

## MEDICAL SCIENCE AND THE LAW

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Advances in medical science have presented both law and bioethics with some of the most fascinating questions of our time. As science continues to forge ahead into new frontiers, in fields such as reproductive technology, human genetics, cloning technologies, and stem cell research, questions have arisen over the role for law in regulating this new terrain. The speed with which medical science has advanced, and continues to advance, can make it difficult to formulate appropriate regulatory responses. The rapid pace of scientific change and the increasing complexity of the science can present hurdles and barriers to the engagement of the public with science and the legal and ethical issues raised by it. As Michael Kirby has pointed out:

In a sense, many of the problems presented by science and technology have gone beyond the understanding even of the intelligent lay person. How many citizens really understand what the atom is? What the relativity theory of Einstein means? How a computer really works? What a gene truly is and how it operates? How the brain functions? And how it gives rise to that greatest mystery of all, intelligent consciousness?<sup>1</sup>

It is against this backdrop that George Smith develops his analysis of the relationship between law, religion and medical science. By seeking to articulate a renewed role for religion in contemporary society, Smith engages with the key question of ethical certainty in the face of constant change. Smith argues 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 shaping both ethical and moral constructs for decision making'.<sup>2</sup> Although he acknowledges the decision making role often given to the law,<sup>3</sup> Smith is cautious about ascribing law, rather than religion, a determining role for morality:

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<sup>1</sup> Hon M Kirby, 'Genomics and Democracy: A Global Challenge' (2003) 31 *West Australian Law Review* 1, 18.

<sup>2</sup> George P Smith, II, 'Law, Religion, and Medicine: Conjunctive or Disjunctive?' (2006) *Macquarie Law Symposium - Law, Religion and Medical Science* 16.

<sup>3</sup> Ibid.

When a distinctly religious voice in, for example, medical ethics becomes passive or is lost, this in turn encourages a form a moral philosophy for the market place and thus places law as the dominant source of morality.<sup>4</sup>

It may be, as Smith argues, that religion could provide a framework for ethical decision-making in the face of new challenges. Yet this framework remains elusive precisely because the shared nature of ethical viewpoints is increasingly contested territory. In part these difficulties arise because the ethical and regulatory issues presented by medical science highlight many of the tensions that already exist in contemporary society. Traditional social institutions such as the Church and the nuclear family are being reshaped by the broader social changes of our times that include an increasing secularism in society, greater gender equality, greater participation by women in the paid workforce, the trend towards smaller families and a growing focus on consumerism and individualism.

In the face of these developments, and given the difficulties associated with finding common ground in ethical debates, the law is, as Smith points out,<sup>5</sup> often given the role of mediator, with the courts crafting solutions for individual cases and law reform bodies and legislatures formulating broader solutions at the macro level. Even here the solutions are not straightforward. The fact that the assumed ethical and social certainties of the past no longer seem as self-evident or as straightforward adds new complexities to the task of devising regulatory frameworks in the face of the ethical dilemmas presented by new science.

Smith sees religion as providing the foundations for contemporary morality, with these religious foundations providing a solid base for the ethical decisions necessary for both law and science. In this context, he argues that ‘there can be no disputation of the first order significance of the moral and ethical theories and principles derived from religion’<sup>6</sup> and the law, informed by ethical principles then plays ‘the primary role of directing and stabilizing all courses of human affairs’.<sup>7</sup> It is this relationship between religion, law and science that Smith sees as ‘a creative partnership’.<sup>8</sup>

Smith acknowledges that the relationship between religion, science and the law has often been a rocky one. As he points out in his article, science and religion have clashed on many occasions, leading to hotly contested public debates around issues such as evolutionary theory. Despite these differences, Smith argues that science and religion can find common ground in their shared concern for the human condition:

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<sup>4</sup> Ibid 28.

<sup>5</sup> Ibid 15-16.

<sup>6</sup> Ibid 35.

<sup>7</sup> Ibid.

<sup>8</sup> Ibid.

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.<sup>9</sup>

It is this appeal to common humanity and respect for human rights that perhaps holds the most promise for finding that common ground that seems so elusive. In a postmodern world, where diversity and pluralism are part of contemporary life, it is important to continue to remind ourselves to look beyond differences. This does not entail a rejection of diversity and pluralism. On the contrary, we should be seeking those points of commonality and agreement that co-exist with, and are respectful of, diversity. Our commitment to universal human rights is built on precisely this approach. The *Universal Declaration of Human Rights* states in Article 1 that 'All human beings are born free and equal in dignity and rights'.<sup>10</sup> The influence of human rights discourse is increasingly evident within bioethics and medical ethics.<sup>11</sup> A growing focus on global health issues within bioethics is creating a new dialogue over the meaning of commonality in a diverse world.<sup>12</sup> As the dialogue continues, new points of connection may emerge.

Medical science will undoubtedly continue to present us with both fascinating possibilities and perplexing dilemmas. The task of finding a path through these tangled debates seems likely to be a long-term one. George Smith's article argues for a role for religion in providing some guidance for this journey and an appeal to the common values inherent in 'love, justice or humaneness'. Whether religion, law and science can develop the 'creative partnership' hoped for by Smith remains to be seen. What is clear is that a shared commitment to human rights and social justice can provide an ethical framework for decision-making about contemporary challenges and may prove that our diverse world has more points of commonality than we think.

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<sup>9</sup> Ibid 36.

<sup>10</sup> *Universal Declaration of Human Rights* art 1.

<sup>11</sup> See, T A Faunce, 'Will International Human Rights Subsume Medical Ethics? Intersections in the UNESCO Universal Bioethics Declaration' (2005) 31 *Journal of Medical Ethics* 173. See also, G P Smith, *Human Rights and Biomedicine* (2000); G P Smith, 'Human Rights and Bioethics: Formulating a Universal Rights to Health, Health Care, or Health Protection?' (2005) 38 *Vanderbilt Journal of Transnational Law* 1295.

<sup>12</sup> See eg, R Macklin, *Against Relativism: Cultural Diversity and the Search for Ethical Universals in Medicine* (1999); P Marshall and B Koenig, 'Accounting for Culture in a Globalized Bioethics' (2004) 32 *Journal of Law, Medicine and Ethics* 252; P Farmer and N G Campos, 'New Malaise: Bioethics and Human Rights in the Global Era' (2004) 32 *Journal of Law, Medicine and Ethics* 243.