

# Pragmatism and law

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## An evolving focus in bioethics.



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The BTRU is a collaborative research project set up to engage people in a conversation about how we want to live in the new century.

Bioethics is one of the more 'sexy' areas of applied or practical ethics. A quick search on your favourite Internet browser reveals numerous sites devoted to hundreds of topics that fall under the general rubric of Bioethics or medical ethics. Many philosophers, who now call themselves *Bioethicists*, find employment standing guard over the Human Genome Project, others are appointed to ethics committees and still others to human research centres. The focus of this article is to highlight the evolving status of Bioethics as a discipline. The first generation of Bioethics was a misguided attempt at providing 'ethical' solutions to advances in medical technique. The second generation of Bioethics is a pragmatic discipline concerned more with creative dialogue than moral certainty, in which the law will play an increasing role.

### The birth of bioethics

Bioethics is one type of applied or practical ethics and involves the application of ethical considerations, criteria, or principles to biomedical issues. While questions of moral philosophy and medicine have been debated since Hippocrates (circa 460-377 BC), Bioethics as a discipline is less than 50 years old. Recent scientific and social developments produced rapid changes in the biological sciences and in health care and these developments challenged traditional conceptions of the moral obligations of health professionals and of society.

There seems to be some consensus that the beginnings of Bioethics as a distinct field of inquiry may be traced to the late 1950s and early 1960s, when developments like kidney transplantation (1954) and heart transplantation (1967) became possible. Assisted reproductive techniques were also established during this period (Louise Brown, the first baby produced through IVF, was born as recently as 1978). Before IVF techniques became a reality, human reproduction was a relatively simple event that involved a romantic couple, a nice red wine and an evening of recreational or pro-creational sex. As we close out the last few months of this century the most complex IVF procedure (from an ethical perspective) involves no sex at all. The social parents becoming parents only after the donor sperm, donor ovum, medical technician and surrogate womb have played a role in this increasingly melodramatic reproductive drama. Modern gene-splicing techniques can now implant genetic material from one animal to another, or even from an animal to a plant and the birth of Dolly the sheep means that human cloning is not a case of 'if' but 'when'.

Also, during this period, the explosion of DNA-based research established itself as one of the 'big-science' projects of the last two decades. The Human Genome Project (HGP) was born and given present estimates, the task of mapping the human genome should be completed some time in the first few years of next century. Estimates of the potential benefits or harm resulting from this project vary from claims that gene-linked diseases could be eradicated, to warnings of a

catastrophic genetic accident. We can only guess at the full ramifications of the HGP but the impact on human reproduction alone could be significant. The romantic couple mentioned earlier might one day be able to play a modified version of 'you show me yours and I'll show you mine' as they insert their personal genome CD into their home computer. Would you really be enthusiastic about sharing your genetic material with a person whose cosmetic nose-minimisation is going to have to be repeated with your offspring? Or perhaps you discover in your potential partner's genome a much more serious pattern of heredity that makes the idea of having children problematic or even foolhardy. Faced with the pace of change in medical technique it is hardly surprising that people are anxious about the future. Recent protests about genetically modified food are symptomatic of public anxiety that scientists need to acknowledge as an inevitable aspect of modern science.

Bioethics, in its first generation, was driven by a similar anxiety that ethics might be left behind in the advancement of medical technique. In order to supply particular ethical guidelines for the increasing dynamic of modern medical technique, Bioethics evolved away from the generalised impressions of moral philosophy. Moral philosophy makes limited statements about human behaviour, such as the various formulations of the 'golden rule,' or that humans prefer pleasure rather than pain, or that we should never treat people as a means to some other end. Bioethics, on the other hand, needed more specific rules. Concepts like 'do to others as you want them to do to you' can't help people decide whether IVF techniques are moral or immoral. Even if the succession of British utilitarians are right that humans prefer pleasure rather than pain, this is irrelevant for the person trying to work out who gets the kidney. And the Kantian principle that we should treat people as ends and not means, is a good general guideline but not that helpful in deciding whether nutrition and hydration are obligatory or optional for a person in a persistent vegetative state.

Faced with increasing pressure to perform, the evolution of the discipline was fast, aggressive, and productive. The language of Bioethics evolved several different ways to solve complex bioethical dilemmas. The task of providing *objective* guidelines for making 'ethical' decisions was undertaken with an urgency that seemed to be demanded by the progress of technique. Objectivity, in the sense used in Bioethics, implies that ethical frameworks are independent of the agent and that they can provide 'ethical' solutions to the medical dilemmas. However, much of the early confidence associated with Bioethics was misguided, and the future of Bioethics is evolving away from principles, rights and preferences into a more creative and flexible account of moral decision making. The reasons for this are to do with the problem of objectivity itself. Objectivity in moral decision making is a myth.

### Dominant theories in bioethics

Bioethics is dominated by two distinct theories of ethics, one suggests that ethical obligation should be based on principles or rights, and the other that ethical obligation should be based on maximising consequences or preferences. Both of the above methods maintain that the application of human reason could provide *objectivity* in ethics, a goal that could not be achieved by traditional ethics, religious or secular. Bioethics, at least in its first phase, presented itself as a scientific discipline devoted to solving complex medical dilemmas and arose out of the search for a common language

that people could use when discussing ethical issues. However, the goal of *objectivity* in ethics has not thus far been achieved. Using the issue of abortion as a case study, we can see that a complex issue like abortion cannot be *solved* in any morally objective sense. The three most prominent theories of ethical obligations in Bioethics (principles, rights and preferences) do not provide an objective solution to the problem of abortion.

### *Ethical obligation based on principles*

The bible of medical ethics, *Principles of Biomedical Ethics*<sup>1</sup> is the best example of the principles approach to ethics.<sup>2</sup> Principle-based ethics states there are four basic *prima facie* principles in medical ethics: autonomy, nonmaleficence, beneficence and justice. Using the principle approach to moral decision making, a generation of health professionals were taught that one juggles the principles in a given case to achieve an objective 'ethical' outcome.

However, after a generation of its application, the role of 'principlism' in Bioethics is being challenged. Advocates of principle-based ethics have been criticised for turning complex decision making into a simplistic principle-based mantra. The Georgetown mantra, as it has been pejoratively called, became a creed recited by medical professionals as they walked around hospital wards. While there are several limitations to principle-based ethics, the key problem for this article is that it does not provide objectivity in ethics at all. Principle-based decision making does not solve ethical dilemmas, although it may help to define what one is dealing with. According to principlism, abortion involves juggling the 'fundamental' bioethical principles of autonomy and nonmaleficence. If we elevate autonomy we would argue that a woman should be free to choose not to have a child. If we elevate the principle of nonmaleficence we might argue that abortion does harm the foetus so it should be prohibited. All we have done using principle-based ethics is attached a code word to an opinion that already exists. There is no mechanism within principle-based ethics that determines which principle should be elevated and subsequently declared as the 'ethical' response to abortion. Given the principle-based mantra, a 'pro-life' person would elevate nonmaleficence and a 'pro-choice' person would elevate autonomy. While it is certainly helpful to understand opposing points of view this does not itself justify the implied claims of Bioethics that an 'ethical' solution can be achieved using principles.

### *Ethical obligation based on rights*

The language of rights has evolved over time to hold the status of orthodoxy in politics and ethics. When we think about 'human rights' in modern politics and social commentary, it seems tantamount to heresy to question the concept itself. However, an orthodox opinion might not be anything other than an orthodox opinion. The language of 'rights-based' ethics assumes this orthodoxy is based on 'inalienable' and 'universal' human rights. However, rights-based ethics, like principlism, is best understood as a language that communicates general ideas rather than as a means to achieve moral certainty. Consider the following two sentences:

'Liberty is a basic divine right,' and,

'Liberty is a basic human right.'

Both appeal to the idea that the concept of liberty exists independently of the individual. While we might question

what *liberty* actually means in ordinary life, the more important question for this paper is the word *basic*. In both sentences the word *basic* implies that liberty is a foundational right for all human beings. In the first example it is clear that God is the foundation of liberty. Whether we agree or disagree with the claim depends firstly on whether we believe in the existence of God. Therefore, any claim that liberty is a basic divine right is problematic, in an objective sense, to say the least. In the second claim the foundation behind the word *basic* is unstated. If liberty is a *basic* 'human' right then when, where, and how did it become so? If rights are 'natural' then they must be part of the evolution of human beings. Humans' ability to reason has been suggested as the source of our natural obligation to respect the rights of others. However, even if we accept the philosophically problematic notion of natural rights, this still does not provide any certainty about how we should act. What does liberty mean if we want to restrict people from driving too fast in a built up area? How do we respect liberty other than by allowing that female sexual mutilation is an uncomplicated expression of liberty by those communities that support it?

A deconstruction of the language of rights movement is beyond the scope of this present essay, but suffice to say that no justification for *basic* human rights exists that is convincing to the majority of philosophers. Claims that human rights are 'universal' and 'inalienable' have no teeth unless they are made pragmatic by political covenant or law. The language of rights is *base-less* without some type of fiduciary or legal covenant between the parties involved. Rights are not so much *basic* as they are relational and forensic, and for human rights to be effective they need to become pragmatic. Institutions, like the United Nations, that rely on the language of rights should use it as a pragmatic political and legal device rather than attempt to convince people of the philosophical efficacy of its claims. Certainty in rights-language will only be achieved when political and legal sanctions are imposed on countries that refuse to treat their citizens with respect and yet wish to be part of a global economic community. The language of rights will never be a convincing ethical solution but it can be a pragmatic legal and economic solution if the idea of an international court is ever taken seriously. Appealing to the 'Rule of Law' has no value if the 'Rules' or 'Laws' don't exist except in the minds of those who use them.

As far as Bioethics is concerned, even if we allow the problematic assumption that the language of rights is a legitimate ethical expression, it cannot, by itself, solve the abortion problem. We are still faced with conflicting rights in the same manner as conflicting principles discussed previously. Those who want to allow women the freedom to control their own reproductive space will argue that they have a *right* to do so. Those who want to protect the life of the foetus suggest that it too has a *right to life*. Neither position makes objective sense of moral certainty. Using the language of rights is always going to be problematic when we go deeper than general statements about how we would like people to treat each other.

#### ***Ethical obligation based on equal consideration of interests (preferences)***

Peter Singer, Australia's most well known philosopher, wrote *Practical Ethics*<sup>3</sup> (1979) with the hope that philosophy, or more particularly the application of human reason, could *solve* complex issues like abortion, animal

experimentation, and poverty. Singer, like most of the utilitarian reformers before him, is driven primarily by social concern. He is not content to argue philosophy in technical journals and university lecture halls. His most well known book *Animal Liberation* (1975)<sup>4</sup> has been described as the first philosophy book to contain recipes. This fact alone exemplifies his endeavour to step outside the boundaries of traditional philosophy to make it a more practical discipline. His work exhibits a genuine belief that the application of human reason provides *objective* guidelines for ethical deliberation. He suggests that Bioethics should begin by taking equal consideration of the interests or preferences of all people involved in the moral dilemma.

At first glance this seems like a good idea and is consistent with many other moral theories. However, given Singer's concerns range from animal liberation to famine relief, calculating preferences of all persons (animals included) is rather difficult, if not impossible, even in simple cases. For example if we analyse our case study of abortion using the principle of equal consideration of interests, we see that it is not as objective as Singer claims. He draws an imaginary preference circle around 'self-aware' beings and suggests that abortion, or killing of newborns, is not unethical because neither a foetus nor a newborn infant is self-aware. It is at this initial stage that Singer's claim to objectivity and rationality in ethics breaks down. He wants to minimise the number of people in the preference circle by claiming that a foetus does not have interests. This is precisely where opponents of abortion begin their argument. They would claim that a foetus is a person and if we are going to promote equal consideration of interests, then the interests of a foetus should be considered as well.

The ideological separation between those who argue that life is sacred and those who argue that women should be free to choose abortion is a permanent and fixed divide. What is missing in the debate between philosophers like Singer and 'pro-life' people, is the recognition that they are not actually involved in a debate at all. There can be no conversation in a constructive argumentative sense because both sides hold to positions that can never be merged without dismantling the argument itself. The 'pro-life' argument invokes words like 'sacredness' as a direct result of some prior duty to God, or to a concept of 'person' that includes the foetus. Pro-choice arguments suggest that in a difficult issue like abortion the autonomy of the woman should be respected first. However, should we respect autonomy when a woman decides that the girl in her womb should be aborted simply because in her culture boys are more valued? Do we respect autonomy if a woman wants to kill her newborn because her husband lost his job and they don't think they can cope with a new baby? Few people who argue that autonomy and choice are the deciding factors in abortion would want to live in a world with no limits on autonomy. The application of equal consideration of interests as a starting point for moral deliberation does not provide moral certainty in the abortion issue because there is no objective test as to whether a foetus is a person or not.

#### **Ethics and the limits of philosophy**

We have seen that Bioethics, no matter what form it takes, cannot solve ethical dilemmas in any objective sense. The first generation of Bioethics was seduced by the ancient anxiety concerning moral relativism. The anxiety of Bioethics manifested itself in several different attempts at moral objectivism. Bioethics was born at a time when the

battle between objectivism and relativism in ethics was becoming increasingly irrelevant. Since the time of Descartes, modern moral philosophy has been driven to find 'clear and distinct' answers to the ancient question 'How are we to live?'. Various attempts were made to avoid the supposedly slippery slope of moral relativism. Each attempt at moral objectivism however, failed to provide anything other than general principles. Bioethics in its first generation attempted to go beyond the limits of philosophy and evolved too quickly into a means for solving problems. Richard Hare provided a warning against this at an early Bioethics forum in 1977 saying, 'perhaps the only contribution of the philosopher to the solution of these problems [in medical ethics] is the clarification of the logical properties of tricky words like wrong'.<sup>5</sup>

In the last few years of this century there is a growing realisation that not only is objectivism in ethics impossible, it is also unnecessary. The slippery slope of moral relativism is not as slippery as we have been led to believe. Even if we never achieve moral certainty we are unlikely to slide into moral chaos. People who are driven to change the world rarely appeal to some sense of final or ultimate truth. Opposition to tyranny of any sort does not need certainty to be effective. While many people might disagree with the theological assumptions of the Society of Friends (Quakers) most would acknowledge they were a significant force in the abolition of slavery. When Peter Singer highlights the cruel way we treat animals, we are more likely to be influenced by his passion and commitment, and to some intuitive sense that he is saying something important, than we are to the logic of his argument.

The second generation of Bioethics will involve us in a conversation about what it means to be human, our place in the biosphere and how we might make the new century less traumatic than the past. Engaging people in a conversation about issues like the Human Genome Project and human cloning will be much more crucial to how we deal with the future than the previous attempt to construct ethical boundaries. Any boundaries we do decide to create around techniques associated with gene-linked experimentation will be pragmatic and legal.

### Ethical and legal pragmatism

Ethicists, philosophers or theologians will not *solve* moral dilemmas like abortion in any objective sense. However, most moral dilemmas can be *resolved* by creative dialogue about the type of society we want to live in and by drawing a line and legislating on that line. A resolution of this type recognises that absolute answers are beyond the scope of the most basic philosophical question, 'How should we live?'. Asking the question in a collaborative and cooperative sense is the first step to take to engage the type of examination needed for a diverse moral community to exist harmoniously. However, because there will never be universal agreement and because dialogue can't *solve* moral problems, a further step needs to be taken. This is done through legislation which, having considered the dialogue, draws a line and legislates the 'ethical' outcome. A legal decision *resolves* the issue either through the parliament or the court. For example, in the case of abortion, political and legal pragmatism takes over when no general agreement is possible. A pragmatic line is drawn somewhere around 20 weeks of gestation that allows for abortion to take place prior to that point. Some societies will still choose to disallow abortion but most will produce pragmatic and legal

guidelines that live with the tension rather than attempt to *solve* the dilemma.

Given that in the new century we will be faced with many more bio-medical dilemmas than in this century, our conversations need to be much more frequent. In this second phase of Bioethics, pragmatism and the law will play an increasing role in resolving ethical dilemmas.

### References

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2. A cut down version of this text is used in Australia – Mitchell, K., Kerridge I. and Lovat, T., *Bioethics and Clinical Ethics for Health Care Professionals*, Social Science Press, Wentworth Falls,.
3. Singer, P., *Practical Ethics*, Cambridge University Press, Cambridge, 1979.
4. Singer, P., *Animal Liberation*, A New York Review Book, 1975.
5. Hare, Richard, 'Can the Moral Philosopher Help?', in *Philosophical Medical Ethics, Its Nature and Significance: Proceedings of the Third Trans-Disciplinary Symposium on Philosophy and Medicine*, 1977.

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*Morris article continued from p.273*

factory farming methods). This was despite Justice Bell finding that we 'were able to establish some incidents of food poisoning attributable to eating McDonald's food', including two serious Ecoli outbreaks; that salmonella was present in '25% of the pieces of deboned [chicken] meat' supplied to McDonald's, and campylobacter on 70%; and that the risk of undercooking, a breakdown of the only effective defence against food poisoning, 'is endemic in the fast food system'.

5. We basically won all of the issue of nutrition, diet and ill-health, although we were somehow deemed to have lost it at the final hurdle. After all, our position was the same as the World Health Organisation. McDonald's expert witness said that the key part of the factsheet text was 'a very reasonable thing to say'. A controversial debate over the meaning of the text raged throughout the proceedings. The Appeal Court ruled it had 'considerable sympathy' with our submissions but was bound by a legal technicality (that during the trial we had withdrawn a previous Court of Appeal hearing on this matter) from ruling outright in our favour. They added that the judge should not have conducted the scientific enquiry (lasting 60 days — the reason for the original and controversial denial of a jury!).

On the issue of employment, we won outright on pay and conditions. On unions, we were put to prove that 'McDonald's have a policy of preventing unionisation by getting rid of pro-Union workers'. Their UK Head of Personnel admitted that employees 'would not be allowed to carry out any overt union activity on McDonald's premises', and that 'to inform the Union about conditions inside the stores' would be a breach of the employee's contract (Crew Handbook), 'gross misconduct' and a 'summary sackable offence'. The judges ruled that this systematic and, we argued, illegal discrimination was not enough to win! But the Appeal Court did agree with us that 100 days of employment evidence was too much.

6. In an important judgment the Appeal Court also agreed with us that campaigning groups should have the same right as the media to plead a defence of 'qualified privilege' (a new and developing area of law which protects a publisher from having to prove 'reasonable' criticisms made in the public interest). But they ruled that the factsheet 'lacked balance' and 'made scant reference to authoritative sources'. We believe this discriminates against publicly-distributed campaigning material.