Struggle for Democrats: Silence on Religion Could Hurt Candidates', *Washington Post*, (Washington, USA), 27 November 2003. See generally E J Dionne Jr, 'Faith Without Fealty: It's Time to Free Religion From Party Politics', *Washington Post*, (Washington, USA), 19 October 2004; William Carey, 'American Democracy and The Politics of Faith' in Hecllo, above n 26; Reichley, above n 7, *Faith in Politics*.

³³ Keith B Reichburg, 'French President Urges Ban on (Islamic) Head Scarves in Schools', *Washington Post*, (Washington, USA), 18 December 2003; Keith B Reichburg, 'French Senate Approves Ban on Religious Attire', *Washington Post*, (Washington, USA), 4 March 2004. See Steven G Gey, 'Free Will, Religious Liberty, and a Partial Defense of the French Approach to Religious Expression in Public Schools' (2005) 42 *Houston Law Review* 1. In June, 2005, the University of Leicester NHS Trust in England announced the placement of Bibles in hospital bedside lockers by Gideons International was ending – this, because it was determined that some ethnic minorities might be offended by this continued practice. See Nick Britten, 'Offensive Hospital Bibles May be Banned', *The Daily Telegraph*, (London, UK), 3 June 2005. Later that month, the Newham General Hospital in East London removed a crucifix

The impact that these occurrences have on the fiber of contemporary society is significant, and – at the same time – truly incalculable. It is made more problematic because of a failure of the system to agree, in the first instance, on a unified definition of religion.³⁴ This situation parallels that state which also exists in international law.³⁵ Because of this present vacuum, it has been suggested that in lieu of defining religion, it would be more practicable to consider it as a belief, identity, or way of life.³⁶ Regrettably, the law – from a national context or perspective – has not risen to the challenge and structured an unerring definition. Rather, the United States Supreme Court has chosen to define religion in *United States v Seeger* by stating that

[T]he test of belief ‘in a relation to a Supreme Being’ ... is whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God. ...³⁷

In August, 2001, the Chief Justice of the Supreme Court of Alabama, Roy Moore, installed a two and a half ton monument to the Ten Commandments as the centerpiece of the rotunda in the Alabama State Building – intending, as such, to remind the citizens of the state of his personal belief in the sovereignty of the Judeo-Christian God over both the state and the church. The Federal District Court ordered, subsequently, the removal of the monument finding its placement to be in violation of the Establishment Clause of the 1st Amendment to the Constitution, which forbids the government from making any ‘law respecting the establishment of religion’.³⁸ On appeal, the Eleventh Circuit affirmed³⁹ and the United States Supreme Court refused to review the case.⁴⁰ While the judicial disposition of this case is now settled,⁴¹ the issues of the extent to which the acknowledgment and expression of religious faith, within the ambit of state action, and is consistent with the Establishment Clause of the Constitution, remains a highly vexatious matter.⁴²

from a prayer room because it made the room too Christian. See Tom Whitehead, ‘Fears as Christian Symbols Disappear’, *The Daily Express*, (London, UK), 6 June 2005. See generally, Jeremy T Gunn, ‘French Secularism as Utopia and Myth’ (2005) 42 *Houston Law Review* 81; Nikki R Keddie, ‘Secularism and Its Discontents’ (2003) 132 *Daedalus* 14.

³⁴ Jeremy T Gunn, ‘The Complexity of Religion and The Definition of “Religion” in International Law’ (2003) 16 *Harvard Human Rights Journal* 189, 191.

³⁵ *Ibid* 190.

³⁶ *Ibid* 200-205.

³⁷ 380 US 163, 165-166 (1965).

³⁸ *Glassroth v Moore*, 229 F Supp 2d 1290 (MD Ala, 2002), *aff’d* 335 F 3d 1282 (11th Cir, 2003).

³⁹ *Ibid*.

⁴⁰ *Moore v Glassroth*, 540 US 980 (2003) (cert denied).

⁴¹ ‘AP’, ‘Alabama Judge Removed: Moore Installed Monument to Commandments’, *Washington Post*, (Washington, USA), 14 November 2003 (reporting on the removal of the Chief Justice from his office of the Supreme Court of Alabama by a unanimous Court of the Judiciary of Alabama).

⁴² See generally, Ronald D Rotunda, *Modern Constitutional Law: Cases and Notes* (6th ed, 2000). The Australian Constitution has a similar clause: Section 116 of the Australian Constitution states: ‘The Commonwealth shall not make any law [(i)] for establishing any religion, or [(ii)] for imposing any religious observance, or [(iii)] for prohibiting the free

Defining the appropriate role of religion in town squares and the nation's public buildings has, of late, however, focused on the extent to which religious monuments may be placed appropriately on public land.⁴³ This has become a new, energized national issue because of the pervasive concern that distinctive American moral values that underpinned the founding of the Nation are eroding and, further, that society is becoming Godless.⁴⁴ In addition to key cases in Alabama⁴⁵ and Texas,⁴⁶ it has been reported that some two dozen disputes over the placement of monuments to the Ten Commandments or similar displays have – since 2000 – been taken to the courts for settlement.⁴⁷

Early in 1980, the United States Supreme Court recognized the Ten Commandments as a 'sacred text in Jewish and Christian faiths' for which 'no legislative recitation of a supposed secular purpose can blind us to that fact'.⁴⁸ It did not hold, however, that not all government uses of the Commandments are taken as impermissible.⁴⁹

Subsequently, in 1988, the Supreme Court – while acknowledging the subtle ways in which the values of the Establishment Clause were 'not susceptible to a single verbal formulation'⁵⁰ – reaffirmed its decision in *Everson v Board of Education* in 1947⁵¹ which structures the modest framework for analyzing issues under the Establishment Clause.

A democratic and political process tied more to television sound bites than intelligent and informed deliberations among its citizens is a process guaranteeing itself of lethargic inactivity if not stagnation. It is for the judiciary to fill the breach and continue its role as interpreters of the Common Law and when need be, architects of the new Age of Biotechnology. Ideally, when individual cases of profound disagreement arise over issues of medical science, courts and legislatures should remain passive and allow resolution of these disputes within each concerned family unit and, where possible, their church community of faith.⁵² Oftentimes, the at-risk family and its religious support groups are unable to cope with

exercise of any religion, and [(iv)] no religious test shall be required as a qualification for any office or public trust under the Commonwealth'.

⁴³ See Copeland, above n 27.

⁴⁴ Ibid. See generally, Paul Finkelman, 'The Ten Commandments on The Courthouse Lawn and Elsewhere' (2005) 73 *Fordham Law Review* 1477. In a September, 2003, pool of 1,003 adults conducted by USA Today/CNN/Gallup, it was determined that 70% of the respondents approve of the placement of Ten Commandments monuments in public places. Ibid.

⁴⁵ *Glassroth v Moore*, 229 F Supp 2d 1290 (MD Ala, 2002), aff'd 335 F 3d 1282 (11th Cir, 2003).

⁴⁶ *Van Orden v Perry*, 351 F 3d 173, 176 (5th Cir, 2003).

⁴⁷ Copeland, above n 27.

⁴⁸ *Stone v Graham*, 449 US 39, 41 (1980).

⁴⁹ 449 US 39, 42 (1980). Their use in teaching a secular study of comparative religion, history or civilization is acceptable.

⁵⁰ *Allegheny County v Greater Pittsburgh ACLU*, 492 US 573, 591 (1988).

⁵¹ 330 US 1 (1947).

⁵² Douglas W Kmiec, *Cease-Fire on the Family: The End of the Culture War* (1995) 55.

understanding the ramifications of ultimate decisions regarding medicine. 'Meditating structures'⁵³ can only go so far in discerning and promoting legal justice – or, the obligation to support the common good.⁵⁴ The common good is shaped by the legislatures and the courts and – ultimately – it remains for an enlightened judiciary to interpret its course. It is regrettable, but a fact in contemporary society, that every complex moral issue is more often than not, transformed into a legal issue.⁵⁵ Since law and morality intersect in daily life, it is not surprising that the courts are called upon to arbitrate.⁵⁶ Invariably, law supports some visions of how life should be lived within the community while, at the same time, undermining others.⁵⁷

The purpose of this essay is to explore the conjunctive and disjunctive influences that religion has in one specific field of current socio-political debate: namely, biomedical technology and ethical decision making.⁵⁸ More specifically, the role of religion as an equal – or, as the case may prove to be – limited partner with law and medical science in assessing the dimensions and patterns of application of the new startling biotechnologies will be evaluated. Central to this inquiry will be a consideration of the legitimacy of, in the first instance, evolutionary science and its acceptance in public education⁵⁹ – for, it is this science from which the whole study of genetics and eugenics arise and which in turn direct and validate the very framework for the new biomedicine.⁶⁰

From this analysis it will be seen that far from being antagonistic to law and medicine, religion and religious principles stabilize the field of biomedicine and serve, additionally, as vectors of force in shaping both ethical and moral constructs for decision making.⁶¹ In turn, each of these three disciplines complements and strengthens what should be the ultimate goal of the state namely: to secure the happiness, spiritual tranquility and well-being of its citizens. This purpose is, in turn, advanced – and thus enhanced – by safeguarding the genetic well-being and general health of its citizens.⁶² Working toward this goal and meeting it eventually

⁵³ Peter L Berger and Richard J Neuhaus, *To Empower People: From State to Civil Society* (1996) 148-49. See generally George P Smith, II, *Family Values and the New Society: Dilemmas of the 21st Century* (1998).

⁵⁴ Kmiec, above n 52, 97.

⁵⁵ M Cathleen Kaveny, 'Law, Morality and Common Ground', *America* (New York City, USA), 9 December 2000, 7.

⁵⁶ *Ibid.* See generally R Kent Greenawalt, 'The Use of Religious Convictions by Legislators and Judges' (1994) 36 *Journal of Church and State* 541.

⁵⁷ *Ibid.*

⁵⁸ See generally George P Smith, II, *The New Biology: Law, Ethics and Biotechnology* (1989).

⁵⁹ See generally R Kent Greenawalt, 'Establishing Religious Ideas: Evolution, Creationism, and Intelligent Design' (2003) 17 *Notre Dame Journal of Law, Ethics and Public Policy* 321.

⁶⁰ George P Smith, II, 'Genetics, Eugenics and Public Policy, the Family: Exploring the Yin and the Yang' (1984) 8 *University of Tasmania Law Review* 4.

⁶¹ See generally, George P Smith, II, 'Intrusions of a Parvenu: Science, Religion, and The New Biology' (1982) 3 *Pace Law Review* 63.

⁶² George P Smith, II, 'Biotechnology and the Law: Social Responsibility v Freedom of Scientific Inquiry' (1988) 39 *Mercer Law Review* 437, 460.

will have the effect of minimizing human suffering and maximizing the social good that derives from rational and humane actions taken to displace man's genetic weaknesses from the line of inheritance.⁶³

II DIALOGUE BEGINS

A primary goal for many religious thinkers has been to develop a process for determining how to lead science and technology toward a level of awareness and appreciation of human and environmental values.⁶⁴ Given the growing trend of placing and then testing scientific development within a framework of moral understanding and normative values, the choice is 'having theologians and religious ethicists contribute a theological perspective or having scientists attempt to be moral philosophers'.⁶⁵

The foundational texts of most religious communities, as well as scripture itself, do not address the complex issues of biotechnology and molecular biology. While the religious texts do establish broad ethical norms for purposeful living, the task becomes one of adapting a mechanism for them to apply to the biomedical issues of contemporary society; in other words, how to re-shape and, thus, modernize them into a constructive dialogue with science – one which escapes the confines of abstract applications and offers specific guidance and modern ethical norms for resolving concrete biomedical conflicts.⁶⁶

Whether it is practical to pursue the development of a common framework for morality and ethical analysis within the context of the New Biology, is problematic.⁶⁷ Advocates of post modernism argue that a 'Christian rather than denominational approach to bioethics' is to be preferred. Whatever course is followed, the challenge remains the same: namely, how to show – and thereby attempt to restate – the relevance of these religious principles to a skeptical secular society.⁶⁸

⁶³ Ibid. See also George P Smith, II, 'Manipulating the Genetic Code: Jurisprudential Conundrums' (1976) 64 *Georgia Law Review* 697, 733. I am, of course, expanding the 'unalienable' rights to life, liberty and happiness set out in the Declaration of Independence to include, modernly, the right to access good genetic health since being healthy is required usually for total happiness.

⁶⁴ Audrey R Chapman, *Unprecedented Choices: Religious Ethics at the Frontiers of Genetic Science* (1999) 19.

⁶⁵ Ibid.

⁶⁶ Ibid. See William B Drees, 'Playing God? Yes! Religion in Light of Technology' (2002) 37 *Zygon: Journal of Religion and Science* 643.

⁶⁷ Chapman, above n 64, 25. See William B Drees, 'Where to Look for Guidance? On the Nature of Religion and Science' (2004) 37 *Zygon: Journal of Religion and Science* 367.

⁶⁸ Chapman, above n 64, 25. See generally, Tad S Clements, *Science vs Religion* (1990). See Stephen P Weldon, 'Postmodernism' in Ferngren, above n 30 (discussing whether postmodernism is not so much a departure from modernist thought as merely an extension of it and whether religion must be made compatible with a scientific understanding of the world).

In an effort to address the basic theological and ethical issues associated with the new medico-science technologies and, thus, engage the issue, much study has been undertaken over the years by various ecumenical and denominational bodies beginning in 1973 with the efforts of The World Council of Churches to study the ethical significance of science and technology.⁶⁹ Through the succeeding years, various other studies were commissioned by various organizations such as the World Conference on Faith and Science and The Future. Interestingly, their findings were never granted any official standing but merely accepted as the views of each study panel.⁷⁰ The Roman Catholic Church did – however – in 1987, begin to both clarify and shape the official dialogue for its members through the issuance of its ‘Instruction on Respect for Human Life in Its Origin and on the Dignity of Life’.⁷¹

All too often, a recitation of traditional beliefs is set forth without an interpretation of their implications for scientific applications.⁷² While of marginal universal significance, these faith-based denominational efforts nonetheless provide a rich opportunity for education and interaction as well as for the development of a broader-based perspective on the religious, moral and ethical ramifications of the New Biology.⁷³ Only time will tell whether these ‘seedlings’ will take root from these critical engagements and provide normative values for biomedical decision making.

As the astonishing positive successes of genetic research and engineering and of genetic medicine continue to be charted with clarity, the role of moral theology – grounded in various faith traditions – should be used to frame guidelines for determining if and when various specific applications of these technologies, within an appropriate ethical context, may be utilized. Richard McCormick suggested the controlling consideration should be, ‘Will this or that intervention (or omission, exception, policy, law) promote or undermine’ the integrity of the human person.⁷⁴

The central concern of Fr Richard A McCormick is the integrity of personhood. For him, personhood begins at conception and, accordingly, would be violated by human stem cell experimentation, cloning, and generally, *in vitro* fertilization.⁷⁵ In

^{69.} Chapman, above n 64, 31-32.

^{70.} Chapman, above n 64, 32. Various reports, policy statements and studies have been commissioned by eight major North American Protestant denominations (including the Methodist, Episcopal, Lutheran, Presbyterian and Baptist churches) which address the religious and ethical ramifications of the science of genetics. *Ibid* 34.

^{71.} See generally, Kevin D O’Rourke and Philip Boyle, *Medical Ethics: Sources For Catholic Teaching* (2nd ed, 1993). But see, George P Smith, II, ‘Quality of Life, Sanctity of Creation: Palliative or Apotheosis?’ (1984) 63 *Nebraska Law Review* 709.

^{72.} Chapman, above n 64, 40.

^{73.} Chapman, above n 64, 37.

^{74.} Richard A McCormick, *The Critical Calling: Reflections on Moral Dilemmas Since Vatican II* (1989) 267.

^{75.} See Sarah Delaney, ‘Pope Condemns Cloning of Human Embryos and Organ Transplant Technology’, *Washington Post*, (Washington, USA), 30 August 2000. See generally Cindy Wooden, ‘Human Cloning Would Be A Crime Against People’, *Catholic Standard*,

this regard, McCormick is *micro* – as opposed to *macro* – in his viewpoint. Long range or societal benefits from scientific advances of this nature and other genetic research are of secondary concern.

Drawing upon a contemporary interpretation of *tikkun olam* – or the mandate to participate in an active partnership in the repair and perfection of the world – the Jewish community supports scientific discoveries and human applications of genetic research.⁷⁶ And, interestingly for Presbyterians, ‘prophetic inquiry’ directs that they endeavor to utilize modern technology and science in affirming the dynamic character of the creation through the teachings and interpretations of the biblical tradition.⁷⁷

Law and policy making as well as administrative and judicial decision making should not – indeed, cannot – favor one denominational theology over another. Rather, balanced decisions must be made incorporating, when appropriate, moral, ethical (eg, religious) values with scientific objectives for individual growth and societal advancement. When cases or issues for consideration arise, they are just that: individual and fact sensitive. Yet, nevertheless, their evaluation can be undertaken by a template shaped by a balancing of costs versus benefit: use or non use – all designed to achieve a positive, just good.

No substantive resolutions are needed. The role for the various church theologies should be, rather, ‘interrogative’.⁷⁸ For any dialogue between science and religion to be effective, ‘fallibilism’ must then be an acknowledged given. In other words, both parties need to accept the proposition that they may not only be incorrect in their understandings of each other, but ‘in their inferences about the implications of their positions, in their development of their own arguments and even in some basic claims they have never questioned’.⁷⁹

A Love and Justice

While there are differences between a legal order, system of morality and set of religious beliefs, it does not follow that contemporary legal order does not contain elements of moral religious beliefs.⁸⁰ All laws are norms set within a hierarchy whose foundation is to be found in love; for it is within the primary form of love that justice is found.⁸¹ Indeed, Augustine saw the ethics of love as the essence of

(Washington, USA), 14 August 2003.

^{76.} Drees, above n 66, 45.

⁷⁷ Drees, above n 66, 44-46.

⁷⁸ David H Smith, ‘Creation, Preservation and All The Blessings’ (2001) 81 *Anglican Theological Review* 567.

^{79.} Ibid 568-569. See generally Ian Barbour, *Religion in an Age of Science* (1990).

⁸⁰ Samuel E Stumpf, ‘Theology and Jurisprudence’ (1957) 10 *Vanderbilt Law Review* 885, 886.

^{81.} Jerome Hall, ‘Religion, Law and Ethics – A Call for Dialogue’ (1978) 29 *Hastings Law Journal* 1257, 1267.

justice.⁸² For him, without the ethics of love, there could be no true orderliness – this, because nature would be disturbed by man’s wilfulness.⁸³

Without love there could be no justice for there would be lacking a cogent motive, and pattern, for men to render to other men their due. ... without love as a gift of God’s grace man could not love the proper things properly.⁸⁴

In addition to including rules and concepts, law is – at its most basic level – but a set of relationships among people.⁸⁵

Despite the obvious tensions or discontinuities between law and religion, one cannot truly flourish without the other. Without religion, law degenerates into little more than a mechanical legalism; and religion without law loses its social effectiveness.⁸⁶

There are four elements shared by law and religion: ritual, tradition, authority and universality.⁸⁷ Within every religion is found two legal elements – one which relates to the social processes of the particular community sharing a faith and the other ‘to the social processes of the larger community of which the religious community is a part’.⁸⁸ Indeed, it has been suggested that the two major dimensions of man’s social life may be seen as law and religion even though, as such, they are dialectically interdependent vectors of force.⁸⁹

In the final analysis, perhaps it is best to see law as a way in which both justice and love are translated into complex social situations within various communities.⁹⁰ Since love is situational, it has been argued persuasively that it – rather than binding rules and *a priori* principles – should direct moral responses (*micro* and *macro*) at all levels of decision making in issues of the New Biology.⁹¹ Accordingly, the standard of humane treatment in end-of-life cases should be shaped and guided by

⁸² St Augustine, *The City of God*, (John Healey trans, 1931) book xix, c.1, 12-14. One finds happiness – or attains the peace of a rational soul (defined, in turn, as an ordered harmony of knowing and doing) – only within society itself. The happy life, then, is social and is guided by love which is seen as service and acknowledged as the universal good. Ernest Barker makes these points eloquently in his introduction to this translation at xxv – xxvii, xxxiv, xliii. See generally, Raymond B Marcin, ‘Justice and Love’ (1984) 33 *Catholic University Law Review* 363.

⁸³ Hall, above n 81, 1270.

⁸⁴ Hall above n 81, 1270. See generally, Martin Rhonheimer, *Natural Law ad Practical Reason: A Thomist View of Moral Autonomy* (Gerald Malsbary trans, 2000).

⁸⁵ Harold J Berman, *The Interaction of Law and Religion* (1974) 83.

⁸⁶ *Ibid* 11.

⁸⁷ *Ibid* 25.

⁸⁸ *Ibid* 79.

⁸⁹ Harold J Berman, *Faith and Order: The Reconciliation of Law and Religion* (1993) 19.

⁹⁰ *Ibid* 391.

⁹¹ See, Joseph Fletcher, *Medicine and Morals* (1954). See also, George P Smith, II, ‘Stop in the Name of Law!’ (1990) 19 *Anglo-American Law Review* 55.

love and, similarly, scientific decisions regarding the suitability of investigation. In one case, the construct is personal and in the other it is communitarian.⁹²

III CONSTITUTIONAL PHILOSOPHY

Ever since America was founded, the national symbol has been an eagle supported in its flights and its destiny by two powerful wings: plain reason or common sense and humble faith.⁹³ The founding generation drew its common sense from not only the traditional wisdom of ancient philosophers and moralists, but from the scriptures;⁹⁴ for, it was evidence to them that a faith in the God of Abraham, Isaac and Jacob was an ideal magnification of human reason.⁹⁵ Indeed, for the founders, of all philosophies and religions, Judaism and Christianity served as the best unified foundation for republican institutions because they encouraged virtue and sharpened a zest for liberty.⁹⁶

From the very beginning of the Nation, the ‘dominant metaphor for church-state relations was that public officials must act as “nursing fathers” to the religious and moral habits of the people’.⁹⁷ Put simply, as a religious people, the majority of early Americans believed wholeheartedly that they owed their liberty to their creator.⁹⁸

In the United States Constitution, the action to separate church from state was driven significantly by the same recognition that religion concerns itself with differing senses or levels of reality than those of the political world.⁹⁹ Accordingly, two clauses in the First Amendment enunciate with clarity the boundaries of church and state – the Establishment Clause forbids the government from making any ‘law respecting the establishment of religion’, and the Free Exercise of Religion Clause prohibits the government from restricting religious belief or practice.¹⁰⁰ While these two clauses, especially the second one, are taken in contemporary society as affirming rights of individual conscience together with the appropriateness of religious pluralism, there is strong historical evidence suggesting however that the

⁹² See generally, George P Smith, II, ‘Setting Limits: Medical Technology and the Law’ (2001) 23 *Sydney Law Review* 283.

⁹³ Michael Novak, *On Two Wings: Humble Faith and Common Sense at the American Founding* (2002) 27. See also Reichley, above n 7, Ch. 3.

⁹⁴ Novak, above n 93, 28-29.

⁹⁵ Ibid 30.

⁹⁶ Ibid 30-33. See generally, E Brooks Holifield, *Christian Thought from the Age of the Puritans to the Civil War* (2003).

⁹⁷ Novak, above n 93, 70.

⁹⁸ Novak, above n 93, 77. While the framers valued the contribution religion made to morals, ‘they distrusted faith, the transcendent dimension of religion, the yearning for the divine likely to express itself in prophecy, theology, or mysticism’. William Carey McWilliams, ‘American Democracy and the Politics of Faith’ in Hecllo, above n 26, 147.

⁹⁹ Fred M Frohock, *Healing Powers* (1992) 140. See generally, R Kent Greenawalt, ‘Diverse Perspectives and The Religion Clauses: An Examination of Justifications and Qualifying Beliefs’ (1999) 74 *Notre Dame Law Review* 1433.

¹⁰⁰ Ibid. See J Hunter and O Guinness (eds), *Articles of Faith, Articles of Peace: The Religious Liberty Clauses and the American Philosophy* (1990).

framers were more interested in recognizing the establishment of religious duties free from state interference.¹⁰¹

One of two driving and very practical forces behind the crafting of the religion clauses in the First Amendment was an evangelical conviction that religion – and not just individual conscience – was to control a limited government that in turn must be subordinate to a sovereign God. A second fundamental conviction undergirding the separation of church and state was that the state should, quite simply, be secular and not religious. It was this unyielding view that was in direct opposition to the Republican belief that the state should support religion in order to promote public morality. It was mainly on the arguments that, for the sake of religious integrity, religion should be insulated from state support, that the secular view of the state triumphed in the Establishment Clause.¹⁰²

A Religion's Role

The role of religion in a constitutional democracy is, surely, at the apex of current legal and social debate.¹⁰³ Since questions about religion involve moral issues, they are presented regularly both to the courts and to the legislatures. Furthermore, since these two bodies are not 'philosophically reflective enough to deal with moral issues which are integral to debates on religious issues',¹⁰⁴ difficulties in meaning, interpretation and application are a given. Under these circumstances, it could be viewed as improper to demand of the state that it be subject *always* to 'the higher law of God'.¹⁰⁵ Nevertheless, it has been suggested that since the 'bedrock of moral order is religion', politics and morality can only be viewed as inseparable.¹⁰⁶ Interestingly, today political activists now include religious believers who seek not only to shape public policy but often to seize state power.¹⁰⁷

¹⁰¹ Frohock, above n 99. See generally, David L Faigman, *Laboratory of Justice* (2004); Herbert Hovenklamp, *Science and Religion in America* (1978) 1800-1860.

¹⁰² Ibid. See Symposium 'Religiously Based Morality: Its Proper Place in American Law and Public Policy' (2001) 36 *Wake Forest Law Review* 217, 401. See also John Witte Jr, 'The Theology and Politics of The First Amendment Religion Clauses: A Bicentennial Essay' (1990) 40 *Emory Law Journal* 489, 491-499.

¹⁰³ David Novak, 'Law: Religious or Secular?' (2000) 86 *Vanderbilt Law Review* 569, 570. See R Kent Greenawalt, 'Religion as a Concept in Constitutional Law' (1984) 72 *California Law Review* 753. See generally, Reichley, above n 7; Philip Kurland, *Religion and the Law* (1962); R Kent Greenawalt, 'The Use of Religious Convictions by Legislators and Judges' (1994) 36 *Journal of Church and State* 541.

¹⁰⁴ Symposium, above n 102, 371.

¹⁰⁵ See Charles E Rice, *Beyond Abortion: The Theory and Practice of the Secular State* (1979) 135.

¹⁰⁶ Ronald Reagan, 'Politics and Morality are Inseparable' (1984) 1 *Notre Dame Journal of Law, Ethics and Public Policy* 7. See generally, James Carroll, 'Why Religion Still Matters' (2003) 132 *Daedalus* 9.

¹⁰⁷ Michael Walzer, 'Drawing the Line: Religion and Politics' (1999) *Utah Law Review* 619.

If the proposition is advanced that only religion provides morality with a foundation,¹⁰⁸ then it follows that religion may be taken as an ‘independent moral force’ in American society.¹⁰⁹ Yet, the extent of its independence remains a complex and volatile issue. While some religions advance civic responsibility as a noble virtue and set high levels of moral performance in daily life, others stress a form of political withdrawal and personal passivity and, still others, are obsessive and fanatical.¹¹⁰

Historically, however, religion is seen as an associative force that serves to strengthen moral solidarity as well as political attachment.¹¹¹ This is seen dramatically in the work of various communities of faith where strong welfare organizations are developed which, in turn, draw upon high levels of popular participation in promoting multiple forms of everyday assistance.¹¹²

IV THE LAW OF RELIGION IN AUSTRALIA AND PERIPHERAL ISSUES

Although Cicero is thought to have been responsible for attempting to define religion,¹¹³ today the courts continue to grapple with a contemporary definition. A commonly accepted lay definition of the term states that a religion ‘means belief that the totality of existence includes objective overall purpose or significance beyond pure reason or the senses’.¹¹⁴

The High Court of Australia did not deal directly and definitively with this issue until 1983 in the case of *Church of the New Faith v Commissioner of Payroll Tax (Vict)*.¹¹⁵ Here, it overturned two appeal decisions of the Supreme Court of Victoria which had held, in essence, that – under the Victorian *Payroll Tax Act* of 1971 – the Church of the New Faith, formed to promote Scientology, was not a religious institution whose ways were exempt for payroll tax under the Act.

In the three judgments in *Church of the New Faith*, two were written jointly – the first by Mason CJ and Brennan J, the second by Murphy J and the third by Wilson and Deane JJ. All three judgments attempt to define, and thereby interpret, religion.¹¹⁶

¹⁰⁸ Ibid 623.

¹⁰⁹ Stephen L. Carter, *The Culture of Disbelief: How American Law and Politics Trivialize Religious Devotions* (1993) 9.

¹¹⁰ Walzer, above n 107, 624.

¹¹¹ Walzer, above n 107, 630.

¹¹² Walzer, above n 107, 630.

¹¹³ Reichley, above n 7, 22.

¹¹⁴ Reichley, above n 7, 22.

¹¹⁵ (1983) 154 CLR, 120. In two earlier cases – *Adelaide Company of Jehovah’s Witnesses Inc. v The Commonwealth* (1943) 67 CLR 116 and *Kryger v Williams* (1912) 15 CLR 365 – the High Court chose not to take decisive action on this definitional issue.

¹¹⁶ See generally, David Malcolm, ‘Religious Tolerance and The Law’ (1996) 70 *Australian Law Journal* 976.

For the Chief Justice and Brennan J, theism is not an essential element of religion. Rather, 'it is belief in a supernatural being, thing or principle' and 'the acceptance of conduct to give effect to that body'.¹¹⁷ Thus, religion not only encompasses conduct but belief as well. Indeed, beliefs, practices, and observances are all central to this analysis.¹¹⁸

For Murphy J, casting his judicial net as far as possible, the validity of a religion's claim that it truly is a religion is tested by, broadly, evaluating the centrality of its position and whether it proposes a way to achieve purpose in life. Accordingly, '[a]ny body which attempts to be religious and offers a way to find meaning and purpose in life is religious'.¹¹⁹

The third judgment, authored by Wilson and Deane JJ, references its foundation to then current meanings of the word, religion, in the United States and thereby presents as much broader template for analysis which may be thought of as somewhere between the previous judgments in the case at bar.¹²⁰ Under their opinion, a range of indicia test is used in the ultimate determination – among them being whether the claimed religion espouses a belief in the supernatural or ideas relating to man's inherent nature and peace within the universe and advances among its identifiable group followers, particular standards of behavior having supernatural significance and, furthermore, that the adherents of the religion maintain their practices or ideas in fact constitute a religion.¹²¹

A Indeterminacy and Extra-Legal Norms

When hard cases arise in the law and relevant statutes, common law, contracts or constitutional law provisions, do not clearly resolve a dispute in question a state of indeterminacy results.¹²² Exactly how this is to be resolved remains unclear. Some argue that non-comprehensive extra-legal norms such as religious views may 'guide' – and only guide – judicial decision-making in such cases.¹²³ Others contend judges have a right to include religious sources when justifying decisions even though such values are not shared universally¹²⁴ or even by the litigants. Still others suggest judges must always first seek to develop an analysis that follows a secular

¹¹⁷ (1983) 154 CLR, 132.

¹¹⁸ Bruce Kaye, 'Case Note and Commentary, an Australian Definition of Religions' (1991) 14 *University of New South Wales Law Journal* 332, 335.

¹¹⁹ (1983) 154 CLR, 151.

¹²⁰ Kaye, above n 118.

¹²¹ (1983) 154 CLR, 173-174. See generally Hans Mol, *The Faith of Australians* (1985); Stephen McLeish, 'Making Sense of Religion and The Constitution: A Fresh Start for Section 116' (1992) 18 *Monash University Law Review* 207.

¹²² Mark C Modak-Truran, 'Reenchanting The Law: The Religious Dimension of Judicial Decision Making' (2004) 53 *Catholic University Law Review* 709, 728-737.

¹²³ Kent Greenwalt, *Private Consciences and Public Reason* (1995) 142.

¹²⁴ Wendell L Griffen, 'The Case for Religious Values in Judicial Decision-Making' (1998) 81 *Marquette Law Review* 513, 518.

model – except in those cases involving issues of human worth where religious arguments may then be considered.¹²⁵

The nature and extent to which interdisciplinary or extra legal normative outreaches should be tolerated remains problematic. Suffice it to suggest that contemporary law in action would incorporate the Kirby Ethic and allow religious values, when pertinent to the resolution of a particular case, to be allowed so long as they are acknowledged specifically as being a part of the judicial analysis of a case at bar.¹²⁶ Whenever existing legal authority proves inadequate, conscientious exploration dictates a judge search out the real bases of legal principle and legal policy – whatever grounding they may have.¹²⁷

B Political Underpinnings

Religions, and the moral theologies attendant to them, have a decidedly political character.¹²⁸ Indeed, Judaism, Christianity and Islam are regarded, in the main, as political. While being prophetic, they have sought nevertheless, and continue to seek, to challenge the socio-political *status quo* and attack the economic inequalities of society as well as endeavor to protect the sick and unhealthy and be a voice for the abused and other marginalized interest groups.¹²⁹

When ecumenical political dialogue is engaged, it is a significant and positive undertaking because it provides a forum where citizens and members of faith communities can seek consensus or more often to merely diminish dissension or simply clarify issues of common disagreement, ‘but always to cultivate the bonds of political community, by reaffirming their ties to one another, in particular their shared commitment to certain authoritative politico-moral premises’.¹³⁰

Often defined as a Christian nation, America still advocates a discursive type of religious pluralism.¹³¹ Allowing, indeed tolerating, an open debate on religion itself becomes the short run or immediate goal. When, however, religion does not inform the debate, but rather undergirds it, the central concern is the extent to which ‘belief or nonbelief in a God makes the difference in one’s normative stance’.¹³²

A distinct feature of modernity is the notion that law is totally secular, without a founding God and, thus, independent of any divine command other than the force of

¹²⁵ Michael J Perry, *Religion in Politics: Constitutional and Moral Perception* (1997) 104.

¹²⁶ Kirby, above n 22, *Judicial Activism*, 28.

¹²⁷ Ibid.

¹²⁸ Michael L Perry, *Love and Power: The Role of Religion in American Politics* (1991) 77. See also Chapman, above n 64, 17.

¹²⁹ Ibid 78.

¹³⁰ Ibid 124-125.

¹³¹ Novak, above n 103, 575-576. See generally, Martin E Marty, ‘Over Religious Secular World’ (2003) 132 *Daedalus* 42.

¹³² Novak, above n 103, 576.

human reason¹³³ which is, of necessity, directed toward the establishment of intelligible order.¹³⁴ A contrary view suggests, ‘everyone must invoke some God or other because ... everyone has to speak normatively’ – for participation in any public activity calls for an acknowledgment of the need for law.¹³⁵

No doubt, the central question to be posited today is: in a constitutional democracy defining itself as a secular polity, can religion ever be represented as the basis of the rule of law?¹³⁶ Can the law’s secular legitimacy be derived from religious principles, values, moral teachings or practices apart from validating a specific historical religion?¹³⁷ Finally, does moral adherence to a body of law require belief in a God or not?¹³⁸ Throughout most of recorded human history, there has always been a connection between God and the law.¹³⁹ For example, the all inclusive name the Bible uses for ‘God’ is *elohim* which means ‘authority’ – first, divine and secondarily, human.¹⁴⁰

Whatever the template contemporary analysis is tied to – a covenantal theology of the Bible, Platonic natural law, Hobbesian natural law or a philosophically informed morality seen in the English Common Law – in America, ‘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’.¹⁴¹ It is for the philosophers and moral theologians to make these arguments.¹⁴²

V CHRISTIAN THOUGHT AND EVOLUTION

While Charles Darwin’s *Origin of Species* first appeared in 1859 and advanced a theory of organic evolution, arguing – as such – current living species evolved from pre-existing species, more than a century earlier a French naturalist, Chevalier de Lamarck, advanced a theory of progressive evolutionary development derived from ‘vital forces within living things and the inheritance of acquired characteristics’.¹⁴³ Rather than accept Lamarck’s theory that the process of natural selection was driven by a benign process of individual adaption, Darwin postulated a ‘survival of the fittest’ process in evolutionary development. Indeed, the central feature of Darwinism became the concept of natural selection.¹⁴⁴

¹³³ Ibid 576-577.

¹³⁴ Ibid 580.

¹³⁵ Ibid 593.

¹³⁶ Ibid 572.

¹³⁷ Ibid.

¹³⁸ Ibid 573. See generally, Pierre Schlag, ‘Law as the Continuation of God by Other Means’ (1997) 85 *California Law Review* 427.

¹³⁹ Novak, above n 103, 574.

¹⁴⁰ Novak, above n 103, 575.

¹⁴¹ Novak, above n 103, 595-596.

¹⁴² Novak, above n 103, 596. See Ronald Dworkin, *Law’s Empire* (1986) 407.

¹⁴³ Edward J Larson, *Summer for the Gods* (1997) 14.

¹⁴⁴ Ibid 16. The theory of evolution focuses on changes in life once begun rather than the origins of life.

For the Christian world at that time, the ultimate challenge of Darwinism to it was stated thusly: ‘Beneficial variation was random and natural selection cruel. If nature reflected the character of its creator, then the God of a Darwinian world acted randomly and cruelly.’¹⁴⁵ The Darwinian theory of a mindless process of natural selection suggests a universe not only blind to life and humanity but totally indifferent to its operation.¹⁴⁶ Yet, within this theory was found the elements of what is termed ‘evolution theodicy’. This, in turn, gave rise to a movement that advocated the acceptance of God’s aloofness or separation from natural evil and thus stood outside a strictly scientific framework of analysis but instead was wedded to metaphysical presuppositions about the nature of God.¹⁴⁷

Interestingly, while philosophy and science have always been influenced by theology – and especially so with evolutionary theory – evolutionists deny steadfastly the influence.¹⁴⁸ Yet, as observed, a central metaphysical presupposition infuses the whole of the technical ordering of evolutionary science: namely, that evolution’s success is tied to a doctrine of God. In other words, ‘[i]t is a theological view that preceded evolution historically and became the metaphysical landscape on which the theory was constructed’.¹⁴⁹ Today, one of the leading authorities in the field has suggested that the process of evolution should be seen within an historical context which, in turn, serves as an enhanced guide to understanding nature.¹⁵⁰

It is thought that evolutionary information comes from two central sources: the science of genetics and from contemporary culture.¹⁵¹ From this comes the view that religion is to be seen ‘as an information system within culture that is part of the effort of nature to understand itself and conduct itself in freedom’.¹⁵²

The interrelatedness of all creation is shown time and again by scientific work in genetics. Indeed, the new DNA discoveries restate with convincing clarity the shared evolutionary heritage of all living things¹⁵³ and the constant lifetime interaction between genes and the environment.¹⁵⁴ Interacting with the biological sciences as a co-efficient, or at least a vector of force, in influencing the total development of the individual is the environment – both the cultural and the physical. Because of the fact that, as cultural beings, individuals shape the contexts in which social interactions occur, they exhibit an inherent capacity for ethical

¹⁴⁵ Ibid 17. See generally, Michael R Rose, *Darwin’s Spectre: Evolutionary Biology in the Modern World* (1998).

¹⁴⁶ Chapman, above n 64, 169.

¹⁴⁷ Cornelius G Hunter, *Darwin’s God* (2001) 145-159.

¹⁴⁸ Ibid 160.

¹⁴⁹ Ibid 159. See generally, John F Haught, *Deeper Than Darwin: The Prospect for Religion in the Age of Evolution* (2003).

¹⁵⁰ Stephen J Gould, *The Structure of Evolutionary Theory* (2002) Ch 2-7.

¹⁵¹ Chapman, above n 64, 172, citing Philip Hefner, *The Human Factor: Evolution, Culture and Religion* (1993) 37.

¹⁵² Ibid 173, citing Philip Hefner, *The Human Factor: Evolution, Culture and Religion* (1993) 156.

¹⁵³ Ibid 175.

¹⁵⁴ Ibid 178. See generally, Mary Warnock, *Nature and Morality* (1985).

behavior and spiritual development.¹⁵⁵ Indeed, the mystery of the human spirit and the capacity for self-transcendence will never be eliminated by the New Biology.¹⁵⁶

While human nature is illuminated by genetic science, it is not explained totally. The complexity, transcendence, and mystery of the human person remains and thus serves as a reference point of intersection between culture and theology as well as the natural sciences.¹⁵⁷ A positive force in contemporary society is to be seen in the new and ongoing dialogue between genetics, molecular biology, and the theology of human nature which seeks to build upon these very points.¹⁵⁸ When a distinctly religious voice in, for example, medical ethics becomes passive or is lost, this in turn encourages a form of moral philosophy for the market place and thus places law as the dominant source of morality.¹⁵⁹ It can only be hoped that from this inter-cultural discourse will come new frameworks for principled decision making which, in turn, promote reasoned and balanced ethical responses to personal and societal challenges of this age of the New Biology.¹⁶⁰

A A Papal Clarification

On October 23, 1996, in an address by John Paul II to the Pontifical Academy of Science, the Holy Father suggested science and religion are compatible.

Science can purify religion from error and superstition, religion can purify science from idolatry and false absolutes. Each can draw the other into a wider world, a world in which both can flourish.¹⁶¹

As to the specific issue of the theory of evolution, the Pope acknowledged that it is 'more than just a hypothesis'.¹⁶² While not mentioning Charles Darwin by name, the statement is seen nonetheless as advancing the idea that religious faith and the teaching of evolution can co-exist easily.¹⁶³ Indeed, while observing that there are a number of different theories of evolution, the Holy Father, went on to observe that, '[i]t is possible to accept evolution as a theory while affirming that the spiritual and philosophical elements must remain outside the competence of science'.¹⁶⁴ At least for Roman Catholic theology, what had been – up to this time – the most significant

¹⁵⁵ Ibid.

¹⁵⁶ Ibid.

¹⁵⁷ Ibid.

¹⁵⁸ See James M Gustafson, *Intersections: Science, Theology and Ethics* (1996). See also Chapman, above n 64, 199-204.

¹⁵⁹ Chapman, above n 64, 15 (relying upon the philosophy of Daniel Callahan).

¹⁶⁰ See generally Roger L Shinn, *The New Genetics: Challenges For Science, Faith and Politics* (1996).

¹⁶¹ Bernard J Ficara, *Evolution: Fact, Fiction or Fancy* (2001) Ch 21.

¹⁶² John Tagliabue, 'Pope Bolsters Church: Support for Scientific View of Evolution', *New York Times*, (New York, USA), 25 October 1996. See Robert J Russell, William R Stoeger and George V Coyne (eds), *John Paul II, On Science and Religion* (1990).

¹⁶³ Ibid.

¹⁶⁴ Ficara, above n 161, 124. See Michael Ruse, *The Relationship Between Science and Religion* (2001). See also Russell, *et al* above n 162.

point of argument and division between the genetic revolution and theology as a body of thought,¹⁶⁵ is no longer in issue.

Today, a consensus has been reached not only among scientists – and biblical scholars, but mainstream religions and educators as well, that the theory of evolution is a verifiable account of the origins of life.¹⁶⁶ With the Pope's acceptance of evolution as a theory, comes the realization that, as such, '[s]cience is not a threat to faith'.¹⁶⁷ Accordingly, what John Paul II has done, hence, is to chart a middle position between the creationists and evolutionists which, in turn, fosters not only dialogue but an openness to truth.¹⁶⁸

B *Darwinism and Intelligent Design*

In 1991, Philip E. Johnson constructed the philosophical underpinnings of a contemporary intelligent-design movement which, in essence, asserts the theory of Darwinian evolution is based on inaccurate assumptions and weak evidence.¹⁶⁹ More specifically, the small and vocal number of biologists, chemists, philosophers and mathematicians who constitute the membership of the movement, argue that because of the refusal of mainstream science to consider anything but natural explanations for things, it is therefore biased subjectively against proofs of supernatural intervention in the evolutionary process. Thus, the efficacy of the evidence for evolution through natural processes is called in question.¹⁷⁰

Proponents of the theory of intelligent design believe, simply, that an intelligent agent (but not necessarily using the word, God) has guided the history of the earth.¹⁷¹ Criticized as not being a science, the president of The National Academy of Science has termed intelligent design as nothing more than a 'way of restating creationism in a different formulation'.¹⁷²

¹⁶⁵ Chapman, above n 64, 235.

¹⁶⁶ J A Moore, *From Genesis to Genetics* (2002) 190-191.

¹⁶⁷ Edmund D Pellegrino, 'Theology and Evolution in Dialogue' (1997) 79 *Q Rev Biology* 385, 389.

¹⁶⁸ Ibid 389.

¹⁶⁹ Phillip E Johnson, *Darwin on Trial* (1991). See Michael Powell, 'Doubting Rationalist: Intelligent Design Proponent Philip Johnson and How He Came to Be', *Washington Post*, (Washington, USA), 15 May 2005.

¹⁷⁰ See Robert T Pennock (ed), *Intelligent Design Creationsim and its Critics: Philosophical, Theological, and Scientific Perspectives* (2001). See generally, Greenawalt, above n 56.

¹⁷¹ Brian J Alters and Sandra M Alters, *Defending Evolution in the Classroom: A Guide to the Creation/Evolution Controversy* (2001). See Edward B Davis and Robin Collins, 'Scientific Naturalism' in Ferngren, above n 30, 322 (analyzing the advocates of intelligent design attacks on scientific naturalism or the claims that 'all objects, processes, truths, and facts about nature fall within the scope of scientific method').

¹⁷² Beth McMurtrie, 'Darwinism Under Attack', *Chronicle of Higher Education*, (USA), 21 December 2001. See generally, Francis Beckwith, 'Science and Religion Twenty Years After McLean v Arkansas: Evolution, Public Education, and The New Challenge of Intelligent Design' (2003) 26 *Harvard Journal of Law and Public Policy* 455.

For the vast majority of the scientific community, evolution began billions of years ago and was both unsupervised and impersonal. Yet, others find significant gaps in the scientific record that leave evolution more a theory than a documented fact. Accordingly, they put forth the notion that the evolution of the species took place over time by the grand design of a transcendent personal creator. These ‘creationists’ also contend that the true age of the earth should, as inferred from the Bible, be computed in thousands of years – not billions.¹⁷³

With the publication in 1965 of *The Genesis Flood*, the term, ‘creation science’ was introduced into the American vocabulary.¹⁷⁴ Soon thereafter, a whole movement took shape.¹⁷⁵ Followers of the creation science movement, termed creationists, adopt the Biblical narrative of the Book of Genesis as their theory of origin,¹⁷⁶ accepting as such the creation of the world by a personal God.¹⁷⁷ For the creationists, only two possible constructs can be employed to resolve the question of the origin of life and of the universe: theistic and atheistic. In other words, God is acknowledged as the creator of history or life and seen as an evolutionary dynamic.¹⁷⁸

The book of Genesis has not been accepted in the public school classrooms of the Nation as a teaching source nor has creation science succeeded in re-shaping mainstream science. Indeed, led by the National Academy of Science, mainstream scientific organizations have rejected totally the creationist approach.¹⁷⁹

Central to the claims of the legitimacy of creationism is an apparent conundrum: normally, if creationists accept the Bible as true and infallible, why is it regarded as important to link science with it? The answer given is that since creationism does not qualify as a science in that it does not afford a set of hypotheses capable of being tested, a higher level of legitimacy is sought for it by placing science at its heart or as its *modus operandi*.¹⁸⁰ ‘Modern Americans cling to scientific rhetoric no matter what the issue.’¹⁸¹ Indeed, ‘scientific sanctification’ validates many conservative beliefs by attributing scientific credibility to their biblical interpretations.¹⁸² What is seen in reality, then, is that by shifting attention from issues of faith and value to those of scientific interpretation, the scientific creationists have ‘reduced the Bible to the level of a science [text]’.¹⁸³

¹⁷³ Pennock, above n 170.

¹⁷⁴ John C Whitcomb and Henry M Morris, *The Genesis Flood* (1965). See Dorothy Nelkin, *The Creation Controversy: Science or Scripture in the Schools* (1982).

¹⁷⁵ Judith Villarreal, ‘God and Darwin in the Classroom’ (1988) 64 *Chicago-Kent Law Review* 335, 345.

¹⁷⁶ Arlie Hoover, *The Case for Teaching Creation* (1981).

¹⁷⁷ Judith Villarreal, above n 175, 350.

¹⁷⁸ Judith Villarreal, above n 175, 351. See Hugh Ross, *The Genesis Question: Scientific Advances and the Accuracy of Genesis* (1998) Ch. 11.

¹⁷⁹ Steven Goldberg, *Seduced by Science* (1999) 33.

¹⁸⁰ *Ibid* 35-36.

¹⁸¹ *Ibid* 36.

¹⁸² *Ibid* 37.

¹⁸³ *Ibid* 25.

Since mainstream Christians and Jews do not see the Bible and evolutionary theory as inconsistent, modern creation science is not a contemporary issue of great moment.¹⁸⁴ Rather, they understand that science, itself, can neither tackle and resolve the moral issues of the day nor serve as a template for living life to the fullest. Put simply, ‘whether rejected or accepted, evolution cannot speak to the vital issue of right and wrong’.¹⁸⁵

C *Scopes and Its Aftermath*

When in 1925 in Dayton, Tennessee, a high school science teacher, John T Scopes, taught a class on evolutionary theory, a national debate was thereby triggered over the origins of humans which – in turn – forced the Nation to confront not only its fears and suspicions of scientific knowledge, but its application and uses as well.¹⁸⁶ In essence, the ‘Scopes Monkey Trial’ pitted religion, and a fundamentalist view of divine creation (eg, creationism) against scientific thought on evolution. It became a harbinger of the utilization of evolutionary biology that did not begin however until after World War II.¹⁸⁷

In 1925, the Tennessee Legislature became the first state in the Nation to enact a law against the teaching of evolution in the public schools. Not only was Darwinism banned, but all teaching concerned with human evolution as well and criminal sanctions were imposed for violations. Originally initiated by the ACLU as a means of invalidating the state’s anti-evolution statute as a violation of the First Amendment, in the end, Scopes lost and was found guilty by a jury and the court imposed a fine of \$100. On appeal, the Supreme Court of Tennessee went back to the original legal issue – that is, whether the anti-evolution statute was inconsistent with the state constitution’s religion clause which forbade preferences being given, by law, ‘to any religious establishment or mode of worship’. With but one dissent, the court held that the challenged legislation was constitutional. Yet, on a technicality, Scopes’s conviction was reversed. Since, under the Tennessee Constitution, any fine greater than \$50 could be assessed only by a jury, it was held that the trial judge had no jurisdiction to impose the \$100 fine.¹⁸⁸

The historians of the 1950s and the commentators of the 1930s saw the Scopes trial at two levels: both groups agreed that it was a defeat for fundamentalism, while the commentators of that period during which the trial occurred saw it as a ‘media spectacular’.¹⁸⁹

¹⁸⁴ Ibid 38-39.

¹⁸⁵ Ibid 39. See generally Ficara, above n 161, Ch. 18.

¹⁸⁶ *Scopes v State* 154 Tenn 105, 289 SW 363 (1927).

¹⁸⁷ Gilbert Merritt, ‘From the Scopes Trial to the Human Genome Project: Where is Biology Taking the Law?’ (1999) 67 *University of Cincinnati Law Review* 365, 368.

¹⁸⁸ Edward J Larson, ‘The Scopes Trial and The Evolving Concept of Freedom’ (1999) 85 *Vanderbilt Law Review* 503, 512.

¹⁸⁹ Larson, above n 143, 239. See generally, Edward A White, *Science and Religion in American Thought: The Impact of Naturalism* (1952).

In the end, then, perhaps the Scopes trial can be viewed properly as ‘a step in the triumph of reason over revelation and science over superstition’.¹⁹⁰ Or, stated otherwise, the enduring importance of Scopes is that it embodied the quintessential ‘American struggle between individual liberty and majoritarian democracy, and cast it in the timeless debate over science and religion’.¹⁹¹ The Scopes controversy continues to persist even today.¹⁹² It is recast now as ‘creation science’ (as opposed to creationism) versus evolution.¹⁹³

D *The Continuing Debate: Strategizing Against Evolution*

It was not until 1968, and the case of *Epperson v Arkansas*,¹⁹⁴ that the federal constitutionality of prohibiting the teaching of evolution in public schools was decided by the United States Supreme Court. Here, again, the ACLU joined in seeking a declaratory judgment against a forty year old anti-evolution statute which had never been used. With but one dissent, the Court held that the statute was void because it sought to establish a religion and thus violated the Establishment Clause.¹⁹⁵ ‘Religious purpose alone became the Court’s basis for striking the law.’¹⁹⁶ Stated simply, it was held that there could be no state prohibition against teaching a scientific theory or doctrine for reasons that would counter the fundamental principles of the First Amendment.

In 1987, in the case of *Edwards v Aguillard*, the United States Supreme Court held that a creationism law in Louisiana forbidding the teaching of the theory of evolution in public elementary and secondary schools, unless accompanied by instruction in the theory of creation science, was invalid facially as violative of the Establishment Clause of the 1st Amendment.¹⁹⁷ The purpose of the challenged legislation was to discredit evolution by counter balancing its teachings at every turn with the teaching of creationism – either of which would promote the beliefs of certain religious groups.¹⁹⁸

¹⁹⁰ Larson, above n 143 227.

¹⁹¹ Ibid 265. See generally, John H Brooke, *Science and Religion: Some Historical Perspectives* (1991).

¹⁹² See eg, Jon Christensen, ‘Teachers Fight for Darwin’s Place in US Classrooms’, *New York Times*, (New York, USA), 24 November 1998.

¹⁹³ Villarreal, above n 175, 345; Dan Sheid, ‘Evolution and Creationism in The Public Schools’ (1983) 9 *Journal of Contemporary Legal Issues* 81, 85-87.

¹⁹⁴ 393 US 97 (1968).

¹⁹⁵ Larson, above n 188, 524.

¹⁹⁶ Larson, above n 188, 525.

¹⁹⁷ 482 US 578 (1987).

¹⁹⁸ For an analysis of whether creation science is really science or merely the religious doctrine of divine creation repackaged in jargon, together with arguments for creationism from the Establishment Clause and the Free Exercise Clause of the Constitution, see Sheid, above n 194, 100; Charles Freid, *Saying What the Law Is: The Constitution in the Supreme Court* (2004) Ch 5; Faigman, above n 101, 318-323. See generally, Jay D Wexler, ‘Darwin, Design, and Disestablishment Teaching the Evolution Controversy in Public Schools’ (2003) 56 *Vanderbilt Law Review* 751. See also Bert Thompson, *The Scientific Case for Creation* (1985).

With the ultimate demise of the anti-evolution statutes through *Epperson*, opponents of the theory of evolution have two, possibly three, strategies in their present battle to eviscerate or bury the theory. First line attacks have centered on supporting attempts to exclude evolution from being taught in the classrooms altogether – asserting as such that the teaching of evolutionary theory promotes the religion of secular humanism.¹⁹⁹ Accordingly, its inclusion in public school science curricula violates the Establishment Clause of the US Constitution. Courts have rejected this view generally – holding that the theory of evolution is scientific and, thus, not to be taken as a religious belief.²⁰⁰

The second strategy has focused on efforts to either compel the teaching of creationism as another valid scientific theory on the origins of life or, alternatively, to discredit the validity as well as the importance of the theory of evolution in the sciences. This strategy has been advanced by efforts to legislate in the states Balanced Treatment Acts designed to require public schools to give balanced treatment to creation science with evolution science.²⁰¹ This approach has also not been successful.²⁰²

Another clever approach – and no doubt the third strategy – to advancing the creation science movement, has been seen more recently in 1999, with the actions of the Kansas State School Board in adopting a new statewide science curriculum which wipes out virtually all mention of evolution and related concepts such as natural selection, common ancestors and the origins of the universe.²⁰³ While the science standards did not prohibit the teaching of creationism, they discouraged clearly the teaching of evolution. Even though these standards were but guidelines, thus allowing each school board within the state the freedom to decide whether to continue to teach evolution, the State School Board had the final authority to determine the content of standardized tests. Accordingly, it was decided – beginning with the 2000-2001 school year, that both the 7th and 10th grade state

¹⁹⁹ Wendell Bird, 'Note; Freedom of Religion and Science Instruction in Public Schools' (1978) 87 *Yale Law Journal* 515.

²⁰⁰ Colleen McGrath, 'Redefining Science to Accommodate Religious Beliefs' (2001) 45 *New York Law School Review* 297, 303. See Theresa Wilson, 'Evolution, Creation, and Naturally Selecting Intelligent Design Out of the Public Schools' (2003) 34 *University of Toledo Law Review* 203.

²⁰¹ *Ibid* 303. See Ark Stat Ann § 80-1663 (1981); 17 LA Rev Stat Ann § 286 (1981); Tenn Code Ann § 49-2008 (1973).

²⁰² McGrath, above n 200, 305-309. See *McLean v Arkansas*, 529 F Supp 1255 (ED Ark 1982) often referred to as 'Scopes II', where state legislation mandating balanced treatment of creation science and evolution science in public school curricula was held unconstitutional thus thereby dealing a death blow to the teaching of creationism and, by implied reference, the teaching of Intelligent Design. Beckewith, above n 172, 458.

²⁰³ Hanna Rosin, 'Creationism Evolves: Kansas Board Targets Darwin', *Washington Post*, (Washington, USA), 8 August 1999. But see, Larry Witham, '49 States Mandate Teaching Evolution', *Washington Times*, (Washington, USA), 8 April 2000 (reporting, however, that Louisiana, Mississippi, Georgia, Alabama, Florida and Arkansas have very brief and restricted standards in regards to the teaching of evolution).

science examinations would not contain questions regarding the origin of life, the earth and the universe. The practical effect of this decision is that the teaching of evolution in the classroom is now discouraged, at best, and – at worst – eliminated totally.²⁰⁴ In November, 2000, a new state board of education was elected in Kansas. It proceeded to reject the 1999 science standards and went on to adopt in February, 2001, new standards which identified evolution as one of the unifying concepts of science.²⁰⁵

One overriding point remains clear: since the U.S. Supreme Court failed to address clearly in *Edwards v Aguillard* the multiple relationships and interactions of religion, science, and secular humanism within the bounds of public school education, unending controversy will continue.²⁰⁶ Indeed, all of the Supreme Court's decisions since the Tennessee Supreme Court's decision in *Scopes v State* have failed to slow the spread of creationism. Rather, they have encouraged fundamentalists, more and more, to abandon evolution-teaching public education for creation-affirming church affiliations or home schooling where their faith, and that of their children, can be nurtured and sustained.²⁰⁷

E *New Outreaches and Challenges*

Even with the 'failures' of public education to accommodate fundamentalism in curricular offerings, with higher education, however, a most interesting occurrence is being recorded: that is, religion – as an academic subject – is no longer confined to divinity schools and Sunday pulpits. Today, it is probed, and its relevance examined, in undergraduate and graduate programs in sociology, political science, international relations, business, and medicine.²⁰⁸ Rather surprisingly, this new-found student interest in the field of religion and the quest to make its tenets applicable to the contemporary problems of daily professional living is having the effect of reshaping the content and the direction of the whole of the social

²⁰⁴ McGrath above n 200, 319. See generally, Jeffrey F Addicott, 'Storm Clouds on The Horizon of Darwinism: Teaching the Anthropic Principle and Intelligent Design in The Public Schools' (2002) 63 *Ohio State Law Journal* 1507.

²⁰⁵ McGrath above n 200, 328.

²⁰⁶ Villarreal, above n 175, 374.

²⁰⁷ Larson, above n 188, 261. The *Religious Land Use and Institutionalized Persons Act* of 2000 forbids the government from imposing or implementing a land use regulation that imposes a substantial burden on the religious exercise of a person or religious assembly. This protection also extends to schools run by religious groups. 42 USC § 2000cc(a)(1). See Caroline Adams, 'The Constitutional Validity of *The Religious Persons Act* of 2000' (2002) 70 *Fordham Law Review* 2361. See generally R Kent Greenawalt, 'Hands Off! Civil Court Involvement in Conflicts Over Religious Property' (1998) 98 *Columbia Law Review* 1843.

²⁰⁸ Teresa Watanabe, 'Faiths Social Reach: Academia Is Getting Religion', *Washington Post*, (Washington, USA), 9 November 2000. For the impact of religious/spiritual education within medical schools, see also, Harold G Koenig, Michael E McCullough and David B Larson, *Handbook of Religion and Health* (2001) 58-59, 437-439 and 455-56 .

sciences.²⁰⁹ However, the extent to which explicit religious arguments should be introduced into public debate remains an open-ended issue.²¹⁰

VI CREATIVE PARTNERSHIP?

Religion, and its denominational theologies, set normative standards for ethical conduct and, thus, serve as a construct for social decision making. Alternatively, as suggested, these norms and constructs can be seen properly as a third culture – interpreting, reconciling and stabilizing law and medical science. Yet, if the view is accepted that the ‘bedrock of moral order is religion’,²¹¹ it must follow that law and science not only build upon it but are linked irretrievably to it in all of their present policies and actions.

The alternative hypothesis suggests the synergistic forces of law, religion, and science combine in a dynamic partnership to form a communitarian alliance dedicated to providing a framework in which man can pursue the peace of ordered harmony which allows for a balanced happiness in his social, spiritual, and physical relationships.²¹² Within the alliance, the rank or equality of status depends largely upon the frame of reference taken for each problem presented. Historically, there can be no disputation of the first order significance of the moral and ethical theories and principles derived from religion. Indeed, it has been suggested that without religious beliefs, moral teachings merely ‘hang in the air’ without any foundation.²¹³ In contemporary society, however, law – as has been suggested – must assume the primary role of directing and stabilizing all courses of human affairs – fortified in interpretative analysis, to be sure, by ethical and moral principles. In public matters, however, if not a Jeffersonian ‘wall of separation’ between matters of church and state, then at least a Madisonian ‘scrupulous neutrality’ must be maintained if faithfulness to the original intent of the framers of the Constitution is to be respected.²¹⁴

While Americans believe in ‘The Living Constitution’ as a ‘morphing document’ evolving from age to age according to majority wishes²¹⁵ – expressed and manifested ideally, as such, through a ‘deliberative’ democratic process²¹⁶ (sadly, not guided by informed judgment) – the central weakness to this theory of living

²⁰⁹

Ibid.

²¹⁰

Goldberg, above n 179, 130. See Mark V Tushnet, ‘The Limits of The Involvement of Religion in The Body Politic’ in James E Wood Jr and Derek Davis (eds), *The Role of Religion in the Making of Public Policy* (1991) Ch. 7.

²¹¹

Reagan, above n 106. See generally, R Kent Greenawalt, ‘The Role of Religion in a Liberal Democracy: Dilemmas and Possible Solutions’ (1993) 35 *Journal of Church and State* 503.

²¹²

See St Augustine, above n 82.

²¹³

Peter Singer, *Writings on an Ethical Life* (2000) xviii.

²¹⁴

See Witte, above n 102. See generally, Goldberg above n 179, Ch 8; R Kent Greenawalt, *Religious Convictions and Political Choice* (1988).

²¹⁵

Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (1997) 46-47.

²¹⁶

Cass R Sunstein, *The Partial Constitution* (1993) Ch 4-6.

constitutionalism is that there is no one guiding principle for it to follow.²¹⁷ In contemporary issues of bio-medicine, there is little ‘rational’ deliberation by the populace. This condition, in turn, forces the judiciary – as interpreters of the laws and the social conscious – to define and inevitably test current medico-legal issues by the text and legislative history of the Constitution thereby providing, ideally, both predictably and stability to both an evolving and highly contentious area of the law.²¹⁸

A *Compatibilities and Incompatibilities*

The duality of man or the recognition of his spiritual and material sides, has not been the grounds upon which contemporary science has advanced. Rather than challenge and attack this concept, science has merely set it aside and defined as non-scientific all inquiries into spiritual matters.²¹⁹ As the scientific dialogue has assumed increasingly that man is no more than matter and energy, dualism has nearly disappeared.²²⁰ Yet, throughout modern science, there remains a continuing search for an intersection point between values and empiricism.²²¹

Perhaps the noblest and most practical point of balance between religion and science should be love, justice or humaneness – for its achievement by man promotes the essence of faith by instilling meaning and value to the life-experience and also enhances one’s overall physical well being. Stated otherwise, the fulcrum of this balancing test between religion and science is the achievement of a point of equilibrium that promotes policies and shapes direct actions that minimize suffering and improve the social well-being of all men.²²² There is a common misperception that religion needs only faith in order to sustain itself. The correct understanding is that ‘religion requires belief and belief is built on knowledge’.²²³ Within differing contexts, both science and theology, then, seek truth and wise judgment.²²⁴

B *Toward Reconciliation*

Not every scientist must become a believer nor every believer embrace science totally in order for there to be a reconciliation between science and faith. While viewed from vastly different perspectives, the biblical and the scientific description of the creation of the universe and the beginning of life on earth present identical realities. Once these perspectives are identified, they can coexist rather comfortably. If an acceptance of the need to read and understand the Bible on the Bible’s terms –

²¹⁷ Scalia, above 215, 44-45.

²¹⁸ Scalia, above 215, 44.

²¹⁹ Goldberg, above n 179, 18.

²²⁰ Goldberg, above n 179, 18.

²²¹ Goldberg, above n 179, 135. See generally, Gustafson, above n 158.

²²² Smith, above n 91.

²²³ Gerald Schroeder, *The Science of God* (1997) 18.

²²⁴ John Polkinghorne, *Belief in God in an Age of Science* (1998) 92. See generally, George P Smith, II, ‘Pathways to Immortality in the Millenium: Human Responsibility, Theological Direction or Legal Mandate’ (1996) 15 *St Louis Public Law Review* 557.

complete with subtexual levels of interpretation – is understood and science then admits it is powerless to either confirm or deny a purpose for life, a true reconciliation between science and faith will be achieved.²²⁵

Scientific investigation is in fact very similar to religious experience. In science, the defining event is when that which was unknown becomes visible and even clear. In spirituality, experiences with meaning, purpose, and teleology are foundational. Thus, semantic differences remain small between scientific insight and what is termed – in the language of religion – revelation.²²⁶

VII CONCLUSION

A *Shaping a Unified Goal and Response*

The theologies of the world religions not only demand an answer but also prompt a response to the problem of suffering – for they assist in seeking an explanation to, or rationalization of, suffering. In one very real sense, then, the New Biology is considered properly as a theological response to the enigma of human suffering. The medical scientists and physicians endeavor to cure. Through therapeutics and investigation, the purpose of religion and medical science is the same: to minimize or ameliorate suffering.²²⁷

It remains ultimately for law to serve as a primary mechanism for effecting this duality of purpose through wise and humane legislation, administrative policy making, and judicial interpretations designed to assume both distributive and corrective justice in the delivery of health care and the advancement of medical science²²⁸ which, in turn, promote the personal dignity, value and integrity of the human person.²²⁹

B *Law's Challenge and The Kirby Ideal*

²²⁵ Schroeder, above n 223, 21, 141. Science has already sought to close biblical ranks by recognizing there was not only a beginning to the universe but that life began on earth rapidly following water and not through millennia of random sets of reactions. Ibid 29. See also Arthur Peacocke, *Paths From Science Towards God: The End of All Our Exploring* (2001) Ch 1-2.

²²⁶ See Schroeder, above n 223; Arthur Peacocke, *Theology for a Scientific Age* (1993).

²²⁷ Martin E Marty and Kenneth L Vaux (eds), *Health/Medicine and the Faith Traditions: An Inquiry into Religion and Medicine* (1982) 209. Interestingly, eighty-four percent of Americans think that praying for the sick improves their chances of recovery: Kalb, above n 31, 46. There is no scientific proof that prayer induces healing, however: 'Symposium, Prayer and Healing: Can Spirituality Influence Health?', *CQ Researcher*, (USA), 14 January 2005, 15.

²²⁸ George P Smith, II, 'Distributive Justice and Health Care' (2002) 18 *Journal of Contemporary Health, Law and Policy* 421; George P Smith, II, 'Judicial Decisionmaking in the Age of Biotechnology' (1999) 13 *Notre Dame Journal of Law, Ethics and Public Policy* 34. See generally, George P Smith, II, *Genetics, Ethics and the Law* (1981) 164-65.

²²⁹ J Robert Nelson, *On the New Frontiers of Genetics and Religion* (1994) 162. See generally, Smith, above n 63, 'Manipulating the Genetic Code'; George P Smith, II, 'Law, Science and Medicine: Leeways of Choice, Partners of Discourse' (1997) 10 *University of New South Wales Law Journal* 103.

In the ‘dreamtime’ of tomorrow, comparative jurisprudence and international law – together with a reliance on interdisciplinary disciplines – will be the touchstones for contemporary lawmaking which seeks to both elevate and thereby validate the nobility of the human purpose and protect its free and oftentimes diverse exercise;²³⁰ eschews parochial strait jackets and, instead, codifies humanistic values;²³¹ and recognizes its compass must always point to the advancement of human rights.²³²

If lawyers are to continue to play a relevant role in the ‘dreamtime’, they must become more aware of the nature and consequences of the scientific and technological advances of the Age.²³³ Otherwise, they will not only ‘increasingly lack understanding of the questions to be asked, let alone the answers to be given’.²³⁴ For, it is well to remember that ‘doing nothing has just as many consequences as doing something’.²³⁵

‘Unless interdisciplinary machinery can be developed, capable of consulting the experts and the general community and helping [legislatures] with social and legal implications of medical developments’, we must then be forced to acknowledge the inability of democratic institutions to respond to the challenges of science and technology – unmistakably ‘the great engines’ of the 21st century.²³⁶ It is well to remember that even though science promises an unpredictable future, futures are inevitably unpredictable.²³⁷

The most fundamental lesson to be learned from the march of science and technology, then, is that in order to foresee development of the future, controlled leaps of the imagination must be engaged in.²³⁸ In the final analysis, the observations of Kirby J are pertinent:

If democracy is to be more than a myth and a shibboleth in the age of natural science and technology and more than a triennial visit to a polling booth, we need a new institutional response.²³⁹

²³⁰ Kirby, above n 22, ‘Seven Ages of a Lawyer’, 10.

²³¹ See Kirby, above n 3, *Through the World’s Eye*, xviii, Ch 15.

²³² See generally, Michael D Kirby, ‘Indicators for the Implementation of Human Rights’ in Janusz Symonides (ed), *Human Rights: International Protection Monitoring, Enforcements* (2003) Ch 11; George P Smith, II, *Human Rights and Biomedicine* (2000).

²³³ Michael D Kirby, ‘Human Rights – The Challenge of The New Technology’ (1986) 60 *Australian Law Journal* 170, 181. See generally, Michael D Kirby, ‘Human Rights and Technology’ (1988) 22 *University of British Columbia Law Review* 123.

²³⁴ *Ibid.*

²³⁵ Kirby, above n 22, ‘Judicial Activism’, 88 fn. 386 (quoting Lord Justice Sedley).

²³⁶ Kirby, above n 1, *Reform the Law*, 238. See also Kirby, above n 16, 31-34.

²³⁷ Owen D Jones and Timothy H Goldsmith, ‘Law and Behavioral Biology’ (2005) 105 *Columbia Law Review* 405, 499.

²³⁸ Kirby, above n 3, *Through the World’s Eye*, 48.

²³⁹ Kirby, above n 1, *Reform the Law*, 238.

- one that is both informed and guided by the Kirby Ethic.

If we fail in this challenge, Kirby J continues, 'we must simply resign ourselves to being taken' where the machines of science and technology move us.²⁴⁰ Such a pathway 'may involve nothing less than the demise of the Rule of Law as we know it'.²⁴¹ Indeed, as Windeyer J cautioned in 1970, if law does not keep pace with medicine, it will continue to march 'in the rear', limping along.²⁴² It is for 'society to decide whether there is an alternative or whether the dilemmas posed by modern science and technology, particularly in bioethics, are just too painful, technical, complicated, sensitive and controversial for our institutions of government'.²⁴³

²⁴⁰ Ibid. See also Kirby, above n 3, *Through the World's Eye*, 50-51.

²⁴¹ Ibid.

²⁴² *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383, 395 (Windeyer J).

²⁴³ Kirby, above n 1, *Reform the Law*, 238. See generally, Radcliffe, above n 17; George P Smith, II, *Law, Science and Religion in a Changing World Order: Designing a Template for the Age of Biotechnology* (2001).