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2013

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### Recommended Citation

George P. Smith, II, Applying Bioethics in the 21st Century: Principlism or Situationism?, 30 J. CONTEMP. HEALTH L. & POL'Y 37 (2013).

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# APPLYING BIOETHICS IN THE 21ST CENTURY: PRINCIPLISM OR SITUATIONISM?

*George P. Smith, II\**

## INTRODUCTION

Living in a Nation that embraces pluralism (also referred to as relativism) results, for some, in an acknowledgment that no one perspective is superior to another in seeking resolutions to moral issues.<sup>1</sup> Making pragmatic decisions conditioned and shaped from similar real-life experiences<sup>2</sup> should be, on balance, the preferred ethical analytical template. Choosing one theoretical and philosophical construct as a framework for decision-making depends largely upon an individual's system of personal beliefs and values. Indeed, it has been suggested that moral beliefs are determined by cultures,<sup>3</sup> and thus, the "truth or falsity of an ethical claim is relative to a particular culture."<sup>4</sup>

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\* Professor of Law, The Catholic University School of Law. LL.D., Indiana University; LL.M., Columbia University; J.D., B.S., Indiana University. Parts of this Article are drawn from my book, *LAW AND BIOETHICS: INTERSECTIONS ALONG THE MORTAL COIL* (2012). The research for and the writing of this Article were undertaken in June 2013, when I was a Visiting Fellow at The Lauterpacht Center, University of Cambridge, and in July-August 2013 when I was a Visiting Scholar at The Hesburgh Center for Civil and Human Rights, University of Notre Dame. This Article is dedicated—with respect, admiration, and appreciation—to the memory of Edmund D. Pellegrino, M.D., valued friend and cherished mentor from whom I learned much of the meaning of life and the place of Bioethics in contemporary society.

1. JONATHAN HERRING, *MEDICAL ETHICS AND LAW* 37 (4th ed. 2012).

2. *Id.* at 38.

3. Nancy S. Jecker, *Applying Ethical Reasoning: Philosophical, Clinical and Cultural Challenges in BIOETHICS: AN INTRODUCTION TO THE HISTORY, METHODS, AND PRACTICES* 127, 130-31 (Nancy S. Jecker, Albert R. Jensen & Robert A. Pearlman eds., 3d ed. 2012). See James Rachels, *The Challenge of Cultural Relativism*, in *BIOETHICS: AN INTRODUCTION TO THE HISTORY, METHODS, AND PRACTICES* 118 *passim* (Nancy S. Jecker, Albert R. Jonsen & Robert A. Pearlman eds., 2nd ed. 2007).

4. Jecker, *supra* note 3, at 128. Ronald Dworkin distinguishes moral standards from ethical standards by defining the former as prescribing how others are treated and the latter as those standards by which individuals live their personal lives. Ronald Dworkin, *What Is a Good Life?*, N.Y. REVIEW OF BOOKS, (Feb. 10, 2011), <http://www.nybooks.com/articles/archives/2011/feb/10/what-good-life/?pagination=false&printpage=true>. He acknowledges that others do not maintain this distinction, however, and—instead—hold that morality includes ethics and vice versa. *Id.*

It has been asserted that all cultures are infused with a central or common core which, in turn, is drawn essentially from the four cardinal principles of autonomy, beneficence, nonmaleficence and justice, which codify principlism.<sup>5</sup> Ethical judgments are justified when they frame one of these four principles.<sup>6</sup> Others contend that all four principles work *in tandem*—to one degree or other—in ethical argumentation which accords rational judgment.<sup>7</sup> When a judgment is made autonomously with informed consent, it confers a benefit, and does not cause harm and is just or fair; it is efficacious.<sup>8</sup>

As a process for moral reasoning, principlism posits that particular judgments are justified by moral rules which are justified by cardinal principles which in turn are justified, ultimately, by ethical theories.<sup>9</sup> Ethics is seen as prescriptive and, consequently, directs its focus to resolving one central question—what ought to be?<sup>10</sup> Whether these four principles are seen generally as independent principles of obligated or as in competition with each other has been advanced as a serious defect of principlism itself.<sup>11</sup> Applying one or more of the principles to any particular case is too discretionary and leads to a “tension-ridden dialectic.”<sup>12</sup>

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See Ruth Benedict, *A Defense of Ethical Relativism in BIOETHICS: AN INTRODUCTION TO THE HISTORY, METHODS, AND PRACTICES* 111 *passim* (Nancy S. Jecker, Albert R. Jonsen, & Robert A. Pearlman eds., 2d ed. 2007).

5. Jecker, *supra* note 3, at 130.

6. *Id.* at 131. Indeed, such a judgment may be seen as both rational and reasonable. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 337 *passim* (8th ed. 2011).

7. See GEORGE P. SMITH, II, *DISTRIBUTIVE JUSTICE AND THE NEW MEDICINE* 17-40 (2008); GEORGE P. SMITH, II, *BIOETHICS AND THE LAW: MEDICAL, SOCIO-LEGAL, AND PHILOSOPHICAL DIRECTIONS FOR A BRAVE NEW WORLD* 6-9 (1993).

8. *Id.* See Paul Ramsey, *The Case of The Curious Exception, in NORM AND CONTEXT IN CHRISTIAN ETHICS* (Gene H. Outka & Paul Ramsey eds., 1968) (studying when a justifiable violation of moral principles or moral values is allowed and concluding that there is only a relative distinction between principles and rules—not a clear one). *Id.* at 74.

9. TOM L. BEAUCHAMP & JAMES F. CHILDRESS, *PRINCIPLES OF BIOMEDICAL ETHICS* 5 (2nd ed. 1983).

10. Joseph Fletcher, *Ethical Aspects of Genetic Controls*, 285 *NEW ENG. J. MED.* 776 (1971).

11. K. Danner Clouser & Bernard Gert, *A Critique of Principlism in BIOETHICS: AN INTRODUCTION TO THE HISTORY, METHODS, AND PRACTICE* 153, 157 (Nancy S. Jecker, Albert R. Jonsen & Robert A. Pearlman eds., 2nd ed. 2007).

12. Daniel Callahan, *Bioethics as a Discipline in BIOETHICS: AN INTRODUCTION TO THE HISTORY, METHODS, AND PRACTICES* 17, 22 (Nancy S. Jecker, Albert R. Jonsen & Robert A. Pearlman eds., 2nd ed. 2007); see Larry Churchill, *Are We Professionals? A*

This Article will propose isolating one of the four bioethical principles—beneficence—and reinterpreting it as the virtue of love and, as such, the sole criterion to determine the ethical propriety of decision-making or, the efficacy of, moral argumentation. Accordingly, actions that, under any circumstance, exhibit a “caring response” (i.e. compassion, mercy, love, benevolence and common sense) should be accepted as ethical and rational.<sup>13</sup> Consequently, when one’s intentions to act are anchored in love, they are tested by the facts of each situation which demand their application. Rather than being tethered to the subtleties and complexities of principlism, situationism requires that the policy or course of action dealing with a particular ethical dilemma be “tested” as to its morality (and rationality) by determining whether that action is undertaken with a humane and merciful purpose.<sup>14</sup>

No doubt, one of the most dramatic—and today quite common—occurrences which trigger responses and present moral dilemmas is end-of-life care.<sup>15</sup> To either initiate or continue treatment which is medically futile should be seen as unethical and, indeed, wrong.<sup>16</sup> Such a course of action not only denies human finitude, but it imposes unnecessary effort, financial expenses, and emotional trauma on both the patient and other affected third parties. When physicians attempt to treat futile medical conditions,<sup>17</sup> such

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*Critical Look at the Social Role of Bioethicists*, 128 DAEDALUS 253, 255 (1990) (arguing bioethical disputations are disregarded by “ordinary people” because they are either deemed as irrelevant to real issues of health care they confront and/or remote from their value systems).

13. George P. Smith, II, *Refractory Pain, Existential Suffering, and Palliative Care: Releasing an Unbearable Lightness of Being*, 20 CORNELL J. L. & PUB. POL’Y 469, 519 *passim* (2011). See Joseph Fletcher, *Love is The Only Measure*, 83 COMMONWEAL 427 (1966). See also Michael Kirby, *The New Biology and International Sharing—Lessons From the Life and Work of George P. Smith, II*, 7 IND. J. GLOBAL STUDS. 425, 432 (2000).

14. See JOSEPH FLETCHER, *SITUATION ETHICS: THE NEW MORALITY* (1966).

15. George P. Smith, II, *Death Be Not Proud: Medical, Ethical, and Legal Dilemmas in Resource Allocation*, 3 J. CONTEMP. HEALTH L. & POL’Y 47 (1987). See George P. Smith, II, *Gently Into the Good Night: Toward a Compassionate Response to End-Stage Illness*, 22 TEMP. POL. & CIV. RTS. L. REV. 101 (2013).

16. George P. Smith, II, *Utility and The Principle of Medical Futility: Safeguarding Autonomy and The Prohibition Against Cruel and Unusual Punishment*, 12 J. CONTEMP. HEALTH L. & POL’Y 1 (1996).

17. *Id.* See George P. Smith, II, *Terminal Sedation as Palliative Care: Revalidating a Right to a Good Death*, 7 CAMB. Q. HEALTHCARE ETHICS 382 (1998).

actions are a total abnegation of one of the cardinal principles of medical ethics—beneficence.<sup>18</sup>

### I. BIOETHICS: AN HISTORICAL PERSPECTIVE

Historically, bioethics can be seen as having no defined essence that sets it apart as a distinct study or discipline. Rather, its individuation derives from a *de facto* set of issues interrelated by what might be termed “family resemblance.” While a common thread joining all of the issues is exceedingly difficult to find, the central core comprising the list of these issues—without question—is a felt concern over the technology of control of man’s body, his mind, and quality of life.

In a very real sense, bioethics encompasses a whole political movement which seeks to harness political forces to deal with a plethora of ethical problems relating to health care delivery, both at the *micro* and the *macro* level of economic distribution.<sup>19</sup> Consequently, many of the concerns of bioethics are ones of public policy—or with legislation, and policy guidelines at state, local and federal levels—that need to be enacted and enforced with respect to all of the issues comprising the *de facto* set. Bioethical concerns may be understood as those prohibitions all rational people urge everyone to follow in an effort to avoid evils on which common agreement exists.

Outside the individual context of determining how one treats another, at the broader societal level of moral acceptability, a democratic consensus must be reached acknowledging that a certain good must be promoted, though its promotion causes some degree of harm elsewhere in society. It is within this setting where much of what is recognized as “bioethics” is

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18. EDMUND D. PELLEGRINO & DAVID S. THOMASMA, FOR THE PATIENT’S OWN GOOD: THE RESTORATION OF BENEFICENCE IN HEALTH CARE (1988). See Edmund D. Pellegrino, *Decision at The End of Life: The Use and Abuse of The Concept of Futility in THE DIGNITY OF THE DYING PERSON* 219, 233-35 (Juan De Dios Vial Correa & Elio Segreccia eds., 2000). See also Ramsey, *supra* note 8.

19. Carl E. Schneider, *Bioethics in the Language of The Law*, 24 HASTINGS CENTER REP. 16 (1994). See DAVID W. BARNES & LYNN A. STOUT, THE ECONOMICS OF PROPERTY RIGHTS AND NUISANCE LAW 17 (1992) (observing that, in the distribution of resources, economics is concerned with efficiency instead of fairness); see also George J. Annas, *The Dominance of American Law (And Market Values) Over American Bioethics in META MEDICAL ETHICS: THE PHILOSOPHICAL FOUNDATION OF BIOETHICS* 83-96 (Michael A. Grodin ed., 2001). See also ROGER DWORKIN, LIMITS: THE ROLE OF LAW IN BIOETHICAL DECISION-MAKING 5-7, 11 (1997); George P. Smith, II, *Biotechnology and The Law: Social Responsibility v. Freedom of Scientific Inquiry*, 39 MERCER L. REV. 437 (1988).

focused. While individual morality operates primarily within a system of restraints, policies affecting society as a whole operate on a level where promotion of good is a moral option. The pivotal question thus becomes: *what goods ought to be restrained (e.g., scientific research)?* Of necessity priorities, values, and goods must be weighed, balanced, and compared. Whenever the benefits and the risks of a particular course of action are assessed, it is well to remember that those very elements in the balancing test are based upon value judgments, with the ultimate goal being the formulation and validation of a final action, which—consistent with art utilitarianism—minimizes human suffering and maximizes the social good.<sup>20</sup> If the pace of scientific advancement is not measured and approached rationally, a principle of precaution may well become a principle of paralysis.<sup>21</sup>

## II. EXPANDING THE OUTREACH

As a discipline or field of research and study, bioethics emerged in the United States in the 1960s and 1970s as an effort to assess, critically, “the significance of medicine in terms of its conceptual and value assumptions,”<sup>22</sup> and as a response to medical paternalism.<sup>23</sup> Today, bioethics is commonly

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20. These ideas are drawn from GEORGE P. SMITH, II, *BIOETHICS AND THE LAW* *supra* note 7 and George P. Smith, II, *Biomedicine and Bioethics: De Lege Lata, De Lege Ferenda*, 9 J. CONTEMP. HEALTH L. & POL’Y 233, 237 (1993). See POSNER, *ECONOMIC ANALYSIS OF LAW*, *supra* note 6, § 8.7; *infra* note 69 and the RESTATEMENT (SECOND) OF TORTS test for unreasonable conduct. See generally Norman Daniels, Ezekiel J. Emanuel & Bruce Jennings, *Is Justice Enough? Ends and Means in Bioethics*, 26 HASTINGS CENTER REP. 9 (1996).

21. See e.g., Rob Stein & Spencer S. Hsu, *Judge Blocks Stem Cell Rules*, WASH. POST, Aug. 24, 2010, at A1. See also George P. Smith, II, *Judicial Decisionmaking in The Age of Biotechnology*, 13 NOTRE DAME J. L. ETHICS & PUB. POL’Y 34 (1999); Richard Delgado & David R. Millin, *God, Galileo, and Government: Toward Constitutional Protection for Scientific Inquiry*, in *ETHICAL, LEGAL AND SOCIAL CHALLENGES TO A BRAVE NEW WORLD* ch. 10 (George P. Smith, II ed., 1982).

22. H. TRISTRAM ENGELHARDT, JR., *BIOETHICS AND SECULAR HUMANISM: THE SEARCH FOR A COMMON MORALITY* 10 (1991). George J. Annas argues the catalyst for the development of American Bioethics was the Nuremberg Doctors’ Trials after World War II and the Nuremberg Code. AMERICAN BIOETHICS AFTER NUREMBERG: PRAGMATISM, POLITICS AND HUMAN RIGHTS 5 (2005).

23. See Laurence B. McCullough, *Was Bioethics Founded on Historical and Conceptual Mistakes about Medical Paternalism?* 25 *BIOETHICS* 66 (2011). See generally *THE STORY OF BIOETHICS* (Jennifer K. Walter & Eran P. Klein eds., 2003); George P. Smith, II, *Procreational Autonomy v. State Intervention: Opportunity or Crisis for a Brave New World*, 2 NOTRE DAME J. L. ETHICS & PUB. POL’Y 635 (1986).

understood as focusing on ethical and legal controversies arising from the delivery of healthcare, the practice of medicine, and on biomedical research.<sup>24</sup>

What originally were acknowledged as the three fundamental principles undergirding the field of bioethics—Autonomy, Beneficence, and Justice<sup>25</sup>—have, for some, been expanded to include one or more of the following: Non-Maleficence, which holds to the premise that one held to a duty of care that forbids the infliction of evil, harm, or risk, or harm on others; Confidentiality, which imposes a standard of non-disclosure of information received by one person to another with the promise of its secrecy; Distributive Justice (refined from the earlier designation as Justice) to include a mandate that benefits and burdens of any medical resource allocation should not only be distributed equitably but that scarce resources be distributed fairly and—furthermore—that no one person or group receive a disproportionate share of either benefits or burdens; and Truth Telling, a principle which demands honesty and integrity in the disclosure of all information about an individual to that individual, himself.<sup>26</sup>

Moving from principlism to utilitarian, Kantian theories, and Natural Law teachings, today, new approaches to understanding and applying bioethical theory have been posited. They include: narrative bioethics; virtue bioethics; ethics of caring; religious bioethics; casuistry; pragmatism; law and economic theory; critical race theory; and feminist bioethics.<sup>27</sup> There is an obvious overlap among all of these approaches. Indeed, most bioethical decision-making is based either on the foundational principles of this discipline or a combination of these approaches.<sup>28</sup>

As bioethical principles and analytical approaches to understanding and applying bioethics to decision-making and policy have expanded over the years, so too has the scope of it as a discipline. One such ranking of contemporary bioethics includes within it the study of: end of life care (which includes aging and dementia); genetics; research ethics; global

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24. RONALD A. LINDSAY, *FUTURE BIOETHICS: OVERCOMING TABOOS, MYTHS & DOGMAS* 19 (2008). *See generally* *BIOETHICS CRITICALLY RECONSIDERED: HAVING SECOND THOUGHTS* (H. Tristram Englehardt ed., 2012).

25. ALBERT R. JONSEN, *THE BIRTH OF BIOETHICS* (1992).

26. BARRY R. FURROW, THOMAS L. GREANEY, SANDRA H. JOHNDON, TIMOTHY S. JOST & ROBERT SCHWARTZ, *BIOETHICS: HEALTH CARE LAW AND ETHICS* 4 (6th ed. 2008). *See generally* TOM W. BEAUCHAMP & JAMES F. CHILDRESS, *PRINCIPLES OF BIOMEDICAL ETHICS* (6th ed. 2009); *ETHICS AND LAW FOR THE HEALTH PROFESSION* chs. 1, 2, 5 (Ian Kerridge, Michael Lowe & Cameron Stewart eds., 3rd ed. 2009).

27. FURROW, *supra* note 26, at 11-14.

28. *Id.* at 14.

international health issues; cloning and stem cells; organ transplants; ethics of public health; feminism (*i.e.*, commodification of female reproduction); technology; disability; and ecogenetics.<sup>29</sup> In another such ranking, seven other activities were listed as inclusive of contemporary bioethics: patient-centered care; evidence-based medicine and pay for performance; community dialogue; cross cultural concerns of race and health disparities; and new technologies.<sup>30</sup> Interestingly, religion and sociobiology are both absent from these listings.<sup>31</sup>

### III. BENEFICENCE AND BENEVOLENCE

The guiding norm of medicine has been the duty of beneficence.<sup>32</sup> As a codified or operational principle, beneficence “prompts physicians to cite their moral commitments and personal support for patients beyond just respecting their rights” of autonomy.<sup>33</sup> Over recent years, however, there has been a significant shift in reverential application of beneficence to an enshrinement of autonomy<sup>34</sup>—anchored, as such, in the Doctrine of Informed Consent—as the foundational or operative bioethical principle with which to comport in decision-making.<sup>35</sup>

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29. This ranking is drawn by Howard Brody from his assessment of the OXFORD HANDBOOK OF BIOETHICS (Bonnie Steinbook ed., 2007). *See generally* HOWARD BRODY, THE FUTURE OF BIOETHICS 7 (2009).

30. In this list Brody enumerates the area that he thinks should be included in a reformulated discipline of Bioethics. *Id.* at 4. *See generally* GEORGE J. ANNAS, AMERICAN BIOETHICS: CROSSING HUMAN RIGHTS AND HEALTH LAW BOUNDARIES (2005).

31. *See* BRODY, *supra* note 29.

32. Edmund D. Pellegrino & David C. Thomasma, *The Conflict Between Autonomy and Beneficence in Medical Ethics: Proposal for a Resolution*, 3 J. CONTEMP. HEALTH L. & POL’Y 23 (1987).

33. *Id.* at 45.

34. *Id.* at 23. *See* Tom L. Beauchamp, *The Promise of Beneficence Model for Medical Ethics*, 6 J. CONTEMP. HEALTH L. & POL’Y 145, 155 (1990) (analyzing the tensions between autonomy and beneficence and acknowledging the moral correctness of Dr. Pellegrino’s argument on behalf and defense of beneficence yet asserting the argument is conceptually incorrect). *See generally* Jay Katz, *Informed Consent: Must It Remain a Fairy Tale*, 10 J. CONTEMP. HEALTH L. & POL’Y 69 (1994).

35. Ultimately, bioethical perspectives or views are shaped by the very nature of the physician-patient relationship which, in turn, is anchored in the philosophy of medicine which mandates that no patient harm be done by a doctor in this partnership. *See* THE PHILOSOPHY OF MEDICINE REBORN: A PELLEGRINO READER (H. Tristram Engelhardt, Jr. & Fabrice Jotterand eds., 2008). *See generally* MARSHA GARRISON & CARL E. SCHNEIDER, THE LAW OF BIOETHICS: INDIVIDUAL AUTONOMY AND SOCIAL REGULATION



Because of the phenomenal expansion of medical technology, which began in the mid-to-late twentieth century and has gained in momentum since the start of this century,<sup>36</sup> new complexities in clinical care and health care decision-making have arisen.<sup>37</sup> With the increased emphasis on economics—both *micro* and *macro*—as a central vector of force in the allocation of medical resources,<sup>38</sup> conflicts have arisen between the role of physicians as gatekeepers to the health care delivery system and their roles as ethical advocates for care which best meets the needs of their patients.<sup>39</sup>

Although the hallmark of moral debates on the use and application of biomedical ethics in policy and in practice, today, is that they are “unsettable and interminable,”<sup>40</sup> there should be a shared commonality of purpose and direction within these ongoing conversations and debates. To be more specific, “values of patient welfare and patient autonomy . . . translate into the corresponding moral duties of beneficence and respect for persons.<sup>41</sup> Indeed, by acknowledging and embracing “the virtue of benevolence (or the principle of beneficence),” the integrity of “the ethical tradition of persons united in community” is sustained and validated since this very tradition is medicine’s ethical root system.<sup>42</sup>

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ch. 1 (2003); George P. Smith, II, *The Vagaries of Informed Consent*, 1 IND. HEALTH L. REV. 111 (2004).

36. See GEORGE P. SMITH, II, *THE NEW BIOLOGY: LAW, ETHICS, AND BIOTECHNOLOGY* (1989).

37. Pellegrino & Thomasma, *supra* note 32.

38. See generally GEORGE P. SMITH, II, *DISTRIBUTIVE JUSTICE AND THE NEW MEDICINE* (2008). See also George P. Smith, II, *Access to Health Care: Economic, Medical, Ethical and Socio-Legal Challenges*, in HUMAN RTS. & HEALTH CARE ch. 20 (David N. Weisstub & G. P. Pinto eds., 2008).

39. Edmund D. Pellegrino, *Rationing Health Care: The Ethics of Medical Gatekeeping*, 2 J. CONTEMP. HEALTH L. & POL’Y 23 (1986).

40. Alasdair MacIntyre, *Why is the Search for the Foundations of Ethics so Frustrating?*, 9 HASTINGS CENTER REP. 16 (1979). See GEORGE P. SMITH, II, *BIOETHICS AND THE LAW*, *supra* note 7. See also Churchill, *supra* note 12.

41. Pellegrino & Thomasma, *supra* note 32, at 45.

42. *Id.* at 46. As a maximizing principle, beneficence imposes—to one degree or other upon each member of society—a responsibility to promote the well-being of everyone. Whether beneficence is morally good, but *not* necessarily required, is subject to current debate. 4 ENCYCLOPEDIA OF PHILOSOPHY 343 (Edward Craig general ed. 1998). Presently, beneficence and benevolence are regarded as synonyms for charity. 2 ENCYCLOPEDIA OF PHILOSOPHY 280-81.

## IV. DELIBERATIVE DEMOCRACY

Central to bioethical decision-making must be a realization that as ethical, socio-legal, economic and medical conflicts persist in modern society, controversies will continue to proliferate unabated. Foundational issues—such as the role of religion in tempering or even impeding the pace of scientific advancement and its potential for extending the limits of artificial reproduction and genetic advancement,<sup>43</sup> claims of a human right to health, the equitable allocation of health care resources nationally, globally, and during times of public health emergencies, together with the extent to which rights of autonomy and self-determination during the end-of-life cycle—all guarantee a vigorous bioethical discourse.<sup>44</sup> Central to the success or the failure of this dialogue is the question of what the proper foundation upon which informed, bioethical debates can be undertaken? Deliberative democracy has come into vogue, recently, and has been advanced as the foundation upon which this dialogue can commence.<sup>45</sup>

With the central purpose of deliberative democracy being to promote the legitimacy of collective decisions,<sup>46</sup> this concept seeks to expand both the number and use of deliberative forums where citizens may enter into discourse over the contentious issues of the new Age of Biotechnology. Through moral disagreements comes—ideally—a “manifest mutual respect” for opposing views, or in other words, mutually respectful decision-making.<sup>47</sup>

Deliberative democracy, viewed as but a complement to the legislative process, is an attractive idea. The principal drawback to its effective implementation is that the average, ordinary, reasonable American is not informed—sufficiently—to enter into meaningful discourse on the

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43. See SHEILA A. M. MCLEAN, *MODERN DILEMMAS: CHOOSING CHILDREN* ch. 1 (2006); GEORGE P. SMITH, II, *GENETICS, ETHICS AND THE LAW* (1981); JOHN FLETCHER, *THE ETHICS OF GENETIC CONTROL* (1974); Smith, *infra* note 121. See also Tim Townsend, *Bishops Not Indulgent on Infertility*, WASH. POST, Feb. 20, 2010, at B12 (reporting on a meeting of the U.S. Catholic Bishops where a document was approved with certain reproductive technologies, e.g., artificial insemination, being condemned as not morally legitimate ways to combat infertility).

44. See generally J. KENYON MASON & GRAEME T. LAURIE, *LAW AND MEDICAL ETHICS* (7th ed. 2006); SHEILA A.M. MCLEAN, *OLD LAW, NEW MEDICINE* (1998). Ethics may be seen as but “reasoned public discourse in search of the common good.” Pellegrino & Thomasma, *supra* note 32, at 34.

45. Amy Gutmann & Dennis Thompson, *Deliberating About Bioethics*, 27 HASTINGS CENTER REP. 38 (1997).

46. *Id.* at 39.

47. *Id.* at 40.

ramifications of the new Age of Biotechnology.<sup>48</sup> Logic is all too often put on “hold” while emotional feelings control and often resolve the debate.<sup>49</sup> Similarly, hard economic realities are ignored or postponed—repeatedly—until the time their ultimate and forced implementation causes more discord and havoc than would have occurred if they had been considered as a first order priority.<sup>50</sup>

Stated otherwise, perhaps the greatest single reason why—even with an ethic of openness within a deliberative democracy—little “intelligent conversation,” let alone constructive debate, can occur at the community level, is the inability of the public to understand the language of the scientists; or in other words, the language of statistics.<sup>51</sup> To be sure, the foundations of humanity—“our sentiments, loves, attitudes, mores and character, as well as the familial, social, religious and political institutions that nourish and are nourished by them. . . .”<sup>52</sup>—are not anchored in scientific rationality. Yet, conduct and decision-making must be, in a participatory democracy, informed and guided by a level of understanding which allows for reasonable courses of action. Given an unsophisticated citizenry as is seen today concerning issues of medical science, biotechnology, and finely nuanced bioethical issues, and subsequent paralytic legislative miasmas which often occur, it remains for the judiciary to recognize its ultimate responsibility to act to safeguard and promote the common utilitarian good.<sup>53</sup>

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48. See generally RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 112 (1990); Smith, *Judicial Decision Making*, *supra* note 21, at 103.

49. See generally SUSAN JACOBY, *THE AGE OF AMERICAN UNREASON* (2008).

50. See Stephen F. Williams, *Limits to Economics As a Norm for Judicial Decision*, 21 HARV. J. L. & PUB. POL’Y 39 (1998).

51. Robert Schwartz, *Genetic Knowledge: Some Legal and Ethical Questions in BIRTH TO DEATH: SCIENCE AND BIOETHICS* 25 (David C. Thomasma & Thomasine Kushner eds. 1996); Roger B. Dworkin, *Bioethics? The Law and Biomedical Advance*, 14 HEALTH MATRIX 43 (2004).

52. LEON R. KASS, *LIFE, LIBERTY AND THE DEFENSE OF DIGNITY: THE CHALLENGE OF BIOETHICS* 281 (2002). See generally MAXWELL J. CHARLESWORTH, *BIOETHICS IN A LIBERAL SOCIETY* (1993).

53. Schwartz, *supra* note 51; Dworkin, *supra* note 51. See STEPHEN BREYER, *ACTIVE LIBERTY* 15, 16 (2005) (stating “active liberty” is grounded in responsibility and capacity). See generally RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* (2003).

## V. TRADITIONAL PHILOSOPHICAL CONSTRUCTS FOR ETHICAL DECISION-MAKING AND MORAL REASONING

Seen as a theory of personal morality and social justice, utilitarianism promotes the maximization of “the sum total of happiness.”<sup>54</sup> Accordingly, a good person strives to maximize that state of happiness;<sup>55</sup> and the good society is one which endeavors to accommodate this quest.<sup>56</sup> When individuals are able to achieve a level of satisfaction from their preferential choices of whatever character or nature, and to whatever extent possible, then economists recognize “happiness, or utility is maximized.”<sup>57</sup> No doubt, one of the inherent difficulties of utilitarianism is defining utility, or pleasure, and—as the case may be—disutility (or pain).<sup>58</sup>

“Hedonistic” and “act” utilitarianism—deriving, classically, from consequentialist or teleological philosophies advocated by Jeremy Bentham and John Stuart Mill—judge actions by their hedonistic effect in achieving pleasure or avoidance of pain.<sup>59</sup> Judged on a case-by-case basis, the morality of each act is separated “from the consequences of a potential aggregation of similar types of acts.”<sup>60</sup> An act which is morally proper and causes or promotes a “greater net utility/happiness/pleasure than other potential acts,” is judged to be moral.<sup>61</sup>

Consequentialism utilizes a common sense analytical approach in judging the ethical character of an action.<sup>62</sup> Thus, the “best outcome” is one which results in the best consequences.<sup>63</sup> Rather than determine certain conduct to be right or wrong—deontologically—consequentialism validates its efficacy by advancing the notion that, in practice, most people knowingly, or intuitively, utilize this process.<sup>64</sup>

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54. RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* 51 (2d ed. 1983).

55. *Id.*

56. *Id.*

57. *Id.*

58. JANET L. DOLGIN & LOIS L. SHEPHERD, *BIOETHICS AND THE LAW* 14 (2d ed. 2009).

59. *Id.*

60. *Id.*

61. *Id.* While Bentham embraced pleasure as the definitive goal of conduct, Mill sought to characterize some forms of pleasure according to their nobility of purpose. *Id.* at 14, 15.

62. HERRING, *supra* note 1, at 12.

63. *Id.*

64. *Id.* at 13.

Emanuel Kant's school of moral philosophy deviated from the Bentham-Mill thesis by stressing the importance and centrality of general rules.<sup>65</sup> Termed *deontological*, Kantian philosophy stresses the notion that "the principles upon which a person acts are more important than the act's consequences."<sup>66</sup> Acts are judged to be good when they harmonize duties (or obligations) which derive from universal principles—with the first and foremost duty being that of "acting in harmony with general moral principles."<sup>67</sup> A significant *issue* in Kantian philosophy is that "various apparent duties seem to conflict with each other (*e.g.*, a duty to be truthful versus "a duty to keep confidences.")"<sup>68</sup>

More than any other Western philosophy, utilitarianism is seen as central to American constructs for decision-making.<sup>69</sup> Either directly or indirectly, "Americans resolve apparent social dilemmas with reference to the comparative good and bad that they think will follow from a set of options, or the 'cost/benefit' ratio as this sometimes translates into economic realms."<sup>70</sup> In a broad sense, utilitarianism is complemented by communitarian ethics which stress the notion that in matters of public health policy making and medical research, for example, individual pursuits of

65. DOLGIN & SHEPHERD, *supra* note 58, at 15.

66. *Id.* The central principle, or categorical imperative, undergirding Kant's philosophy is equivalent to the Golden Rule that one should do unto others what he would want done to himself. *Id.* at 16.

67. *Id.* at 16.

68. *Id.*

69. *Id.* See generally Bruce N. Waller, CONSIDER ETHICS: THEORY, READINGS AND CONTEMPORARY ISSUES ch. 4 (3d ed. 2010).

70. DOLGIN & SHEPHERD, *supra* note 58, at 15. Before conduct is held to be unreasonable and subject to legal restraint, the RESTATEMENT (SECOND) OF TORTS § 827 (1979) requires the extent and the character of the alleged harm be evaluated with the social value of the enjoyment which is being challenged by the unreasonable conduct; as well as "the suitability of the particular use or enjoyment invaded to the locality"; and "the burden on the person harmed by avoiding the harm." § 827(d)(e). The balancing factors used in the Restatement of Torts serve, broadly, as a construct for evaluating when conduct is, at any and all levels of social action, seen as reasonable. In this regard, the factors have pertinence in bioethical and health care decision-making since they serve as points of assessment for executing rational, common sense judgments—and particularly in decisions relative to controversial scientific undertakings (*e.g.*, IVF research, human cloning) and end-of-life care. See George P. Smith, II, *Setting Limits: Medical Technology and The Law*, 23 SYDNEY L. REV. 283 (2001). See JONATHAN BARON, AGAINST BIOETHICS ch. 3 (2006) (stressing the ineluctable foundation of utilitarianism as the preferred basis for bioethical decision-making); DOLGIN & SHEPHERD *supra* note 58, at 13.

happiness must be compromised—or at least displaced—for the preservation of the common good or advancement of the general welfare.<sup>71</sup>

There is, at best, a tenuous “link” between moral philosophy and modern bioethics —this, simply because average, ordinary citizens, in contemporary society, grapple with bioethics issues through use of theological ethics, the social and behavioral sciences, normative legal standards, political theory, and public health policies without resort to ethical theory. Theoretical generalities advanced by moral philosophies are largely viewed as being extraneous to pragmatic decision-making.<sup>72</sup> An inherent complement to this decision-making model is the theory of casuistry which largely discards applying general principles to individual cases and—instead— analyzes the facts of a particular case compared and contrasted with other similar cases in order to resolve a conflict.<sup>73</sup> The doctrine of precedence is central to the casuistical method.<sup>74</sup>

Closely resembling casuistry is narrative ethics which considers patients as far more than case histories—and, instead, sees them as individuals with narrative histories who experience both disease and disability as elements of life itself.<sup>75</sup> Both casuistry and narrative ethics place emphasis on analyzing concrete aspects of a case.<sup>76</sup>

Yet, another philosophical construct for ethical decision-making is seen in virtue ethics which emphasize an assessment of morally correct conduct—not the consequences of one’s actions as determinative of their appropriateness or correctness.<sup>77</sup> Thus, attitudes (*e.g.*, virtues) motivating a line of conduct are assessed carefully.<sup>78</sup> Put simply, virtue ethics places more importance on the character of a decision maker or health care provider than the consequences of their action.<sup>79</sup>

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71. DOLGIN & SHEPHERD, *supra* note 58, at 17; HERRING *supra* note 1. See George P. Smith, II, *Re-shaping the Common Good in Times of Public Health Emergencies: Validating Medical Triage*, 17 ANNALS HEALTH L. 1 (2009).

72. Tom L. Beauchamp, *Does Ethical Theory Have a Future in Bioethics?*, 32 J. L. MED. & ETHICS 209 (2004). See George P. Smith, II, *Policy Making and The New Medicine: Managing a Magnificent Obsession*, 3 J. HEALTH & BIOMEDICAL L. 303, 309 (2007) (asserting that health distribution decisions “are utilitarian in character and definition”). See generally Smith, *Biomedicine and Bioethics*, *supra* note 20; WALLER, *supra* note 69.

73. HERRING, *supra* note 1, at 30.

74. *Id.*

75. Jecker, *supra* note 3, at 134-35.

76. *Id.* at 132.

77. HERRING, *supra* note 1, at 33.

78. *Id.*

79. *Id.* at 11.

## VI. SITUATIONISM

Drawing from the works of James Gustafson,<sup>80</sup> Paul Ramsey,<sup>81</sup> Paul Tillich,<sup>82</sup> and others<sup>83</sup> in the twentieth century, the late Joseph Fletcher—an Anglican priest—became, perhaps, the most eloquent American proponent of and spokesman for situationism.<sup>84</sup> As a pragmatic and relativistic methodology of ethics, rather than a substantive system,<sup>85</sup> situationism advances the proposition that there is but one law of love that is superior to and exclusive of all moral principles and laws.<sup>86</sup>

Rather than embrace principles—although they were acknowledged as an ethical part of all judgment—situationists de-emphasize normative behavior and focus on context or “situations” as determinative.<sup>87</sup> Accordingly, for Fletcher and other situationists, “the good is what works, what is expedient, what gives satisfaction.”<sup>88</sup> Situationism, then, embraces a “greater good” morality.<sup>89</sup> What is “good” is that which leads to “human welfare and happiness (but not, necessarily pleasure).”<sup>90</sup>

Any principle can be suspended, ignored, or even violated if, by doing so, one “can affect more good than by following it.”<sup>91</sup> Indeed, the very reason for altering principles and rules is because “circumstances” (or situations) warrant a common-sense and compassionate response not otherwise

80. FLETCHER, SITUATION ETHICS: THE NEW MORALITY, *supra* note 14, at 34.

81. See Paul Ramsey, *Lehman's Contextual Ethics and the Problem of Truth-Telling*, 21 THEOLOGY TODAY 474 (1965).

82. FLETCHER, SITUATION ETHICS: THE NEW MORALITY, *supra* note 14, at 34.

83. *Id.* at 33 (referencing, among others, the work of Dietrich Bonhoeffer, Charles West, and H.R. Niebuhr).

84. See generally FLETCHER, SITUATION ETHICS: THE NEW MORALITY, *supra* note 14.

85. *Id.* at 36.

86. *Id.*

87. Joseph Fletcher, *Situation Ethics under Fire*, in STORM OVER ETHICS 149, 149-73 (James M. Gustafson et al., eds. 1967). See Joseph Fletcher, *What's in a Rule? A Situationist's View*, in NORM AND CONTEXT IN CHRISTIAN ETHICS 325-338 (Gene H. Outka & Paul Ramsey eds. 1968).

88. FLETCHER, SITUATION ETHICS: THE NEW MORALITY, *supra* note 14, at 42.

89. Fletcher, *Situation Ethics Under Fire*, *supra* note 87, at 173.

90. FLETCHER, SITUATION ETHICS: THE NEW MORALITY, *supra* note 14, at 33.

91. JOSEPH FLETCHER, MORAL RESPONSIBILITY: SITUATION ETHICS AT WORK 31-32 (1967).

embraced by an *a priori* rule.<sup>92</sup> Love is the only norm which is “intrinsically good” and unalterable.<sup>93</sup>

For Fletcher, rather than adhere totally to strict pragmatism which embraces the notion that the ends justify the means, the ends and the means are not taken as independent entities, but “are relative to each other.”<sup>94</sup> Thus, the means are regarded as the components necessary to a realization of the ends.<sup>95</sup> Accordingly, the actual result of a course of conduct is of far less determinative value than the intended end<sup>96</sup> (e.g., a compassionate response to end-stage pain and suffering).

Under situationism, love is identified with justice—for, they are seen as “one and the same thing.”<sup>97</sup> Love, however, defies a precise definition and is reached only “by an act of faith.”<sup>98</sup> It is only through a particular situation that an individual is provided with ethical judgment and, in turn, it is through the situation that the full context of love is determined.<sup>99</sup> Love, then, is not prescriptive but rather situational.<sup>100</sup> When the law and love conflict, love must always triumph<sup>101</sup> because the only universal ethical norm recognized is love.<sup>102</sup> Other than the commandment, “to love God in the neighbor,”<sup>103</sup> situationism rejects all other norms or laws.<sup>104</sup>

92. FLETCHER, SITUATION ETHICS: THE NEW MORALITY, *supra* note 14, at 299. *See generally* 2 ENCYCLOPEDIA OF PHILOSOPHY 281 (Edward Craig general ed., 1998).

93. FLETCHER, SITUATION ETHICS: THE NEW MORALITY, *supra* note 14, at 121. *See* Fletcher, *Love is the Only Measure*, *supra* note 13. *See also* Frederick S. Carney, *Deciding in the Situation: What is Required?*, in NORM AND CONTEXT IN CHRISTIAN ETHICS 3, 5 (Gene H. Outka & Peter Ramsey et al. eds., 1968) (criticizing the idea that love is the all-inclusive principle of the Christian moral tradition and suggesting that faith and love must be included in this equation).

94. FLETCHER, SITUATION ETHICS: THE NEW MORALITY, *supra* note 14, at 121.

95. *Id.* at 121-22.

96. *Id.* at 153. *See* Smith, *Gently Into the Good Night*, *supra* note 15.

97. JOSEPH FLETCHER, MORAL RESPONSIBILITY: SITUATION ETHICS AT WORK, *supra* note 91.

98. *Id.* at 13.

99. NORMAN L. GEISLER, CHRISTIAN ETHICS: OPTIONS AND ISSUES 58 (1989).

100. FLETCHER, SITUATION ETHICS: THE NEW MORALITY, *supra* note 14, at 134.

101. *Id.* at 169.

102. *Id.* at 58-60.

103. *Id.* at 26.

104. *See* Fletcher, *Love is the Only Measure*, *supra* note 13. *See generally* George P. Smith, II, *Stop, in the Name of Love!*, 19 ANGLO-AM. L. REV. 55 (1990).



## VII. LAW'S PURPOSE

There is general agreement that the principal purpose of law is not only to define and protect individual rights and to ensure public order, but also to resolve disputes and redistribute wealth and thereby optimize economic efficiency.<sup>105</sup> Additionally, laws should dispense justice, provide a structure for preventing or compensating injury, and be “a lever for moving human behavior.”<sup>106</sup> Accordingly, all legal systems may be viewed correctly as existing “to effect some change in human behavior.”<sup>107</sup> By seeking to alter socio-cultural influences, law can truly shape and re-shape behavior.<sup>108</sup>

As seen, law is the language of social regulation.<sup>109</sup> Thus, it obeys systemic imperatives often irrelevant and in conflict with efforts to achieve a genuine understanding and wise resolution of moral issues.<sup>110</sup> Although it would be incorrect to hold that every moral obligation “involves a legal duty,” it would, however, be proper to recognize “every legal duty is founded on a moral obligation.”<sup>111</sup> It remains for the state—through the promulgation of laws—to determine which particular ideal of morality should guide.<sup>112</sup> Ideally, and of necessity, that moral standard that best recognizes autonomy, and thereby “maximizes freedom” without harming others, must be embraced.<sup>113</sup> As a language, law competes with other languages of religion and morality, of love and friendship, of custom and compromise, and of pragmatism and social accommodation. Interestingly,

105. Owen D. Jones, *Law and Biology: Toward an Integrated Model of Human Behavior*, 8 J. CONTEMP. LEGAL ISSUES 167 (1997); See POSNER, *ECONOMIC ANALYSIS OF LAW*, *supra* note 6, § 8.7

106. Jones, *supra* note 105, at 167.

107. *Id.*

108. *Id.*

109. *Id.* at 168. See POSNER, *ECONOMIC ANALYSIS OF LAW*, *supra* note 6, § 8.7.

110. Schneider, *supra* note 19, at 16, 22.

111. *R v. Instan*, 1 QB 450, 453 (1893, per Lord Chief Justice Coleridge). See Smith, *Procreational Autonomy*, *supra* note 23, at 638, referencing the observation of President Ronald Reagan that “the bedrock of moral order is religion.” Ronald Reagan, *Politics and Morality are Inseparable*, 1 NOTRE DAME J. L. ETHICS & PUB. POL’Y 7 (1984).

112. SHEILA A. M. McLEAN, *ASSISTED DYING: REFLECTIONS ON THE NEED FOR LAW REFORM 202* (2009).

113. Law should neither codify nor mandate norms of conduct which are inconsistent or out of step with “the lived moral values” of society. CATHLEEN KAVENY, *LAW’S VIRTUES: FOSTERING AUTONOMY AND SOLIDARITY IN AMERICAN SOCIETY* (2012). Indeed, there is no general moral duty to obey the law. See ABNER S. GREEN, *AGAINST OBLIGATION: THE MULTIPLE SOURCES OF AUTHORITY IN A LIBERAL DEMOCRACY* (2012).

these other languages are spoken more comfortably, fluently, and with more conviction in daily life than the language of law.<sup>114</sup>

### VIII. SCIENCE AND RELIGION

The two great systems of human thought are science and religion, and the predominant influence over the conduct of most individuals, historically, may be said to be religion.<sup>115</sup> Although there is a religious perspective present in the lives of most individuals, religion's stylized, institutionalized role has declined sharply over the years. While traditional Christian doctrines are being displaced from personal consciousness, they are not replaced—however—by rational scientific thought; for science is just as elusive and inaccessible to the public as organized religions.<sup>116</sup>

Because contemporary existence has been altered dramatically by scientific achievement through technology, lives are changed radically—with the corresponding conclusion reached that traditional religions often appear to be lacking in modern relevance in resolving both personal and social problems.<sup>117</sup> The deep questions of existence are approached differently by science and religion. While science is based on careful observation and experimentation, which in turn allows for theories to be constructed connecting different experiences, religion asserts unalterable truths that cannot be modified to accommodate changing ideas. Accordingly, the true believer stands by his faith regardless of whatever evidence may be deduced against its efficacy.<sup>118</sup> Yet, for the scientist, if scientific irregularities prove a theory to be fallacious, it will be abandoned and a new approach adopted.<sup>119</sup>

The reality of social behavior is that science and technology are the great engines of modern times; and these engines drive and force constant change. Far from becoming simpler, the very real promise of science and technology is that they will become more difficult and, indeed, unyielding. Finding definitive solutions to both the tendentious problems and the opportunities they present is especially difficult since no “solution” can ever be taken as

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114. Schneider, *supra* note 19, at 21.

115. See PAUL DAVIES, GOD AND THE NEW PHYSICS 1 (1983).

116. *Id.* See George P. Smith, II, *Law, Medicine, and Religion: Towards a Dialogue and a Partnership in Biomedical Technology and Decisionmaking*, 21 J. CONTEMP. HEALTH L. & POL'Y 169 (2005).

117. DAVIES, *supra* note 115, at 2.

118. *Id.* at 6.

119. *Id.* See generally George P. Smith, II, *Pathways to Immortality in the New Millennium: Human Responsibility, Theological Direction or Legal Mandate*, 15 ST. LOUIS U. PUB. L. REV. 557 (1996).

final— this is because “with changing technology comes changing dimensions of the problems.”<sup>120</sup>

## IX. BIOETHICS AND HUMAN RIGHTS

Interestingly, a distinct positive-negative, or *yin-yang*, relationship exists between science and religion that gives rise to a level of synergistic energy, which allows both science and religion to work independently, advancing the common good spiritually and scientifically.<sup>121</sup> Similarly, there is an inter-relationship between bioethics and human rights—nationally and internationally. More specifically, the extent to which bioethics serves as a framework, if perhaps not a foundation, for advancing a claim that there is a human right to health care<sup>122</sup> is illustrated clearly in recent work by UNESCO in presenting to the United Nations a Universal Declaration on Bioethics and Human Rights in 2005.<sup>123</sup> Others prefer to see human rights as a *lingua franca* for advancing a globalized notion of bioethics and one no longer shackled to an inflexible regime of principlism.<sup>124</sup>

In addition to the 2005 Universal Bioethics Declaration, the 1997 Universal Declaration on the Human Genome and Human Rights, and the 2003 International Declaration on Human Genetic Data are pivotal to a new global effort to structure a framework to advance a bioethics/human rights constitutionalism.<sup>125</sup> Together with the Universal Declaration of Human

120. Michael D. Kirby, *Health Law and Ethics*, 5 J. L. & MED. 31, 34-35 (1997). See Belinda Bennett, *Expanding Horizons: Scientific Frontiers, Legal Regulation, and Globalization*, 19 IND. J. GLOBAL STUD. 507 (2012).

121. See e.g., George P. Smith, II, *Eugenics and Public Policy*, 1985 S. ILL. L. J. 435; Francis Canavan, *Genetics, Politics and The Image of Man*, in 2 ETHICAL, LEGAL AND SOCIAL CHALLENGES TO A BRAVE NEW WORLD ch. 2 (George P. Smith, II, ed. 1982). See generally GEORGE P. SMITH, II, *THE CHRISTIAN RELIGION AND BIOTECHNOLOGY: A SEARCH FOR PRINCIPLED DECISIONMAKING* (2007).

122. John D. Annas & Elizabeth M. Fenton, *Bioethics and Human Rights*, 39 HASTINGS CENTER REP. 27 (2009).

123. See GEORGE P. SMITH, II, HUMAN RIGHTS AND BIOMEDICINE (2000); *Human Rights and Bioethics: Formulating a Universal Right to Health, Health Care or Human Protection?*, 39 VAND. J. TRANSNAT'L L. 1295 (2005). The Universal Declaration may be found in HEALTH AND HUMAN RIGHTS: BASIC INTERNATIONAL DOCUMENTS 105 (Stephen P. Marks 3rd ed., 2013) See also Rex D. Glensy, *The Right to Dignity*, 43 COLUM. HUM. RTS. L. REV. 65 (2011).

124. Annas & Fenton, *supra* note 122.

125. George P. Smith, II, *Bioethics and Human Rights: Toward a New Constitutionalism*, 13 CONST. L. & POL'Y REV. 68 (2011). The 1997 Universal Declaration on the Human Genome and Human Rights and the 2003 International

Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Cultural and Social Rights contain numerous principles and obligations which bear a direct relationship to norms of medical ethics.<sup>126</sup>

#### X. DISTRIBUTIVE JUSTICE

As observed, another great issue of the moment confronting bioethics as a discipline is the issue of distributive and social justice in health care reform, as caution must be taken to separate the terms, “medical and health care.” Conflation of the two often leads to confusion—this, because health care is within the purview of a responsible polity, it is a much broader conception which must remain second in priority of concerns and action to medical care.<sup>127</sup> Accordingly, primary efforts must be directed toward assuring treatment for those in present need of it rather than shaping a national public policy designed to cultivate an overall improved health status with the goal of preventing future illness. Relief of suffering precedes cultivation of health, important as the latter surely is.

In the final analysis, the goal of medical care must be to enhance the well-being of the patient.<sup>128</sup> The most vexing issue in achieving this goal is to both develop and to administer an equitable system of access to care that balances patient autonomy with quality of life—particularly when age and disease are more progressively incapacitating.<sup>129</sup> Invariably, the ethics of medical care and of healthcare are tied, inextricably, to applying *micro* economic policy at the point of patient entry into the health care delivery system and *macro* economics in determining the rational parameters of

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Declaration on Human Genetic Data may be found respectively in HEALTH AND HUMAN RIGHTS: BASIC INTERNATIONAL DOCUMENTS, *supra* note 123 at 78, 95. *But see* GLOBAL BIOETHICS: THE COLLAPSE OF CONSENSUS (H. Tristram Englehardt ed., 2006).

126. SMITH, *supra* note 123; The Universal Declaration on Human Rights may be found at HEALTH AND HUMAN RIGHTS: BASIC INTERNATIONAL DOCUMENT, *supra* note 123, at 1; The International Covenant on Economics, Social, and Cultural Rights is at HEALTH AND HUMAN RIGHTS: BASIC INTERNATIONAL DOCUMENT, *supra* note 123, at 5; and The International Covenant on Economic, Social, and Cultural Rights is at HEALTH AND HUMAN RIGHTS: BASIC INTERNATIONAL DOCUMENTS, *supra* note 123, at 13. *See* Immaculda De Melo-Martin, *Human Dignity in International Policy Documents: A Useful Criterion for Public Policy*, 25 BIOETHICS 37 (2011).

127. *See generally* SMITH, *supra* note 38; PELLEGRINO & THOMASMA, *supra* note 18.

128. DAVID C. THOMASMA, HUMAN LIFE IN THE BALANCE 184 (1996).

129. *Id.* at 183.

health care policy.<sup>130</sup> In as much as health care resources are finite, they must be rationed<sup>131</sup>—with the consequence being that there can be no recognized or absolute duty to provide full medical treatment for all people at all times.<sup>132</sup>

The extent to which medical resource allocations are provided is under ongoing review and assessment. Indeed, the standard for “codifying” the elements of Distributive Justice is an issue of great national concern.<sup>133</sup> Finding an acceptable unit or metric for measurement of disease burden is exceedingly problematic and lacking in uniformity. One construct growing in popularity for making the determination is the Quality-Adjusted Life Year calculation—a measurement by which the quantity of life lived is computed, statistically, in order to determine whether there is a sustainable value for a particular medical intervention.<sup>134</sup> Cost-effectiveness, thus, is of central importance in this measurement. Another tool for evaluating the use of a medical resource is found in a growing reliance on the practice of evidence-based medicine, which is a systematic process of reviewing, appraising, and using clinical research findings to aid in the delivery of optimum clinical patient care.<sup>135</sup> Thus, society continues to explore various options for measuring the disease burden to reasonably allocate medical resources.

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130. See George P. Smith, II, *Social Justice and Health Care Management: An Elusive Quest*, 9 HOUSTON J. HEALTH L. & POL’Y 1 (2009); POSNER, THE ECONOMICS OF JUSTICE, *supra* note 54.

131. Peter Singer, *Why We Must Ration Health Care*, N.Y. TIMES MAG., July 19, 2009, at SM38. Economic policy analysis seeks to not only “determin[e] which allocation of scarce resources maximizes wealth . . . [but is] concerned with efficiency, not fairness.” BARNES & STOUT, *supra* note 19.

132. JONATHAN HERRING, OLDER PEOPLE IN LAW AND SOCIETY 293 (2009). The principle of *triage* was enunciated during the Napoleonic Wars and, today, is an efficacious medical construct for clinical rationality in the allocation of medical resources in public health or national emergencies. George P. Smith, II, *Triage: Endgame Realities*, 1 J. CONTEMP. HEALTH L. & POL’Y 143, 143-44 (1985). See Smith, *Re-shaping the Common Good*, *supra* note 71, at 9-10. See generally RICHARD A. POSNER, AGING AND OLD AGE (1995) GEORGE P. SMITH, II, LEGAL AND HEALTHCARE ETHICS FOR THE ELDERLY (1996)

133. See SMITH, *supra* note 38, at 9-11.

134. *Id.* at 2-3.

135. See generally SHARON E. STRAUS, W. SCOTT RICHARDSON, PAUL GLASZIOUS & R. BRIAN HAYNES, EVIDENCE-BASED MEDICINE (2003).

## CONCLUSION

Once it is accepted that the provenance of the virtue of benevolence derives properly from the principle of beneficence,<sup>136</sup> it can then be hypothesized that love should be the dominant vector of force in bioethical decision-making in the twenty-first century. Accordingly, decisions should be guided by a spirit of rational thinking<sup>137</sup> and basic common sense which seek, always, to direct a “caring response”<sup>138</sup>—or, in other words, one which is compassionate, loving, humane, and merciful,<sup>139</sup> and that also recognizes a right to basic dignity.<sup>140</sup>

Ethical taxonomical ambiguities should be foresworn in order to reach reasonable and just results.<sup>141</sup> This approach—drawn from the notion of a “common morality”<sup>142</sup>—seeks to re-define rather abstruse ethical and philosophical principles and, thereby, reduce them to one common denominator: love or benevolence. In this way, no definitive choice between principlism and situationism is required. Rather, this interpretation allows the principle of beneficence to serve as the foundational principle upon which love or benevolence shape the response to individual situations in which ethical judgments are required.<sup>143</sup> Moreover, in a system founded on benevolence, principlism and situationism are complementary and by no means disharmonious. Indeed, they become inextricable in their resolve to serve as constructs for ethical decision-making, which is in turn rational.

Moral theory, in and of itself, can never be the exclusive basis for moral judgments<sup>144</sup> because there can be no unified criteria to test the validity of a moral claim.<sup>145</sup> Therefore, it is better to judge the morality or immorality of

136. See Pellegrino & Thomasma, *supra* note 32, at 46. See also 4 ENCYCLOPEDIA OF PHILOSOPHY, *supra* note 42.

137. See POSNER, LAW, PRAGMATISM, AND DEMOCRACY, *supra* note 6, at 337.

138. See Smith, *Refractory Pain*, *supra* note 13, at 519-20.

139. *Id.* See Raymond C. O'Brien, *The World of Law, Science and Medicine According to George P. Smith, II*, 8 J. CONTEMP. HEALTH L. & POL'Y 163, 167-68 (quoting George P. Smith, II, *Quality of Life, Sanctity of Creation: Palliative or Apotheosis?*, 63 NEB. L. REV. 709, 734-35 (1984)).

140. Glensy, *supra* note 123, at 66-68.

141. See RESTATEMENT (SECOND) OF TORTS, *supra* note 70, § 283 (analyzing of the legal requisites of reasonable conduct).

142. See generally Janice Daurie, *Sedgwick on Moral Theories and Common Sense Morality*, 14 HIS. PHILOSOPHY Q. 425 (1992).

143. See GEISLER, *supra* note 99.

144. See Richard A. Posner, *The Problematics of Moral and Legal Theory*, 111 HARV. L. REV. 1637, 1639 (1998).

145. *Id.* at 1642-43.

conduct based on the *situation* in which an issue is raised or presented for review and determination.<sup>146</sup> Inasmuch as cultural variants differ within each culture or community,<sup>147</sup> morality must be viewed as community based—thereby defying a defined structure for problem-solving.<sup>148</sup>

Moral relativism necessitates a casuistic (or case-based) form of analysis when ethical judgments must be made. Situationism, as presented, compels the use of love or benevolence as the virtue of a common sense morality that is rational and eschews a rigid or unyielding adherence to a formalistic system codified in principlism. In making this conclusion, this Article—while recognizing that bioethics can only frame relevant questions regarding conflicts<sup>149</sup>—seeks to re-calibrate the “traditional” template or compass for ethical argumentation and, in so doing, assure an active role and relevance for bioethics in this century.<sup>150</sup>

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146. See GEISLER, *supra* note 99.

147. Jecker, *supra* note 3; Rachels, *supra* note 3, at 118-20.

148. Posner, *The Problematics of Moral and Legal Theory*, *supra* note 144, at 1642-43. See George P. Fletcher, *Law and Morality: A Kantian Perspective*, 87 COLUM. L. REV. 533, 533-34 (1987) (noting that many commentators argue that morality cannot be legislated).

149. DOLGIN & SHEPHERD, *supra* note 58, at 20.

150. See Smith, *Biomedicine and Bioethics*, *supra* note 20; Smith, *Judicial Decisionmaking*, *supra* note 21, at 102-03. See also Susan Sherwin, *Looking Backwards, Looking Forward: Hopes for Bioethics' Next Twenty-Five Years*, 25 BIOETHICS 77-78 (2011); see generally Engelhardt, *supra* note 24.