

## LAW, RELIGION AND BIOMEDICINE: CONSENSUS OR CONFLICT?

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### I INTRODUCTION

Professor George Smith has a bold vision. He argues that the ‘broad ethical norms for purposeful living’<sup>1</sup> that emerge from religious texts share enough in common and are sufficiently abstract that they can be distilled – or at least interpreted – in order to generate a broad consensus on how society, through law, should regulate biomedicine. The belief that the various faith traditions share common ground and can act as a resource for identifying where the public benefit lies when confronting questions about new biomedical technologies, is perhaps the most provocative hypothesis Professor Smith advances in his paper.

Let’s put Professor Smith’s grand vision in a clearer context. For many scholars working in law and medicine, what is exciting about this field is the chance to explore the legal and ethical problems posed by the application of technology to medicine and the biological sciences. Often, scholars gravitate towards a topic of interest – such as electronic medical records, prenatal genetic testing, or cloning – and proceed to investigate how the possibilities of the technology *can*, and *should*, be shaped by the policies that law embodies. In his paper, Professor Smith introduces a new player – religion – into the fray. He is clearly right to identify religion as a force that influences and constrains both advances in (bio)medicine itself, and the way that law responds to them.

Yet Professor Smith does not limit himself to the way that religion influences the law’s regulation of this or that biomedical hot topic. His interest is the broader, fundamental question of how religion, as a moral and social force, should interact with the law in shaping biomedicine and its associated technologies. (Later in his paper, through a discussion of evolution, creationism and intelligent design, he raises the issue of religion’s role in shaping science). Most commentators accept that in a free, democratic society, organised religion should be free to argue its

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<sup>1</sup> G P Smith, ‘Law, Religion, and Medicine: Conjunctive or Disjunctive?’ (2006) *Macquarie Law Symposium – Law, Religion and Medical Science* 17.

ideals in the marketplace of ideas and to 'influence policy as much as possible'.<sup>2</sup> At the same time, there must be limits. It is inconsistent with the idea of a pluralist society for this or that religious organisation – through its appropriation of political and legal channels – to seek to 'impose [its own] specifically religious views of moral behaviour on those citizens who do not share their creed'.<sup>3</sup> Where religion ought to draw the line, in influencing the regulation of biomedicine, is a permanent site of conflict in bioethics and medical law.

## II WHERE DOES PROFESSOR SMITH STAND?

Professor Smith is well aware of the dilemma. 'Invariably', he writes, 'law supports some visions of how life should be lived within the community while, at the same time, undermining others'.<sup>4</sup> We might sketch a rough continuum. On the far right lies the 'moral politics' view: religion competes for influence in the political and legal arena and seeks to institutionalise its own ('morally right') views. On the far left is the 'personal morality' view: religion avoids intruding into the political and legal realm, retaining a public presence, no doubt, but seeking to appeal primarily to personal conscience. The left hand view tries to avoid mixing law with religion; the right hand view tries to *make religion law*.

Professor Smith appears to share with the right-hand side of the continuum the assumption that it is appropriate for religion to express its views through political and legal processes. He is a believer, an optimist and – at some level – a natural lawyer. One of the challenges for bioethics, he suggests, is to 'restate the relevance of [Christian, possibly Judeo-Christian] religious principles to a skeptical secular society'.<sup>5</sup> Religion and law both share the same moral core: love, from which springs justice, and a concern for public benefit. Religion *should* therefore aim to influence law, and indeed, 'Without religion, law degenerates into little more than a mechanical legalism; and religion without law loses its social effectiveness'.<sup>6</sup>

On the other hand, Smith is ecumenical rather than sectarian. He wants to unlock the potential of 'faith-based denominational efforts', to move beyond their *abstractness* in order to identify useful guidance on how to respond to the challenges of biomedical governance. He doesn't say so in as many words, but Professor Smith's approach reads as a strong dissent from what is currently the

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<sup>2</sup> L. Skene and M Parker, 'The Role of the Church in Developing the Law' (2002) 28 *Journal of Medical Ethics* 215, 215-6. Skene and Parker accept that 'the church, like other institutions, legitimately competes for support in elaborating ways of living life and organising society in a public, not just a private sense': 217.

<sup>3</sup> C Coady, 'Religious Meddling: A Comment on Skene and Parker' (2002) 28 *Journal of Medical Ethics* 221, 221.

<sup>4</sup> Smith, above n 1, 16.

<sup>5</sup> Smith, above n 1, 17.

<sup>6</sup> Smith, above n 1, 20. In the same way, Smith argues that religion *ought* to influence medical ethics: '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': 28.

most visible contribution of religion to biomedicine and health law: the ‘Biblical BioPolitics’<sup>7</sup> of the American religious right.

Ultimately, Professor Smith’s implicit ecumenism poses some hard questions. Can religion speak with *one voice* (as distinct from many), in order to present a coherent response to the regulatory questions that biomedical technology forces upon society? Is it too optimistic to suggest that these three domains – law, biomedicine and religion – can cooperate effectively to strengthen ‘what should be the ultimate goal of the state namely: to secure the happiness, spiritual tranquillity and well-being of its citizens’?<sup>8</sup> And above all, *whose religion, whose* version of medicine, and *whose laws* are capable of achieving this goal? Law, medicine and religion are all (besides being many other things) sites for the expression of political power. To ignore that; to downplay religious differences and to over-emphasise consensus carries the risk that we will swallow a regulatory framework that expresses the moral agenda of some, while claiming to represent all.

### III THE CONVERGING ORBITS OF LAW, BIOMEDICINE, ETHICS AND RELIGION

Stepping back for a moment, there can be no argument about the starting point for George Smith’s dream of a rapprochement between law, religion and medicine. Law has become increasingly enmeshed with medicine, and this will continue. As Ian Kennedy has argued, legislatures may, for a time, sidestep hot political issues. But inevitably, ‘the courts will be invited, urged or required to step in’.

Beset by problems which are immensely difficult, going to the heart of what we want for ourselves and for others, and faced by public institutions which are reluctant to act, those with something to gain or lose will take their claim to the courts, the one institution which, once asked, cannot refuse to supply a response.<sup>9</sup>

History demonstrates how the concerns of bioethics have evolved steadily into *legal* issues. Following hot on the heels of the inter-disciplinary conversations of the 1960-70s came recourse to the courts and the appearance of legislation: the rapid emergence of ‘medical law’.<sup>10</sup> Physicians and scientists might not like it, but law’s appropriation of *their* profession – including, at times, their clinical discretion – reflects the exercise of political power in our society. While lawyers tend to take the blame for this, it is not the power of the legal profession that is driving the

<sup>7</sup> The term belongs to Perry: See, J E Perry, ‘Biblical BioPolitics: Judicial Process, Religious Rhetoric, Terri Schiavo and Beyond’ (2006) 16(2) *Health Matrix* <<http://ssrn.com/abstract=775587>>.

<sup>8</sup> Smith, above n 1, 16.

<sup>9</sup> I Kennedy, ‘The Medical Frontier’ in L Howe and A Wain (eds), *Predicting the Future* (1993) 96-117, 111. Kennedy continues: ‘Of course, when the courts do step in, the subtle and difficult question of whether the issue really does call for legal regulation becomes moot. The court is stuck with the problem and must make a decision. Public policy there will be and it will be law’.

<sup>10</sup> See, R S Magnusson, ‘A Short History of the Next Thirty Years: Genetic Testing, Clinical Care and Personal Choices’ (2003) 26 *University of New South Wales Law Journal* 743, 746-7.

process.<sup>11</sup> Rather, law is the system through which the power is exercised. In so far as there is legislation, the State is increasingly regulating decisions that were once informal and discretionary. Case law, for its part, illustrates how health consumers (aka ‘patients’) are pressing their rights, and disrupting the historical power (im)balance between doctors and patients.

Professor Smith points out that as medicine comes increasingly within law’s gravitational pull, many of the issues that are litigated, legislated or otherwise regulated, are *moral* ones.<sup>12</sup> Law has coalesced around these issues precisely because they are seen to have moral, and therefore religious significance. This has given rise to struggles for regulatory control. On repeated occasions – as illustrated recently by the Teri Schiavo case in the United States – groups who share moral and religious ideals have sought to influence both the courts and the legislature. ‘Moral politics’ is alive and well.<sup>13</sup>

#### IV A CLOSER LOOK AT THE GRAND VISION

So what are the values that Professor Smith believes religion will bring to biomedicine? As I read Professor Smith’s work, there is an unmistakable emphasis upon public benefit (as distinct from individual interests), which is ultimately to be achieved through a form of cost/benefit analysis. The underlying purpose is to identify (without privileging any particular religious or denominational tradition) the forms of regulation that will minimise human suffering, while maximising human flourishing and genetic well-being. A utilitarian calculus, tempered with compassion, is an enduring feature of Smith’s work.<sup>14</sup> Professor Smith is neither a moral conservative, nor a libertarian, which explains his perspective on genetic health. Worldwide, a recent report suggests that 3.3 million children under 5 years of age die each year from serious birth defects, causing an enormous burden, particularly on poorer countries.<sup>15</sup> Professor Smith is well aware of the problem: his proactivist view on displacing ‘man’s genetic weaknesses from the line of inheritance’<sup>16</sup> [sic] reflects somewhat non-libertarian opinions about ‘responsible’ parenthood and the limits of reproductive freedom (elsewhere, for example, he has

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<sup>11</sup> Lawyers are omnipresent, of course, but rather like bankers, they assist interested parties to gain access to the legal system (and impose their tax for doing so), as distinct from being directly responsible for what Hillyard and Dombrink call the ‘general domestication of medicine’ that is being accomplished *through law*: D Hillyard and J Dombrink, *Dying Right: the Death with Dignity Movement* (2001) 18.

<sup>12</sup> Smith, above n 1, 16.

<sup>13</sup> See, eg, J Eisenberg, *Using Terri: The Religious Right’s Conspiracy to Take Away Our Rights* (2006). F Charatan, reviewing this book, quotes Howard Ahmanson Jr, a prominent funder of the religious right, as saying ‘My purpose is total integration of biblical law into our lives’ (2006) 332 *British Medical Journal* 309.

<sup>14</sup> R C O’Brien, ‘The World of Law, Science and Medicine According to George P Smith II’ (2002) 8 *Journal of Contemporary Health Law and Policy* 163, 166-7.

<sup>15</sup> J Zarocostas, ‘Serious Birth Defects Kill at Least Three Million Children a Year’ (2006) 332 *British Medical Journal* 256.

<sup>16</sup> Smith, above n 1, 16-17.

advocated mandatory genetic screening programs).<sup>17</sup> He couples this with rather progressive views about experimentation in human embryology and reproductive biology.<sup>18</sup>

How, in a more mechanical sense, can biomedicine and religion establish the communication channels necessary to generate the guidance Smith believes religion can provide? Smith invites religion to move beyond abstractions and ‘a recitation of traditional beliefs’<sup>19</sup> and to be ‘interrogative’, entering a dialogue with biomedical science that permits ‘fallibilism’ and a tentative approach towards hitherto established positions. Universal principles and rules are out: Smith advocates a kind of virtue ethics, arguing that ‘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’.<sup>20</sup>

For my money, I suspect that the larger, hierarchical denominations of the Christian Church would opt for their own ‘moral politics’ approach to bioethics in preference to the process of dialogue Smith has in mind. More fundamentally, I wonder if the values and belief structures of the major religions preclude commonality on bioethical issues, except perhaps at an abstract, rather meaningless level?

#### V THE FIVE ‘NON-NEGOTIABLES’: CONSENSUS OR CONTEST?

In the United States, where Professor Smith has taught law for over 25 years, the Christian Right – an active participant in bioethics – has focused its political activity on ‘five non-negotiables’: abortion, gay rights, assisted suicide, stem cells, and cloning.<sup>21</sup> As Dombrink notes, these five ‘take as their central point the contestation of certain facets of personal autonomy and morality’; their common theme is a ‘culture of life’.<sup>22</sup> Belief in the sanctity of life at, and from, the point of conception (a belief supported by the theological notion of the soul), together with belief in the sanctity of marriage and in God as the creator and source of new life, provide pillar supports for this ‘culture of life’. The view that emerges is hostile to abortion (typically seen as murder), and disapproving of assisted conception (which commodifies procreation, ignores the moral status of the foetus, and displaces God’s role in the miracle of new life). Similarly, stem cell research that involves the destruction of embryos is regarded as murder, while whole body cloning is rejected since it dispenses with God-as-creator and with the heterosexual union which is the proper context for procreation.

<sup>17</sup> See G P Smith, *Human Rights and Biomedicine* (2000) 117ff.

<sup>18</sup> See R S Magnusson, ‘Review of Human Rights and Biomedicine by George P Smith II’ (2001) 23 *Sydney Law Review* 630-5.

<sup>19</sup> Smith, above n 1, 18.

<sup>20</sup> Smith, above n 1, 20.

<sup>21</sup> See J Dombrink, ‘Red, Blue, and Purple: The Paradox of American Views Towards Personal Morality and the Law’ [Spring 2005] *Dissent*.

<sup>22</sup> J Dombrink, ‘Deepening Reds, Contrasting Blues, and Various Purples’ (unpublished paper).

It is not correct to contend, however, that all faith traditions accept these conclusions in an absolutist fashion, much less all people who wish to behave morally and approach bioethics in a thoughtful way. For some, a developing foetus acquires greater moral significance commensurate with its rate of development; an in vitro foetus deserves respect as potential life, but not necessarily the respect accorded to live-born 'persons'. God may be the source of life, but few believers would dissent from the way that medicine, on a daily basis, supplements or supplants the body's natural biological processes: some feel no particular discomfort when medicine's interventions relate to reproduction. Professor Smith would himself support the screening of extracorporeal embryos for genetic diseases, as well as their use for research purposes, including stem cell research.<sup>23</sup>

The point is, moral premises matter, and the moral implications of bioethical issues are a matter of genuine debate, even within the Judeo-Christian tradition. For example, while the dualist belief in a soul that – from conception – has a separate existence from the body provides the theological foundation for resisting abortion and stem cell research involving the destruction of the foetus, not all religious traditions (including Judaism and Seventh-day Adventism) acknowledge such a distinction. Not surprisingly, this significantly alters moral intuitions and permits more latitude on questions of abortion and reproductive decision-making, while generating a tendency to balance the (evolving) moral significance of a foetus against the interests of a pregnant mother or intending mother. Turning to the end of life, while the Catholic and Anglican churches supported the Commonwealth Act that overturned the Northern Territory's brief experiment with euthanasia legislation,<sup>24</sup> the Uniting Church criticised euthanasia opponents for 'simplistic and inaccurate views of euthanasia' and attacked the legislation, arguing that it was 'not about the care of patients but about politicians claiming the moral high ground without commensurate moral responsibility for the human beings who are affected by their decision'.<sup>25</sup> To argue that these views somehow 'don't count', perhaps because they are 'dissenting' or 'minority' perspectives, is simply to engage in moral politics. Could Professor Smith be exaggerating the capacity for a consensus even within the Christian churches, let alone elsewhere?

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<sup>23</sup> See Smith, above n 17, 38, 51.

<sup>24</sup> *The Rights of the Terminally Ill Act 1995* (NT) was overturned by the *Euthanasia Laws Act 1997* (Cth).

<sup>25</sup> H Pitt, 'Churches Split in Euthanasia Morality Clash', *Sydney Morning Herald* (Sydney), 18 January 1997, 3. The Reverend Harry Herbert, Secretary to the Uniting Church's Board for Social Responsibility said that 'If people better understood the issues, they would see the need for voluntary euthanasia in very limited cases': Helen Pitt, 'Uniting Church Divided on Outcome', *Sydney Morning Herald* (Sydney), 26 March 1997, 6. By contrast Gino Concetti, a Franciscan priest, writing in *L'Osservatore Romano*, the Vatican's official voice, states: 'Man is not the owner of human life but its wise administrator, as has been repeated and taught for centuries. Consequently he cannot be 'Lord' of death either. Death has to come as a natural event. It is not licit for anyone to accelerate it by any means. To kill – to interrupt or suppress life – is always a crime. It is a crime whether it is executed out of pity or in order to avoid the sufferings of an irreversible terminal condition': G. Concetti, 'Life is Not Ours to Choose', reprinted in *The Age* (Melbourne), 5 July 1996, A13.

## VI WHAT IS LEFT OUT OF THE VISION?

In conclusion, it is worth noting that religion's influence upon biomedicine, especially as illustrated by the 'culture of life' issues of the Christian right, contrasts brightly with the lack of engagement between religion and questions of *human health*. Religion's concern in biomedicine tends not to be the health of the body, but the protection of certain moral principles. One might well ask: if religion is concerned to protect life (restricting abortion; over-riding personal autonomy by prohibiting assisted death), even to the point of requiring the continuation of ventilation and life-prolonging hydration and nutrition for a person in an incurable vegetative state, why don't the determinants of a *healthy life* assume greater moral significance for the organised religions? Why is 'life' itself such a distinctly moral matter, in comparison to a 'healthy life'? Why does religion focus its concern upon bioethics, remaining largely unconcerned with questions of public health?

The contribution of modifiable lifestyle risk factors to illness and death is well established.<sup>26</sup> In Australia, tobacco smoking has been estimated as responsible for 12% of the total disease burden in men and 7% in women, mostly due to lung cancer, chronic obstructive pulmonary disease, heart attack, and stroke.<sup>27</sup> Yet the voice of organised religion is much fainter here; indeed, counter-productive in some cases. So it is, then, that newspapers around the world carried pictures of the Pope giving a private audience to the Marlboro Formula One motor racing team, admiring a model car emblazoned with the world's best known cigarette brand.<sup>28</sup> Back in Australia, Sydney's Catholic Archbishop has claimed that 'Homosexual activity is a much greater health hazard than smoking'.<sup>29</sup> It is not, of course, even if one were to assume (erroneously) that all cases of AIDS in the world are somehow caused by homosexuality. Sometimes, I would suggest, religion's choice of what are the 'moral issues' (ie, those issues that have the extra weight of 'morality' attached to them), is curious if not arbitrary. The challenge remains for religion, to adopt Professor Smith's argument, to be a resource for *public health*, as well as for

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<sup>26</sup> For example, epidemiological research confirms that certain risk factors (including smoking, physical inactivity, obesity, high blood pressure, high blood cholesterol, diabetes and inadequate fruit and vegetable intake) are responsible for an alarming share of the burden of disease. The recent INTERHEART case-control study found that over 90% of the risk of heart attack in men and women, young and old, across all geographical regions and ethnic groups can be predicted by the seven above-mentioned risk factors, together with an eighth factor, psychosocial stressors. A ninth factor, alcohol consumption, had a modest protective effect: S Yusuf, *et al*, 'Effect of Potentially Modifiable Risk Factors Associated with Myocardial Infarction in 52 Countries (the INTERHEART Study): Case-Control Study' (2004) 364 *The Lancet* 937-52.

<sup>27</sup> C Mathers, T Vos and C Stevenson, *The Burden of Disease and Injury in Australia* (1999) 103, 107.

<sup>28</sup> David Simpson, 'Italy: Holy Smoke! Pope Swerves Off Track for Marlboro' (2005) 14(2) *Tobacco Control* 78.

<sup>29</sup> D Marr, 'For Whom the Pell Tolls', *Sydney Morning Herald* (Sydney), 31 March 2001, 29.

responding to those issues that have come to be associated with the discipline of bioethics.<sup>30</sup>

Professor Smith's vision of a rapprochement between religion and biomedicine is a reminder to people of goodwill everywhere to look for common ground, and to pursue public benefit instead of private advantage. I suspect, however, that organised religion will continue to be a political actor, jockeying for position as it seeks to influence law to do the 'right thing' in its regulation of biomedicine. Health law and bioethics will remain interesting for some time yet!

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<sup>30</sup> See, eg, M Ghouri, M Atcha and A Sheikh, 'Influence of Islam on Smoking Among Muslims' (2006) 332 *British Medical Journal* 291. The authors argue that religious rulings declaring smoking to be religiously prohibited (*haram*) and not merely discouraged (*mukrooh*), could have an enormous effect on public health in Islamic countries, where smoking rates exceed those in English-speaking countries. In 2004, smoking prevalence in Australia was 17.4%; in Indonesia it was 69% (for men), and 3% (for women): 292.