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BOOK REVIEWS

STANDARD OF CARE: THE LAW OF AMERICAN BIOETHICS. By George J. Annas. New York: Oxford University Press. 1993. 291 Pp. \$24.95.

*Reviewed by John C. Fletcher**

George Annas, one of the nation's most active health care lawyers and teachers, is a prolific contributor to the literature of bioethics. He is also a creative and witty writer in a field whose main threat is probably not "bioethics backlash" but editors who wantonly publish work so boring or repetitive that it smothers readers' will-to-read. This book is a real pleasure to read and most of its positions are clearly argued.

The book's chapters are from Annas' recent essays and articles on major legal cases or disputes posing bioethical issues. Some collections are inchoate, and their disunity is editorially masked by artifice of headings and subheadings. The contents of this book are knit together by goals that have long guided Annas' interests in bioethics: 1) to show that the standard of care for medical practice rests as much or more on ethical than on legal grounds, 2) to defend and renew constitutional protection of individual civil and privacy rights in an era when a majority of the Supreme Court displaces them in key decisions, and 3) to demonstrate that the law has had a pervasive, even determinative, influence on American bioethics.

In bioethics, Annas sees this book as the first stage in a larger project of values clarification. He wants here to explore the values at stake in certain cases to provoke clarification of "which values deserve legal support in the U.S."¹ Beyond this goal, he envisions a larger project to clarify values that ought to underlie international human rights law. He notes that human rights law is somewhat unfamiliar to U.S. bioethics because of the uniqueness of the U.S. Constitution in American legal and

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1. GEORGE J. ANNAS, *STANDARD OF CARE: THE LAW OF AMERICAN BIOETHICS* 5 (1993).

cultural traditions. He does not develop a theory of human rights or values in this book but points to a direction such a theory might take, i.e., "because human rights are based on human characteristics, the universal is more important than the particular."² At a future time, he intends to develop an "international agenda for human rights in health."³ One must await his future work on human rights and bioethics. Some obstacles for a rights-based ethical theory are mentioned below.

This collection of writings of a columnist, lecturer, and essayist on law and bioethical controversies mainly succeeds. Annas, who writes about legal cases and bioethical issues very soon after they break into public view, almost always "gets it right," in the sense of framing the problem and making the judgments that need to be made. The book's main weakness stems, in my view, from unguarded claims and overstatements made in the "Introduction" about the determinative role of law in shaping American bioethics and social innovations like ethics committees. After discussing the book's contents and strengths, the review concludes with an analysis of this section.

Nineteen chapters are organized in three main parts: I. The U.S. Constitution and Bioethics; II. Private Sector Bioethics; and III. Public Sector Bioethics. A final chapter reviews the history of the teaching of health law, the perspectives from which it can be taught, and proposes that the final "lost" semester of the third year of law school could be well-spent in a total immersion in health law.

In explaining the contents of Part I, Annas writes, "The reconstituted Reagan-Bush U.S. Supreme Court seems to have taken as its project increasing the power of the government to control the personal lives of its citizens."⁴ Annas holds that "constitutional law as we have come to know it" is under attack by the conservative members of the Court and that it cannot be relied upon to protect citizens from government intrusion into the "doctor-patient relationship and into personal decision making regarding reproduction, birth, treatment refusals, and death."⁵ Annas argues that a new "countervailing force" in the form of a "new bioethics" is needed to protect individuals' personal liberties from unjustified intrusions at these times when individuals are so vulnerable to unwarranted intrusions.

Accordingly, the chapters in Part I take up decisions by the U.S.

2. *Id.*

3. *Id.*

4. *Id.* at 11.

5. *Id.* at 11.

Supreme Court, state courts, and some state and federal legislatures in bioethical controversies over individual rights, the physician-patient relationship, and the authority of government to intrude. The cases discussed include *Rust v. Sullivan*⁶ (the "gag rule"), *Skinner v. Railway Labor Executives' Ass'n*⁷ (drug testing), *National Treasury Employees Union v. Von Raab*⁸ (drug testing), *Washington v. Harper*⁹ (forcible anti-psychotic medication), *In re A.C.*¹⁰ (forced Cesarean section on a dying pregnant patient), *Webster v. Reproductive Health Services*¹¹ and *Planned Parenthood v. Casey*¹² (abortion cases), *In the Matter of Baby M*¹³ (commercial surrogate motherhood), *Davis v. Davis v. King*¹⁴ (dispute over ownership of frozen embryos), *Johnson v. Calvert*¹⁵ (child custody and a non-genetic gestational mother), *Cruzan*¹⁶ (forgoing life sustaining treatment in persistent vegetative state) and a review of the variation between New York and New Jersey state court decisions on forgoing treatment, as well as legislation on advance directives. There is a too brief discussion of the federal Patient Self-Determination Act as an initiative to educate citizens and protect their right to refuse life-prolonging treatments. This act, almost entirely due to the work of Senator John Danforth (R-MO), can be seen as a kind of personal penance for what his state did to the Cruzan family, although Danforth's interest in promoting advance directives through public policy precedes the *Cruzan* case.

Part II, "Private Sector Bioethics," is intended to deal with areas "in which the Constitution has never played a major role, either because they have been dominated by private players or because the Constitution provides strong authority for government dominance. Here the major concern is more often money and markets than government power, and the increasing shift from medical ethics to business ethics."¹⁷ This part includes chapters on AIDS and doctors' obligations to treat persons with AIDS and the political strife regarding FDA drug trials for HIV and demands from AIDS activists for changes in regulations to speed testing of

6. 111 S. Ct. 1759 (1991).

7. 489 U.S. 602 (1989).

8. 489 U.S. 656 (1989).

9. 494 U.S. 210 (1990).

10. 573 A.2d 1235 (D.C. 1990).

11. 492 U.S. 490 (1989).

12. 112 S. Ct. 2791 (1992).

13. 537 A.2d 1227 (N.J. 1988).

14. 842 S.W.2d 588 (Tenn. 1992), *cert. denied*, 113 S. Ct. 1259 (1993).

15. 851 P.2d 776 (Cal. 1993).

16. *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261 (1990).

17. ANNAS, *supra* note 1, at 11.

new drugs. It also includes an excellent chapter on the Human Genome Project that seems out of place under a "private sector" heading, since the initiative and its funding clearly occur in the public sector. It is true that knowledge and information from the project create issues that span the public and private sectors, including family life. A final case in this section is that of *Moore v. Regents of the University of California*¹⁸ that involved a dispute over researchers' selling a lucrative cell line for research without the prior knowledge of a patient from whom the cells were obtained.

Part III, "Public Sector Bioethics," is intended to "address issues that have not been dealt with by the law from a primarily constitutional perspective."¹⁹ It contains chapters on politics and fetal tissue transplants, disputes over brain death, anencephalic infants and transplantation, consent to the artificial heart, and rationing medical care in a reformed health care system. This part also includes a hypothetical Supreme Court ruling set in the year 2020, "*Minerva v. National Health Agency*," that defends criteria to ration the artificial heart. Another chapter criticizes the inadequacies of moral reasoning used in choices to separate Siamese twins. A concluding chapter in this part appears to be against permitting assisted suicide in medicine, at least with the impersonal and distancing means of Dr. Kervorkian's "killing machines." Annas does not take up cases of physicians like Dr. Timothy Quill, who actively helped in a patient's suicide, and whose motives towards and relationship with the patient were much more fully formed than Dr. Kervorkian's. In my view, he needs to address a harder case than Kervorkian's. Also, by not addressing the euthanasia question directly, he appears to veer away from one of the strongest implications of his key principle of self-determination and its liberty interests. It is not clear where Annas stands on this issue.

Many kinds of readers can use this book. Judges, legislators, and policy makers who confront disputes marked by bioethical issues will be interested. The book can be especially commended to those who write and teach in bioethics, health law, or courses that combine both fields. Annas's case accounts, commentary, and analysis are good resources for teaching and class discussion. Bioethicists who co-teach with health lawyers are always searching for contemporary material for courses. This book contains excellent discussions of almost thirty recent legal cases

18. 793 P.2d 479 (Cal. 1990).

19. ANNAS, *supra* note 1, at 11.

posing bioethical issues. Decisions in these cases expose choices among sharply contested values in current political and judicial culture. The best casebooks and textbooks in bioethics and health law are now somewhat dated,²⁰ organized around one major theme,²¹ or are primarily bioethics texts that require supplemental legal material.²²

At the University of Virginia, we are experimenting with a course on the history of bioethics using a "great cases" approach. What were the formative causes of the new field of bioethics? Annas believes that the law had a strong and even determinative role. One goal of the course is to examine the extent to which certain cases, and the forces at work behind them, helped to create the field of bioethics. Another goal is to compare the interpretation of different scholars who analyzed the cases. Not all of the formative cases that influenced the field of bioethics started as or evolved into court cases, but many of them obviously did. What choices of cases ought one make for an ideal course?

Our one-semester course of student-led sessions now uses cases of 1) coercive sterilization: *Buck v. Bell*,²³ *Relf v. Weinberger*;²⁴ 2) human subjects research: the Tuskegee syphilis study, the Jewish Hospital for Chronic Disease cancer study; 3) rationing life-saving technology: the Seattle hemodialysis committee; 4) cases of Jehovah's Witness refusals of blood transfusion: *Brooks*,²⁵ *Osborne*,²⁶ *Labrenz*,²⁷ *Georgetown*,²⁸ 5) abortion cases: *Roe v. Wade*,²⁹ *Planned Parenthood v. Casey*,³⁰ 6) forgoing life-sustaining treatment: *Quinlan*³¹ and *Cruzan*;³² 7) physician assisted death: Sigmund Freud's death by euthanasia, practices in the Netherlands, Dr. Quill's aid in Diane's suicide; 8) neonatal treatment decisions: the Johns Hopkins Down syndrome case and later Baby Doe cases; 9) futility cases: Helga Wanglie; 10) anencephaly and organ donation: Baby Theresa, 11) the history of genetic testing for Huntington's disease; 12)

20. JUDITH AREEN ET AL., *LAW, SCIENCE, AND MEDICINE* (1984).

21. ALAN MEISEL, *THE RIGHT TO DIE* (1989).

22. GREGORY E. PENCE, *CLASSIC CASES IN MEDICAL ETHICS* (1990).

23. 274 U.S. 200 (1927).

24. 565 F.2d 722 (D.C. Cir. 1977).

25. *Estate of Brooks v. Brooks*, 205 N.E.2d 435 (Ill. 1965).

26. *In re Osborne*, 294 A.2d 372 (D.C. App. 1972).

27. *People v. Labrenz*, 104 N.E.2d 769 (Ill. 1952).

28. *President and Directors of Georgetown College, Inc.*, 331 F.2d 1000 (D.C. Cir. 1964).

29. 410 U.S. 113 (1973).

30. 112 S. Ct. 2791 (1992).

31. *In re Quinlan*, 355 A.2d 647 (N.J. 1976).

32. 497 U.S. 261 (1990).

animal experimentation: Philadelphia head injury study); and 13) health care reform at the state level: the Oregon plan. Annas' discussions concern some of these cases and themes, and his selection of cases is an excellent way to study the more recent history of bioethics. One clearly needs two semesters to complete a full course.

A second strength in this volume is the author's consistent commitment to an ethical position of human rights and values within a liberal political polity. His larger ethical perspective is still evolving, based on his comments in the Introduction. There is no one place at which Annas gives an extended description of his ethical perspective, although one can be fairly confident that it combines elements of traditions of philosophical liberalism (Kant and Mill) and its political expressions (Rawls, Dworkin and others). Clearly, a cornerstone of Annas' ethical perspective is the supremacy of individual self-determination and the liberties enjoyed by persons who have this capacity or who have had it and lost it. From this core emanate a cluster of moral and legal rights to privacy, bodily integrity, and reproductive liberty.

These rights are invoked as the bodyguards of citizens in a liberal democracy whose main threat is from particularistic and absolutist views of the good life competing for supreme loyalty in the arena of political and judicial action. What one is not clear about is whether Annas holds that government should be consistently neutral with regard to implementing views of the good life embedded in particular resolutions of bioethical controversies, including neutrality regarding the liberal ideal, or whether he advocates that government's role is to promote the liberal ideal of autonomy and self-determination as the surest way to realize the good life in society. I infer that he prefers the latter direction, as indicated in his discussion of health care reform, but he can clarify this question in future writings.

Annas' is at his persuasive best arguing from his basic premise to protest intrusions into and infringements of self-determination and its attendant rights by government, large bureaucracies, and courts, especially when disadvantaged and vulnerable persons are the major losers. He assails the Supreme Court majority's defense of the "gag rule," mandatory drug testing, and forcing anti-psychotic medication on competent prisoners who may be a danger to themselves or others. His discussion of the Angela Carder case, in which a court-ordered cesarean section was performed on a pregnant woman dying of cancer at George Washington University Hospital — against her stated wishes — is crystal clear on a central moral and legal failure to recognize Ms. Carder as a person with

rights. This case's impact was such that it is unlikely that the option of a forced cesarean in a competent patient will be seriously considered by a judge in the future, as shown already by an Illinois court.³³ Annas' preparation of this important chapter, created from two of his articles, omitted to include or cite his important response to a critical reply to his first article from the attorney for the fetus.³⁴ Annas' reply stressed Ms. Carder's competence at the time of her final refusal of a cesarean. It would have been possible to refer to or include a summary of this important interchange. Much more recently and too late for reference in the Annas volume, George Washington Hospital's ethics committee generated a comprehensive policy to guide its clinicians and administrators in maternal-fetal conflicts of this type.³⁵

Annas' discussion of *Planned Parenthood v. Casey*³⁶ by the Supreme Court welcomes the joint opinion's reaffirmation of *Roe v. Wade*³⁷ as constitutional law in abortion choices, but he criticizes their acceptance of Pennsylvania's 24 hour waiting period after a required "informed consent" process. He views this requirement as flawed by an intent to inculcate guilt about abortion and by unfairness to women in rural areas and the very young. He is critical of the "undue burden" test and finds it unfairly used in the Pennsylvania decision. Annas sees the content of Pennsylvania's consent process as demeaning to women as it appears to presume that they have not heretofore considered the abortion choice with moral seriousness.

Self-determination plainly has limits for Annas; he is not a libertarian. In his view, one cannot simply justify any practice in the name of autonomy. Protecting individual dignity and especially equality between the genders is such a limiting value on autonomy for Annas. He especially wants to restrain commerce in human tissue, cells, body parts, and pregnancy. He condemns commercial surrogate motherhood, welcoming its apparent cultural demise. He invokes norms against selling children, as well describing a "classist and sexist" tendency as a "method to obtain

33. Penny Roberts, *Baby Born into Path of Legal Storm*, CHI. TRIB., Dec. 31, 1993, at 1.

34. Barbara Mishkin, *But She's Not an "Inanimate Container . . ."*, 18 HASTINGS CENTER REP. 40-41, (June-July 1988) (replying to George Annas, *She's Going to Die: The Case of Angela C.*, HASTINGS CENTER REP. 23 (Feb.-Mar. 1988)).

35. Douglas Mishkin & Gail J. Povar, *Decision Making with Pregnant Patients: A Policy Born of Experience*, 19 J. QUALITY IMPROVEMENT 291-302 (1993).

36. 112 S. Ct. 2791 (1992).

37. 410 U.S. 113 (1973).

children genetically related to white males by exploiting poor women.”³⁸ He comments that commercial surrogacy “subverted any principled notion of economic fairness and justice, and it undermines our society’s commitment to equality and the inherently priceless value of human life.”³⁹ Annas also criticizes the decisions of two California courts in the Anna Johnson case to reject her claims to be the mother of a child because she was not genetically related to him. Johnson contracted to attempt a pregnancy that began with an embryo transfer and changed her mind about her role as surrogate to assert a claim to be the rightful mother of the child. Opposition to commercial surrogacy appears to be the major motive for Annas’ position here, as well as defense of a traditional definition of motherhood favoring the gestational parent. In the *Moore* case decision, Annas criticizes the appeals court denial of a property interest to Moore in his cells as biased in favor of the biotechnology industry. He favors amending U.S. patent law to prohibit the patenting of human cells (including genes and gene fragments), and the Organ Transplant Act to prohibit the sale of human tissue and cells for any purpose.⁴⁰

If self-determination is not an absolute value for Annas, it has a very high but relative place in his commonwealth of values, depending upon the issue before him. One can see a distinctive valuing process at work in his discussion of rationing medical care, in which Annas responds to critiques from a communitarian perspective. He opens by describing the U.S. health care system as “wasteful, technologically-driven, death-denying, legalistic, and individualistic.”⁴¹ Annas’ approach to health care reform appears to be pluralistic and comprehensive, rather than a one-time reform, such as single-payer. He doubts that the U.S. is politically capable of changing the fee-for-service compensation system or its commitment to research. But what ought to be done? He accepts some of Daniel Callahan’s critique of American confusion of the goals of medicine and obscurity of the natural life-span, but he tends to reject placing communitarian values, in this case, ahead of individual values. Indeed, he stresses that more emphasis on self-determination can oppose “perverse communitarianism” of the type he sees practiced in Missouri’s forcing the Cruzan family to continue treatment and preserve life, “regardless of its quality.” In a key passage, he states:

38. ANNAS, *supra* note 1, at 61.

39. ANNAS, *supra* note 1, at 61.

40. ANNAS, *supra* note 1, at 176.

41. ANNAS, *supra* note 1, at 211.

The health care system of every country is shaped by the country's political system and values, not the other way around. The pluralistic American political system was not founded on the idea that the government should control our daily lives, but on the notion that the government exists to enhance the "life, liberty and pursuit of happiness" of the individual, and thereby the community. With liberty as its hallmark, we once believed (and I think we still do) that life without liberty is not worth living. Thus to argue that the problem with Americans is that we put too high a value on self-determination, and should look for other values instead to live by, is to argue against our basic political system itself.⁴²

It is hard to construct a compelling ethical argument for comprehensive health care reform in the United States using liberty as the guiding value, since the ideology of individualism is a great obstacle for that reform. In any such argument liberty needs to share equal time with social justice and equality, values that provide more guidance as to the kinds of communities and persons needed for the task of redistributing economic arrangements to insure access to basic health care for all Americans and the strangers in our midst at any given time. Appeals to liberty will insure that reforms will not make health care slaves of Americans. But liberty does not give insight into the profound unfairness of the status quo and the monumental task to be done. As a societal goal, health care, which includes nutrition and preventive medicine, differs from other goals, like education, housing, commerce and work, in that it is a presupposition to claim and enjoy the fullness of the other goals. Without basic health care, "life, liberty, and the pursuit of happiness" cannot be claimed by persons at all. A government and a private sector with the capacity to insure that all persons have equal access to health care, and fail consistently to do so, do not violate the obligations of liberty so much as those of justice and equality. Inasmuch as these other values play a role in his thought in other places, why does not Annas share liberty's obligations with those of social justice and equality? But, other than his reference to Callahan, he does not interact with other major contributors to the debate on concepts of justice and redistribution of medical services, e.g., Norman Daniels, Ronald Dworkin, Annette Baier, and Ezekiel Emmanuel, among many others.

In a fourth edition of a well-known text, Beauchamp and Childress write, "We suspect that no part of the moral vocabulary has done more to

42. ANNAS, *supra* note 1, at 216.

protect the legitimate interests in political states than the language of rights."⁴³ They also point out that the major weakness of locating basic ethics in rights is that

rights is only a piece of a more general account that stakes out what makes a claim valid. Justification of the system of rules within which valid claiming occurs is not itself rights-based. Pure rights-based accounts also run the risk of truncating or impoverishing our understanding of morality, because rights cannot account for the moral significance of motives, supererogatory actions, virtues, and the like.⁴⁴

The major task for a rights-based view of ethics, which Annas can pursue, is to increase the dialectic with other perspectives and themes in different traditions than human rights. Such work will be needed especially if he desires to traverse the territory of an international (and cross-cultural) perspective on human rights.

There is a societal layer latent in Annas' ethical thought which emerges in choices not to rely on one dominant principle as he weighs and makes judgments in particular cases. As suggested in a review of an earlier work,⁴⁵ Annas needs to reach for a more balanced account of society's interests in bioethical conflicts and of the variety of human communities that must co-exist within the rights-giving and rights-protecting society. In what our ideology seems to stress, we liberals are usually right in what we affirm (self-determination and liberty interests) and wrong in what we deny (legitimate interests of particular communities).

Finally, the substance of the Introduction must be discussed. Annas often "gets it right" ethically and legally in the chapters of the book, but he is badly off target in its starting pages. This section does not fit well with the remainder of the book in terms of its quality. Annas begins by reminiscing about a Seattle conference in September, 1992, organized by Albert Jonsen and the University of Washington on the "Birth of Bioethics."⁴⁶ The occasion marked the 30th anniversary (Nov. 9, 1962) of Shana Alexander's article in *Life*⁴⁷. She exposed a tendency among members of a Seattle committee to use social merit in recommending

43. TOM L. BEAUCHAMP AND JAMES F. CHILDRESS, *PRINCIPLES OF BIOMEDICAL ETHICS* 77 (4th ed. 1994).

44. *Id.* at 76.

45. John C. Fletcher, *What are Society's Interests in Human Genetics and Reproductive Technologies?*, 16 *L., MED., & HEALTH CARE* 131 (1988).

46. Albert R. Jonsen, *The Birth of Bioethics*, 23 *HASTINGS CENTER REP.* S1 (Special Supp., Nov.-Dec. 1993).

47. Shana Alexander, *They Decide Who Lives, Who Dies*, *LIFE*, Nov. 9, 1962, at 102.

who among the many end-stage renal patients should receive the then scarce life-saving treatment of hemodialysis. A keynoter, Alexander used the podium that day less to revisit her article than to argue in favor of physician assisted death. In this vein, she said to the audience, "I trust my lawyer more than I trust my doctor." Interestingly, her remark does not appear in Jonsen's edited edition of her talk.⁴⁸ She meant that her lawyer, whom she knew intimately, could be more trusted with knowledge about her desire to be spared suffering and have a good death at the end than her current doctor, a virtual stranger. Her most trusted physician had died and another had moved away after "burn-out." Annas accurately recalls the surprise and stir that this comment caused, but he blurs the context of her statement, i.e., her desire for help in dying. Nonetheless, Annas takes off from Alexander's remark about her lawyer to make a case that American law has had the single greatest influence to date on bioethics. He writes that the assembled bioethicists should not have been surprised by her comment, since the civil rights law tradition is dedicated to protection of individual rights against arbitrary uses of power by government or physicians. He then states, "This is why American law, not philosophy or medicine, is primarily responsible for the agenda, development and current state of American bioethics."⁴⁹ Thus begins an excursion into overstatement.

To illustrate how pervasive the law's influence has been on bioethics in America, Annas cites the growth of ethics committees of all types. Among these are: Institutional Review Boards (IRBs) to conduct prior review of research with human subjects, Institutional Ethics Committees (IECs) in healthcare institutions concerned with patient care issues, and the ethics committees of professional and specialty organizations, like those of the American Academy of Pediatrics, the American College of Obstetrics and Gynecology and the American Fertility Society, that began in the 1980s. Annas mentions briefly the Ethical, Legal and Social Implications Program of the Human Genome Project under the heading of "Ethics at the Governmental Level," but he omits the more influential work of government-sponsored bodies like the National Commission for the Protection of Human Subjects and the President's Commission for Ethical Problems in Medicine. Annas' view seems to be that all of these groups largely function to protect the interests of the institutions in which they are housed. He sees them as having come about due to legal con-

48. Shana Alexander, *Thirty Years Ago*, 23 HASTINGS CENTER REP. S5 (Special Supp. Nov.-Dec. 1993).

49. ANNAS, *supra* note 1, at 3.

cerns. They are less concerned with formulating ethical considerations, and more concerned with “providing ethical cover” to protect the institutions that do research, for physicians, for the business practices of practitioners, and for the Human Genome Project. He ends this section calling for a “real effort to see if multidisciplinary committees can ‘do ethics’ and encourage real change in our hospitals and medical care facilities to go beyond the law and risk management to ‘do the right thing.’ Good ethics (and a good ethics committee) begins where the law ends.”⁵⁰

There are two serious shortcomings here. The first is that these statements are inaccurate in a historical sense; i.e., neither bioethics as a movement, or as a field, nor such committees in particular can be explained as due primarily to the influence of law. A second shortcoming is that he oversimplifies both the problems and performance of such committees, compromising his argument by a morally self-defeating position. I think that he wants these groups to succeed but does not give an accurate account of their history or a vision for a future in which they can succeed. Annas probably believes that society is better than worse off for the aggregate work of such committees. He does not state this belief explicitly, but it is implicit in statements like the one cited just above. Does Annas seriously desire to return to a time when there were no such groups? If not, why not?

The answer is that such groups function - some better and some worse - to meet two needs in the interactions of a pluralistic society with the research and health care communities. The first need is to share power in decision making — about what research ought to be done and under what conditions and how ethical problems in patient care are optimally addressed in the local setting. A second need is to enlarge ethical foresight about uses of medical technology, beginning in the laboratory and ending at the bedside. In the case of the second need, IECs and IRBs can play some role in identifying problems and concerns, but public bioethics groups at the government level clearly play a much larger and more influential role. Annas does not really address the question of how public bioethics ought to be done, but he has done so since this book.⁵¹

Addressing these two societal needs — to share power and enlarge ethical foresight — are also involved in explaining why there is a bioethics movement and a field of studies by the same name. In my view, society

50. ANNAS, *supra* note 1, at 10.

51. George J. Annas, *Will the Real Bioethics (Commission) Please Stand Up?*, 19 *HASTINGS CENTER REP.* (Jan.-Feb. 1994).

needed bioethics before there was such an entity, or it would not have appeared. Why was there a bioethics movement at all? These two needs were not being adequately met with the conceptual and institutional resources available to researchers and clinicians in the 1950s and 1960s. It is true that researchers reached out more readily to lawyers like Irving Ladimer, William Curran, and to physicians with strong legal interests, like Jay Katz, for help to construct new resources to meet these needs than to philosophers, theologians, or social scientists, but even their kind of reaching out differs radically from an interpretation that they had to do it "because of law." To say that IRBs were "created by law"⁵² is literally true but historically incomplete. The National Research Act of 1974 was the culmination of at least two decades of growing evidence that the ethical resources within the research communities were insufficient to protect human subjects. However, IRBs were not created by law; they evolved from earlier forms and legal requirements were added for gender, membership from several disciplines, and at least one non-institutional member. The earliest precursors of IRBs were small groups, at first only composed of researchers, to examine research protocols that significantly departed from standard practice. An early example, but probably not the first, was organized as a subgroup of the Medical Board when the Clinical Center, NIH, opened in 1953.⁵³ Welt's research in the late 1950's showed that these groups were rare.⁵⁴ Although researchers themselves were aware of the value of prior group review of research for protection for subjects, their spotty efforts were insufficient to prevent the research ethics megadisasters of the 1960s (e.g., Jewish Hospital for Chronic Diseases cancer study), the 1970s (e.g., the revelation of the Tuskegee syphilis study active since 1932), and those that still come to light today (e.g., the Department of Energy's reports about studies involving radioactivity). No prior group review of these and many other ethically unjustified studies actually took place. In the early 1960s, leaders at the NIH were weighing the merits of requiring prior group review when the consequences of the Jewish Hospital experiment and the first transplant of a baboon heart to a human⁵⁵ without any scientific or ethical discus-

52. ANNAS, *supra* note 1, at 6.

53. Minutes of the Medical Board, Clinical Center, NIH, March 3, 1953. A document describing the Clinical Research Committee and the policy of the NIH, "Group Consideration of Clinical Research Procedures Deviating from Accepted Medical Practice or Involving Unusual Hazard," was issued in 1954.

54. Louis G. Welt, *Reflections on the Problems of Human Experimentation*, 25 *CONN. MED.* 75 (1961).

55. James D. Hardy, et al., *Heart Transplantation in Man*, 188 *JAMA* 1132 (1964).

sion propelled them into action. The main impetus for IRBs was the 1966 decision by NIH and PHS officials that *local* prior group review must precede application for funding support.

My main point in reviewing the story of IRBs, which could be done with each of the other ethics committees of which Annas is so critical, is that these stories are far richer and more complex than his account suggests. Most of all, I disagree with his interpretation that they were either created by law or in response to fear of litigation. This theme is not absent, but it is not dominant. A more accurate account of their causes is that these groups were institutional expressions of influence from a bioethics movement to address the same two societal needs that brought the movement into being along with other expressions of enlarging civil rights at the time, i.e., a need to share power in crucial decision making, and a need to enlarge foresight in the uses of medical technology. Ethics committees of various types are a later expression of the efforts of society, local reformers, and health care institutions to come to grips with these needs. If this needs-based premise is true, then it follows that one needs a larger view than Annas provides for the history of bioethics and a broader vision and strategy to encourage the improvement of the performance of ethics committees.

In the history of bioethics, law was one discipline and institution among many that responded to needs within society and its interactions with research and health care that were not being met by the traditions that nurtured researchers and clinicians. Annas mentions only "philosophy and medicine" as other contributors to the agenda and development of bioethics, an account that neglects the moral labors of too many others to go unchallenged. In the 1960s, early contributors to a future interdisciplinary field that came to be known as "bioethics" were from the social sciences (e.g., Bernard Barber, René Fox, Herbert Kelman, Talcott Parsons, Donald Warwick), theological ethics (e.g., Joseph Fletcher, Paul Ramsey, Immanuel Jakobovitz), as well as philosophy and medicine. Annas' too brief account fails to give credit where credit is due.

Annas' views of the state of affairs among ethics committees and of the pervasive role of law in bioethics need to be examined against historical accounts of the period before the "birth of bioethics" (1953-70) and evaluations of how the bioethics movement has succeeded and failed. Moreover, Annas' hope for the "good ethics" that he wants committees to do seems to be in direct conflict with his assessment of a culture within which this work is to be done. Does he seriously accept Joseph Campbell's indictment of a culture so shattered that has "no ethos" and is held together

only by law and lawyers?⁵⁶ This theme seems self-defeating to his stated project. There is obviously a contradiction here. From what sources will the concepts, materials, and tools for the “good ethics” that he desires arise if not from streams of political and ethical traditions within the culture? From whence does Annas derive his own ideas except from a certain stream within the culture?

If his real desire is to provoke bioethics and ethics committees of all types to excel in their special tasks, he needs to be more precise about those tasks and the resources and standards required for them, rather than to dismiss them simply as “cover” to comfort the captains of research and health care. After all, these groups are composed of the many thousands of recruits to a bioethics movement in which he is a leader. The question is: what do they need to flourish and grow in knowledge and skill? He neglects this larger task, which is very much on the agenda of contemporary bioethics. Annas is a talented writer and sharp critic in contemporary health law and bioethics. However, at times he seems to want to stand outside of the workaday world of bioethics to throw stones rather than develop the perspectives and tasks that will help this movement mature, endure, and be transmitted to future generations.

56. ANNAS, *supra* note 1, at 12, 258.

