1992

The World of Law, Science, and Medicine According to George P. Smith, II

Raymond C. O'Brien

Follow this and additional works at: https://scholarship.law.edu/jchlp

Recommended Citation
Available at: https://scholarship.law.edu/jchlp/vol8/iss1/13

This Article is brought to you for free and open access by CUA Law Scholarship Repository. It has been accepted for inclusion in Journal of Contemporary Health Law & Policy (1985-2015) by an authorized editor of CUA Law Scholarship Repository. For more information, please contact edinger@law.edu.
THE WORLD OF LAW, SCIENCE, AND MEDICINE ACCORDING TO GEORGE P. SMITH, II

Raymond C. O'Brien*

I.

When one enters George Smith's law school office, closes the door, and hunts for a vacant area to sit, one is confronted with two posters taped to the back of his door: one of the remote and isolated village of Bellagio, Italy, on Lake Como, where he visited as a Rockefeller Foundation Scholar in December 1980, and the other from the Cousteau Society that admonishes all who read it to "Help Make Waves" (and save the whales). It struck me rather vividly that these two posters capture the spirit and essence of what George is all about as a professional: in one sense a remote and objective scholar; and, in another, a scholar who writes about "cutting edge" subjects and does in fact "make waves!"

The entry for George P. Smith, II, in Marquis' Who's Who in the World numbers fifty-one lines¹ and that entry shapes the contours of his professional life of service. It does not, however, list the bibliography of his published works² that, in turn, mark the boundaries of his life as a scholar. His peregrinations as an international lecturer³—also not listed in his entry—

---

² For a bibliographic tribute and complete listing of his writings on his 25th anniversary of teaching law which is already outdated, see The Complete Bibliography of the Writings of George P. Smith, II: 1964-1989, 6 J. CONTEMP. HEALTH L. & POL'Y 483 (1990). Each of these entries and papers documenting his scholarly presentations are in his archive at the Lilly Library, Indiana University, Bloomington, Indiana.
add a lustre to his perspective as both teacher and scholar. Similarly, his various research appointments nationally and internationally have under-

4. Including Indiana University's School of Public and Environmental Affairs (Aug. 1992); Center for Socio-Legal Studies, Wolfson College, Oxford University Eng. (July 1992); Kings's College Center for Medical Law and Ethics, London, Eng. (July 1992); Wolfson College, Cambridge University, Cambridge, Eng. (Easter Term 1992); Trinity College, Dublin University, Dublin, Ir. (Apr. 1992); University of Victoria, Faculty of Law, Victoria, B.C. (Feb. 1992); Working Center for Studies in German and International Medical Malpractice Law, Free University of Berlin, Berlin, Ger. (Jan. 1992); Center for Biomedical Ethics, University of Minnesota Medical School, Minneapolis, Minn. (Dec. 1991); University of Sydney Law Faculty, Sydney, Austl. (Aug. 1991); University of Auckland Law Faculty, Auckland, N.Z. (July 1991); Cleveland Clinic Center for Creative Thinking in Medicine, Cleveland State University, Cleveland, Ohio (June 1991); Yale University Divinity School, New Haven, Conn. (Apr.-May 1991); Center for the Advanced Study of Ethics, Georgetown University, Washington, D.C. (1990-91); Center for Human Bioethics, Monash University, Melbourne, Austl. (July-Aug. 1990); Center for Biomedical Ethics, University of Virginia School of Medicine, Charlottesville, Va. (Jan. 1990); Hughes Hall, Cambridge University, Cambridge, Eng. (Apr.-Aug. 1989); Biblioteca Apostolica Vaticana, Rome, Italy (July 1989); McGill University Center for Medicine, Ethics and Law, Montreal, Can. (July 1988); Center for Law and Tech-
scored his commitment to a dynamic research agenda in a variety of forums. This commitment to research is one that he shares freely with his junior colleagues as he endeavors to excite and encourage them to develop their own research programs. This encouragement spawns my present attempt to author this retrospective.

On a given day, George P. Smith strives to write three thousand words in final form. On an outstanding day (i.e., cloudy, overcast, or rainy), he has been known to write as many as eight thousand words. On bad days, he is fond of relating how he might spend the whole day checking the correct etiology of a given word in *The Oxford English Dictionary* or contemplating the advisability of using the dash or the comma as a mark of punctuation.

It has been said that behind every great scholar stands at least one million footnotes. If this be true, George Smith has surely met this first test of enduring scholarship and is moving toward the second plateau.

Perhaps even more remarkable than this achievement is the manner in which George writes. The initial draft always comes first, in longhand on the “vanishing” yellow legal tablet. This is then edited and typed on a portable manual typewriter he has been using since he first obtained it circa 1956 as a gift from his parents for completing a typing class at Wabash High School in Wabash, Indiana. After editing, he then takes this piece to a word processor who, more often than not, makes more errors in the draft than in his original! One day, after bemoaning this cruel state of affairs, I suggested to George that this third rather frustrating step could be eliminated if only he would learn to use a word processor himself. I have pleaded with him repeatedly to make this bold commitment and stop his lamentations, assuring him that his level of productivity would increase four-fold. He always responds wryly that he has reached his desired maximum level of productiv-


ity the "old-fashioned" way and eschews having his life controlled (or even worse, manipulated) by an electric screen a la 1984!

Professor Smith takes particular pride in the condition of his office and his "art" of organized floor, desk, and chair clutter—attributing such to his wish to complement his late mentor's office at the University of Michigan Law School. There, Professor William W. Bishop, Jr. enjoyed the pre-eminent honor of having one of the most cluttered offices of anyone on the faculty. Yet, when called upon to locate a particular letter, manuscript, or book, Professor Bishop amazed all with his ability to locate the appropriate one. Professor Smith is equally skilled!

II.

When reduced to the written word, knowledge may be recognized as more or less scientific in focus, complementary to or integral with an objective search for truth, valued within the market place of ideas, or useful. Put directly, the world of law, science, and medicine for Professor George Smith meets, and in some cases exceeds, all of these evaluative standards. He follows carefully the admonition of Dean Guido Calabresi of the Yale Law School that "the role of the scholar is to look in dark places and to shed light on what he or she sees there." Dean Calabresi continues his observation by stating,

When that light is shed, people of the world can decide whether the vision is true or distorted and, even if it is true, whether to pay attention to what they see or to continue to live with their illusions. Often such illusions (even if dangerous) are well worth preserving and the scholar whose iconoclasm has been rejected is foolish to feel that he or she has been rejected or has not performed a worthy task, nonetheless. It is not, of course, the job of a scholar to distort what he or she sees or to describe as false, as myth or subterfuge, what is not. Yet if in all honesty what the scholar sees seems false, then the scholar must declare it to be false even if that opens him or her up to the charge of nihilism.

I find Professor Smith's undistorted vision of biomedicine to be both exciting and, at the same time, challenging: exciting in its fresh, objective analysis

---

10. Guido Calabresi, Correspondence to Paul D. Carrington, 35 J. Legal Educ. 23, 23 (1985) [hereinafter Calabresi, Correspondence]. See also GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 180 (1982).
11. Calabresi, Correspondence, supra note 10, at 23.
and challenging in its admixture of law and economics as complementary elements to the whole decisional framework of health care delivery.

I shall not consider George Smith's books in the field of law, science and medicine, as they have been reviewed elsewhere. I, nonetheless, must observe in passing that all these books bear a marked consistency of focus and clarity in developing research which provides a framework for principled decision-making in the field. For Smith, that framework—incorporated not only in his books but in his articles and papers—is grounded in a deceptively simple yet, upon investigation and application, complex economic balancing test. This balancing test weighs costs versus benefits in making informed, critical decisions which consider, for example, undertaking noncoital experimentations to combat fertility or ceasing aggressive therapies for a terminally ill patient. According to Smith, this economic balancing test, when applied either to micro- or macro-decisional levels, produces a reasonable decision that is rooted in love and humaneness. He states his position as follows:

Since the binding force of life is love, then it can be argued that men should endeavor to maximize a response to love in whatever life situations man finds himself. If an act renders more harm than good to the individual concerned, and to those around him, the act would properly be viewed as unloving. The crucial point of understanding is that a basic cost/benefit analysis is almost always undertaken—consciously or unconsciously. Of course, the methodology utilized in this assessment will be situational and incapable of absolute determination. Of necessity, the basic norm or

15. See generally Richard A. Posner, THE ECONOMICS OF JUSTICE (3d ed. 1986) (asserting that the efficient allocation of resources to maximize the wealth of society through economic analysis has been extended to such fields as law and medicine).
standard to be used will be love.\textsuperscript{17}

I find this construct quite intriguing in its commingling of law and economics with love and humaneness. While I can accept the premise of love and compassion as a determinant in medical decision-making, I initially had some difficulty in equating this with good economics. But after probing his writing, I can indeed see and appreciate the relevance and application of the Smith Theory.

Economics is an inextricable part of modern medical law.\textsuperscript{18} Physicians make seventy-five percent of all decisions regarding health care delivery expenditures and, in fact, become the initial gatekeepers to all medical systems.\textsuperscript{19} More and more, the inescapable and contemporary challenges of providing care to patients in decentralized health care systems are seen as tied to patients' fiscal status or solvency and their medical salvageability or rehabilitation as a consequence of the treatment provided that, of necessity, utilizes scarce medical resources.\textsuperscript{20} In reality, classical principles of triage\textsuperscript{21} and more current views of cost/benefit analysis dictate the extent to which a definitive response can be provided regarding the extent to which a sustained level of health care maintenance can be provided to each citizen.\textsuperscript{22}

The comments of one physician offer an appreciation of the pressures the average doctor encounters when evaluating whether to admit a seventy-two year old with severe chest pain:

If I admit this patient, and he must stay more days than the allotted time for the diagnoses I put down in the chart, who will pay for the additional days? Will the patient? Will I? Will I spend my time writing letters to justify to admit and keep the patient in the hospital until I judge him ready to go home?

\textsuperscript{22} See Smith, supra note 20, at 50.
Will I spend, as have my colleagues, days in court before a judge to argue the decision about whether days in hospital will be paid for by the third-party payer or by the patient? If I do admit the patient, will I be able to prove I utilized the time well? And that means will I be able to explain to a reviewing agency why a day went by when no test was performed . . . . Never mind that the CAT scanner was inoperable that day?

Will I be able to construct a chart cannily enough to convince the reviewer that I am accurate, efficient and economically practical?23

In an effort to deal with a national commitment to provide health care services for all citizens regardless of ability to pay, the United States Congress established the Medicare and Medicaid programs.24 While Americans do show some concern for providing health care for all who are in need,25 they are unwilling to pay unlimited additional costs for this service. The primary concerns of the health care delivery system in the United States are not only to provide a minimal level of care and equity of access for all citizens, but also to check the staggering escalation of costs associated with health care delivery.26 The failure of these two goals has sparked re-evaluation and debate over how best to fine tune or totally overhaul the American health care system.27 Sadly, quick and decisive action is not anticipated.

III.

The role of the scholar is not dissimilar from that of the classroom teacher, for one role complements and strengthens the other. While the calling card of the scholar is honesty in pursuit of what is not apparent to others,28 the good teacher also seeks to pursue honesty and truth in the classroom setting and thereby enlighten his or her students to the strengths and pitfalls of the legal system through rigorous legal analysis. In George

26. Id.
28. Calabresi, Correspondence, supra note 10, at 23.
Smith's professional life, one sees the strong balance of scholarship and teaching—especially so in his deft use of the Socratic method.\textsuperscript{29} The excited and thorough scholar becomes the exciting and creative teacher. Indeed, George brings a "generous enthusiasm"\textsuperscript{30} to his teaching.

As Smith poses questions to his students in the classroom, so too does he to his readers. Should law, science, and medicine be full partners in the New Biology,\textsuperscript{31} or should law be a reactive force\textsuperscript{32} rather than a directive one\textsuperscript{33} in this regard? Do religion and morality strengthen or challenge and confuse the tenets of the New Biology?\textsuperscript{34} Should science be restrained or given unfettered opportunities for advancement?\textsuperscript{35} Should the gene pool be controlled through continued use and experimentation with modern eugenics, thereby minimizing human suffering and maximizing the social good?\textsuperscript{36}

What is the extent to which human experimentation \textit{in vitro} and \textit{ex utero} should be either condoned or advanced?\textsuperscript{37} Is there a fundamental right to sexual privacy that allows unrestricted use of any and all fertility techniques

\textsuperscript{29} Dedication, 2 J. CONTEMP. HEALTH L. & POL'Y 1, 1 (1986).

\textsuperscript{30} Smith, \textit{supra} note 7, at 36.


\textsuperscript{32} See Warren E. Burger, \textit{Reflections on Law and Experimental Medicine}, in \textit{1 ETHICAL, LEGAL AND SOCIAL CHALLENGES TO A BRAVE NEW WORLD} 211, 211 (George P. Smith, II, ed., 1982).


to create a traditional family? More specifically, should restrictions be placed upon married and unmarried individuals in their use of artificial insemination or surrogation? Are the mentally handicapped accorded the same legal rights of procreation as those without handicaps? Should liability be imposed upon women for fetal abuse? To what extent may the state, exercising its parens patriae and police powers, control and penalize unwholesome acts that threaten the moral fiber of society? Should quality of life be considered totally apart from the sanctity of creation in medical decision making, or are both principles part of an inextricable balance that complements one another? In what manner and to what extent should


44. See George P. Smith, II, Murder, She Wrote or Was It Merely Selective Non-Treatment?, 8 J. CONTEMP. HEALTH L. & POL’Y (1992); George P. Smith, II, Long Days Journeys Into Night: The Tragedy of the Handicapped At Risk Infant, in MORAL ISSUES IN MENTAL RETARDATION 129, 129 (Ronald S. Laura & Adrian F. Ashman eds., 1985); George P. Smith, II, Defective Newborns and Government Intermeddling, 25 MED. SCI. & L. 44, 47 (1985); Smith, supra note 17, at 709; George P. Smith, II, Handicapped Babies and The Law—The
scarce medical resources be allocated? Do ethics committees assist or impede decision making here? Should scientific and legal frameworks be developed for accommodating man's wish for immortality through processes such as cloning and cryonics? Should death with dignity be guaranteed, or at least acknowledged and protected for both the competent and incompetent?

The answer, or construct for decision making, to each of these questions follows a basic form. As a situationalist, Smith carefully analyses the facts of each problem presented. He evaluates the consequences of particular courses of action, balancing the economic, social, legal, medical, ethical, and individual costs against similar societal benefits. Such a course of action produces the greatest net good for as many people as possible, minimizes human suffering, and advances economic efficiency when followed and is thus recognized as reasonable, humane and loving.


45. See Smith, supra note 25, at 55; Smith, supra note 20, at 56-62; Smith, supra note 21, at 145-48.


49. See generally RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE (1990) (defining the problems of jurisprudence as fundamental, philosophical questions of whether the law is objective and autonomous or political and personal); RICHARD A. POSNER, THE ECONOMICS OF JUSTICE (3d ed. 1986) (reconciling competing ethical principles to arrive at a moral theory that judges whether acts and institutions are good or just by whether they maximize the wealth of society); Richard A. Epstein, The Utilitarian Foundations of Natural Law, 12 HARV. J.L. & PUB. POL'Y 713 (1989) (addressing the principles of natural law and utilitarianism in light of the historical and institutional foundations of the principles of right and wrong, and increased societal capacity for formal and empirical problems analysis).
IV.

There are two main divisions of ethics: normative ethics and metaethics. Normative ethics suggest that efforts be made to evaluate actions and states of affairs as being right, wrong, good, or bad. At one level, metaethics analyzes the meanings of ethical terms and, at another level, considers the nature and validity of the various competing theories of normative ethics.

While ethics—as with science—involves careful reflection, application of complex reasoning processes, and rules of logic, most of the disputes concerning ethics “remain forever unresolvable.” Yet, helpful criteria (which coincidentally are the identical criteria for judging scientific theory) exist to assist in validating the structures used in ethical analysis and testing the merits of ethical theories: “impartiality, logical coherence and consistency, concern for factual evidence and reasoned analysis, relative simplicity or parsimony, and consistency with considered moral judgments.”

Normative ethical theories are classified as either teleological or deontological. Teleologists posit there is “one basic or ultimate right-making characteristic, namely, the comparative value (nonmoral) of what is, probably will be, or is intended to be brought into being.” Those individuals subscribing to deontological theories seek to promote “the principle of maximizing the balance of good over evil,” and advance those normative actions designed to produce the “greatest net ‘good.’” Situation ethics devolve from deontological theory that holds, in turn, “each person and situation are unique and must be judged by their special attributes rather than by broad, generally applicable rules.”

There can be little doubt that George Smith espouses situation ethics in his philosophical analyses and as such draws heavily upon the works of the late Dr. Joseph F. Fletcher, III, of the University of Virginia. Indeed, in

51. Id.
52. Id.
53. Id. at 79.
54. Id.
55. Id. at 80.
56. Id. at 81.
57. Id.
58. Id.
59. Id. at 85.
his very first article on law and medicine in the *Michigan Law Review*, Smith relied heavily upon Dr. Fletcher's work in laying the foundation for his own theory of analysis. Reliance on Dr. Fletcher's theory results in Smith's adherence to the principle that human needs, goals, and aspirations are more controlling elements in medical, ethical, and legal decision making than any unyielding moral principle. As humanists, Fletcher and Smith are concerned with the welfare of persons—either on a societal, macro level or an individual, micro level—being more important than the enshrinement or validation of a principle or abstraction.

V.

In this 1968 article, specifically dealing with artificial insemination, the opening sentence sets the tone of this theory and those that were to follow: "The shadowy predictions of Huxley and Orwell can no longer be dismissed as blurred and unrealistic prophecies." Indeed, the predominant focus of Smith's writings in the field seeks to probe the extent to which law, science, and medicine are able to form a partnership in tackling the challenges illustrated in *1984* and in *Brave New World*—a world that, to a very large degree, is already here.

It is also within this landmark article that Smith shows his interest in the science of eugenics as a model for improving the quality of the human gene pool and, thereby, combatting genetic diseases before they manifest themselves at birth. Heavily influenced by the late Nobel Laureate Professor Herman J. Muller of Indiana University, Smith begins his odyssey into the fascinating interplay of eugenics, genetics, and the law as they combine forces to meet the dilemmas of the New Biology. He fully explores and develops this interplay in a subsequent article in the *Georgetown Law Jour-

---

62. *Id.* at 129 nn.14, 15 & 17, 130 nn.21-22, 131 n.26, 132 n.31, 145 n.94.
63. *See supra* notes 61-62 and accompanying text.
64. Smith, *Through a Test Tube*, supra note 39, at 127.
65. *Id.* at 149.
67. ALDous HUXLEY, *BRAVE NEW WORLD* (1946).
where he acknowledges genetic manipulation as more a "hope for the future generations" than a "cure for the present," or a hope for a higher standard of qualitative living. It is within this article that Smith initiates his dialogue on bioethics—the interaction of science and ethics as constructs for legal decision making.

Stated simply, bioethics investigates the manner in which life can be lived and adjusted to in light of startling new reproductive technologies. It should be viewed as a natural response to not only sociopolitical, religious, legal, and medical dilemmas, but also increased knowledge, from which arises the ultimate ethical issues of the extent to which new life may be created and man remade.

Smith urges continued biomedical research to explore the extent to which man's biological knowledge can further the social good, evidenced by the minimization of suffering and the advancement of economic utility. He cautions that "[M]an cannot learn by merely thinking in this area," but must act with "rational purpose and design" and "a spirit of humanism" in meeting the challenges and opportunities of the New Biology. In order to ensure rationality and purpose, Smith urges public debate over the social and legal consequences of experimentation. He insists that a balance be struck between an individual's need to master an understanding of the genetic code to control the future genetic make-up of the human body and the maximization of the social good which derives from the continued advancement of biomedical research.

Even though science is incapable of solving normative problems, its use and development serve a vital purpose in both assisting and evaluating the

---

70. George P. Smith, II, Manipulating the Genetic Code, supra note 31.
71. Id. at 726.
72. Id. at 733.
73. Id. at 726 passim.
74. See, e.g., John D. Arras, Nancy Rhoden: Exploring the Dark Side of Biomedical Technology, 68 N.C. L. Rev. 835 (1990) (examining the contributions of Nancy Rhoden in the field of biomedical ethics, including her position on imperiled newborns, abortion, and forced cesarean sections).
76. Smith, Manipulating the Genetic Code, supra note 31, at 730.
77. Id. at 732.
78. Id. at 727.
79. Id. at 700.
80. Id. at 727.
81. See, e.g., GEORGE P. SMITH, II, THE NEW BIOLOGY: LAW, ETHICS, AND BIOTECHNOLOGY (1989) (discussing the Genome Project, which is designed to decipher all the genes in the human body).
82. See Smith, Manipulating the Genetic Code, supra note 31, at 700.
means used in reaching various societal goals. According to Smith, restraints on scientific inquiry should be imposed only when actions are unreasonable or the long- and short-term costs of the effects of a particular process outweigh the long-term benefits derived from its study, implementation, and use. Professor Smith thus mandates continued research into new reproductive technologies (e.g., in vitro fertilization and experimentation) as not only a positive means to deal with—and therefore aid in resolving—the tragedy of infertility in family planning, but also as a way to enhance the genetic health of the nation’s citizens by engineering man’s genetic weaknesses out of the direct line of inheritable traits. If, as a consequence of these actions, healthier and more genetically sound individuals are born, they in turn have a much better opportunity to pursue and actually achieve a “good life” and thereby make a significant contribution to the greater well being of society.

The obvious difficulty in safeguarding human rights, autonomy, self-determination, and a basic sense of freedom as inalienable rights is that they must be inevitably balanced against scientific actions which have the capacity to improve the quality of life (and thus may be recognized as being a matter of choice), minimize human suffering, and maximize the greatest social good for the greatest number of citizens. Consequently, social utilitarianism becomes not only the goal of free scientific inquiry but also the result of necessary compromises to personal autonomy, societal constraints, and theological understanding. Surely, if truth and knowledge are recognized as the basic interstices to any balancing tests that must be undertaken, such compromises must always be acknowledged as reasonable. Persistent inquiry must be made into what is a “good life” or “significant contribution” and Professor Smith is open to consideration of other disciplines, especially religious faith and traditional magisterium. Difficulty arises when only one perspective is allowed.

VI.

In the 1984 foundational article in the *Nebraska Law Review* on the

85. *Id.*
86. *Id.*
87. Reed, supra note 12, at 321; see also Smith, *Intimations of Immortality*, supra note 47, at 132.
88. Reed, supra note 12, at 321.
90. Smith, supra note 17.
rights of handicapped newborns, Smith delineates his theory of reasonableness and demonstrates its fact-sensitive application to treatment decisions of not only at risk infants but also medical patients of any age. He states, "The standard of reasonableness is always flexible and responsive to individual factual applications. This flexibility may be enhanced through interpretation and application of social policies emerging from each particular situation. Forces of reasonableness and social policy are balanced as justice or equity is sought in individual cases."91

Equally as important as the determinative question of when human life begins is the value to be placed on that life. Smith recognizes that every person has a value of incalculable worth.92 He suggests, however, that there are "situations in which continued physical existence offers no benefits."93 In such cases, maintaining life may be regarded as an assault on the very dignity of human existence.94 Therefore, "when therapies would be futile, and thus run counter to the best interests of a patient, they should not be undertaken regardless of the age of the patient. Efficacious treatment is no treatment at all."95

Consistent with contemporary medical and scientific directions96 and enlightened legal thinking,97 Professor Smith, in agreement with the late Dr. Fletcher, stresses cerebration as the key factor in establishing and maintaining personhood.98 In fact, he quotes Dr. Fletcher: "In the absence of the synthesizing function of the cerebral cortex, the person is non-existent. Such individuals are objects not subjects."99 Without cerebration, the potential for sustaining human relationships is absent; for Smith, the absence of this "relational-potential" is crucial in pursuing the central goal in life—namely,

91. Id. at 730.
92. Id. at 735.
93. Id. at 735-36.
94. Id. at 736.
95. Smith, supra note 14, at 311 (footnotes omitted).
96. See generally DANIEL CALLAHAN, WHAT KIND OF LIFE: THE LIMITS OF MEDICAL PROGRESS (1990) (suggesting that the patient's condition and long-term prognosis should determine what technology will do for the overall life and welfare of the patient and not what it will do to forestall death or sustain organ systems).
98. See Smith, supra note 17, at 737.
99. Id. (quoting Joseph Fletcher, Indicators of Humanhood: A Tentative Profile of Man, HASTINGS CENTER REP., Nov. 1972, at 1).
to "grow in love of God and neighbor." Thus, when one's condition is such that "it represents a negation of any 'truly human' qualities or 'relational-potential,' then the best form of treatment should be no treatment at all." In sum, "life should not be viewed as an end in and of itself, but rather as something that should be preserved so that other values can be fulfilled." While admitting the principle of relational-potential is not mathematically precise, Professor Smith suggests an ethical-legal-medical framework for principled decision making. This framework emerges when model legislative enactments, buttressed by established technical-medical criteria for determining futile cases, are placed within the balancing test construct of reasonableness which Smith advances. I agree with his conclusion about the emergence of the framework, but would personally adhere to a unified or theological approach rather than the situational or fact sensitive one advocated by the Professor.

In his amicus curiae brief to the United States Supreme Court in Bowen v. American Hospital Ass'n, Professor Smith argued convincingly that federal regulation of hospital care for handicapped newborns was an unnecessary intrusion into state autonomy and further, that the child abuse laws already in place in the fifty states were more than adequate safeguards to protect such at-risk infants. Interestingly, Justice John Paul Stevens, writing for the majority, accepted this argument.

Professor Smith's position in his Brief is consistent with his insistence that the family be the central unit for medical decision making and their decisions regarding medical treatment of their children be guided by what is in a child's best interest. He acknowledges state intervention is necessary "in those cases where the parents are not competent members of society ... [and] are incapable of making mature, reasonable, and loving judgments re-

100. Id. at 732 (citing RICHARD A. MCCORMICK, HOW BRAVE A NEW WORLD? DILEMNAS IN BIOETHICS 349 (1981)).
101. Id. at 733.
102. Id.
103. Id.
104. See id. at 737-38.
105. See, e.g., supra note 97.
106. See, e.g., id. at 724-29.
107. Id. at 730.
111. See Brief, supra note 109, at 21-24.
garding the medical treatment of their newborn.” He presents other examples where state intervention would be necessary, including, where “a fourteen-year-old, drug dependent, and economically insecure young girl giv[es] birth to a neonate” and where parents feel compelled because of religious beliefs to withhold emergency blood transfusions. In the first instance, where an underage mother, because of lack of sophistication, modest economic circumstances, and illness, decides to forego recommended medical treatment on her child who has been determined “salvageable” by the attending physician, the state would be justified in overturning the enfeebled mother’s decision not to treat the child. Similarly, when religious principles form the basis for parental decisions to stop necessary medical treatment or prevent its initiation, the state is justified in “piercing the familial veil of privacy” and implementing the course of action that is in the at-risk infant’s best interests.

I agree with Clark C. Havighurst of Duke University when he acknowledges Smith’s recent piece in the University of California Davis Law Review as “monumental” and opines that it “should help us, as a society, to come to grips with our increasing control over our own mortality.” Another commentator suggests that this article will “guide” the future discussion on euthanasia and suicide that must occur within society. In this tour de force—spanning some 144 pages and 1060 footnotes—Professor Smith considers whether the theories of suicide, euthanasia, rational suicide, assisted rational suicide, and beneficient euthanasia will be replaced, categorically and legally, with a principle of enlightened self-determination that, when applied, allows a humane and dignified death to be recognized. Implementation of his theory would “render moot the distinction between the right to decline life-sustaining treatment and the right to commit suicide.” Smith advocates that “in whatever context of self-determination the central issue is cast, a moral and a legal right is nevertheless bestowed upon the individual to act—for whatever purposes she wishes—to end her life by refusing life-sustaining medical treatment or for whatever enlightened or ra-

112. Id. at 23.
113. See Smith, supra note 14, at 410.
114. Brief, supra note 109, at 23.
115. See id. at 24.
116. Id. at 23-24.
117. See Smith, supra note 17, at 731.
118. See Smith, supra note 14.
120. T. Todd Tumbleson, Preface to 22 U.C. DAVIS L. REV. 267, 268 (1989). See also Howe, supra note 12, at 450.
121. See Smith, supra note 14, at 419.
tional reason she wishes.”

In reaching this conclusion, Smith presents a restatement of his long-championed balancing test as the central focus for decision-making. Accordingly, in determining whether aggressive treatment or palliative care should be followed in the course of treatment decisions, he balances the costs to the individual of such a course of action against the societal benefits accruing from such action. He states, “Determining a patient’s best interests are thus grounded in policies of reasonableness and humaneness. It is an inhumane and callous argument that protracts the agony of death by using gastronomy tubes, nasogastric tubes and other means of providing alimentation under the guise of being efficacious treatment.”

It is not only a waste of scarce economic resources to deploy treatment, medication, artificial life support mechanisms and other exotic interventions, hospital bed space, as well as the actual hours of service by multiple health care providers, but also unloving and inhumane, Smith argues. To attempt to salvage “unsalvageable” patients who are either terminally ill, inoperable, brain dead, or suffering from long-term disability conditions such as Alzheimer's disease or strokes is an inefficient use of scarce medical resources. Quite simply, Smith maintains that it not only prevents those who are capable of rehabilitation from receiving the total medical services they need, but also is a useless and unreasonable endeavor. For him, an action is unreasonable or inefficient when socio-political costs of an individual outweigh economic benefits sustained by society—or social utilitarianism. This, then, is the penultimate exposition of his thesis that he first articulated in embryonic form in his 1968 Michigan Law Review article and subsequently began developing in his writings. For instance, he observed:

Social justice demands that each individual be given an opportunity to maximize his individual potential. Yet, a point is often reached where maintenance of an individual is in defiance of all concepts of basic humanitarianism and social justice. When an individual's condition is such that it represents a negation of any "truly human" qualities or relational-potential, then the best form of treatment should be arguably no treatment at all.

Life should not be viewed as an end in and of itself, but rather as something that should be perceived so that other values can be fulfilled. Life should be preserved when it holds a potentiality for

122. Id.
123. See Smith, supra note 14, at 418.
124. See supra notes 61-68 and accompanying text.
125. See, e.g., Smith, supra note 48; Smith, supra note 20; Smith, supra note 21; Smith, supra note 17; Smith, Manipulating the Genetic Code, supra note 31.
human relationships.\textsuperscript{126}

In further relating economics with humanism, he opined,

Life—viewed as a human resource—should be developed and preserved along those lines which allow for the achievement of its fullest potential for total economic realization, maximization or productivity. Indeed, human life—at whatever stage of development or decline—is both a precious and sacred resource. Its initial advancement or abrupt curtailment should be guided always by a spirit of humanism.\textsuperscript{127}

What initially I found somewhat difficult to understand fully as a theory or construct for decision making, now—upon reflection and analysis—I find fresh, insightful, and even practical. Its simplicity belies its textual complexity and obvious difficulty in applying it on a case-by-case basis. Nonetheless, as I observe, it is an original theory. Measuring “quality of life” within this analytical framework does have purpose and modern acceptance.\textsuperscript{128} However, I have difficulty with it and fear especially that quality of life may become the sole measuring tool for ultimate decision making. There can be no doubt that one of the last remaining challenges of the age is to humanize death and thereby no longer allow it to be “a source of dread.”\textsuperscript{129}

VII.

As Diogenes, the Greek Cynic philosopher, lighted a lamp in broad daylight as he searched for an honest man,\textsuperscript{130} so too has George Smith sought to illuminate—and thereby explicate and understand even-handedly, rather than polemicize—the tenets of the New Biology. In this regard, he is a scholar’s scholar and an outstanding one of his generation, for he is not closed minded or dogmatic. The great body of his work is a tribute to all prodigious scholars who join in this great and noble life time undertaking. As a “prescient prophet of the New Biology,”\textsuperscript{131} he has done—and continues pursuing—creative work of the first order that not only provides a glimpse of law in action, but also serves as an impetus for legal reform.\textsuperscript{132}

\begin{itemize}
  \item \textsuperscript{126} Smith, \emph{supra} note 20, at 62 (footnote omitted).
  \item \textsuperscript{127} Id. at 63 (footnote omitted).
  \item \textsuperscript{128} See DANIEL CALLAHAN, \emph{SETTING LIMITS: MEDICAL GOALS IN AN AGING SOCIETY} 179 (1987).
  \item \textsuperscript{129} \emph{Euthanasia: What is the “Good Death”?}, \emph{THE ECONOMIST}, July 20, 1991, at 21, 24.
  \item \textsuperscript{130} \emph{THE NEW CENTURY CLASSICAL HANDBOOK} 395 (Catherine B. Avery ed., 1962).
  \item \textsuperscript{131} Buetow, \emph{supra} note 12, at 173. A Citation of Merit from the Indiana University Institute of Advanced Study, presented on July 17, 1985, recognized his “path breaking interdisciplinary research and writing on medical and biological issues as they relate to the norms of law and ethics.”
  \item \textsuperscript{132} Id. at 174. Interestingly, Professor Smith’s own commitment to legal reform was seen early in his career when he served as a consultant for model legislative drafting proposals
\end{itemize}
The contributions of George P. Smith, II, in their scale and magnitude, and the optimism and depth of coverage, are of epic proportions. To use a word of contemporary parlance, they are—with over 120 total bibliographic entries—truly awesome! George Smith does more than prophesize the course of the New Biology; he demonstrates how the law must react to varying and complex pressures of conflicting interests if it is to direct the course of the new biotechnology. He has structured a framework for principled decision making that attacks—if not resolves—many of the present and forthcoming biomedical dilemmas of the twenty-first century. It is a framework built uniquely on law, science, medicine, economics, and humanism. In this regard, he has fulfilled admirably the mandate of Guido Calabresi: namely to shed light into dark places.133

133. Calabresi, Correspondence, supra note 10, at 23.