

## CONVERSATIONS ON LAW, RELIGION AND MEDICAL SCIENCE

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### I THE MACQUARIE LAW SYPOSIUM

The idea for the ‘Syposium’ developed from the Macquarie Lectures. The Lectures have provided a focus for a special presentation each year by Distinguished Visiting Professors to the Division of Law, Macquarie University. In 2005 we held the Macquarie Lecture in the Banco Court of the Supreme Court of New South Wales. George P Smith, II of the Columbus School of Law, Catholic University of America, was our Distinguished Visiting Professor. His title for the Lecture was as memorable as George’s journal pieces: ‘Of Panjandrums, Pooh Bahs, Parvenus, and Prophets: Law, Religion and Medical Science’. The audience comprised invited guests representing the legal, academic and wider communities. Given that it was our 30<sup>th</sup> anniversary year, it also provided an opportunity to create space for a new kind of dialogue in the form of the *Macquarie Law Symposium*. The concept is consonant with the motto of Macquarie University – ‘And gladly teche’ – and with the nature of our speaker, George Smith, himself. The concept builds upon the idea of ‘gladly learning’ and ‘gladly teaching’. We hope that the Macquarie Lecture will become the basis of a series of occasional publications in which leading scholars in the field of the speaker might be invited to make comments in response. The dialogue is imagined not as a finite conversation, verse and response, but more in the nature of a relay – using the ideas in the lecture as a trigger for intellectual engagement, or jousting, in turn inviting others to pick up the threads of the debate. Gladly teaching; gladly learning; and gladly teaching in turn. The idea of the *Macquarie Law Symposium* was born.

In this inaugural issue of the *Macquarie Law Symposium*, we have presented George’s Macquarie Lecture and the responses to it from some of Australia’s finest legal academics. Those who have picked up the baton in George’s dialogue are leaders in the health law field, and in the study of law and religion, both nationally and internationally. In his body of work George has engaged each of us in differing ways. As Justice Michael Kirby commented in his speech commemorating the founding of the Chair in George’s honour at the University of Indiana, ‘[George]

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shows the obligations, and the means, to respond. But will we have the imagination and the courage to follow?’<sup>1</sup>

## II GEORGE

George P Smith II first came to Australia in the mid-1980s. He was a Visiting Professor, on one of his now many, and regular, visits to Australia. On that occasion he was the Fulbright Visiting Professor of Medical Law and Medical Jurisprudence.

It was 1984. A momentous year. Orwellian indeed. The *Artificial Conception Act 1984* (NSW) was passed. It rang a bell for those intrigued by property, inheritance and medical law questions. For some it may have seemed like the beginning of the end. The new dawn of the Frankenstein era. Philosophically, it was fascinating.

By this time George was already a household name in medical law circles – renowned for pushing the boundaries – and for the incredibly witty and sharp style of his law review pieces. One of his articles that struck a chord with the time was ‘Through a Test Tube Darkly: Artificial Insemination and the Law’.<sup>2</sup> This piece jostled with the questions of the day: artificial insemination and adultery; artificial insemination and illegitimacy; artificial insemination and inheritance. It went into the ‘perhaps’ zone:

Perhaps controlled breeding is a dangerous and foolhardy undertaking. Perhaps determining the size and quality of a family is a human right, inextricably related to human dignity. Perhaps attempting to interfere with the natural process of procreation would ruin the very fiber of our culture.<sup>3</sup>

But George did not leave his conclusion in the air. He ventured upon solutions:

One fact does remain: population forecasts indicate that ours will soon be an overpopulated world if appropriate steps are not taken. Improve the quality by public supervision? Absurd! Yet, who would have ever dreamed of test-tube babies?<sup>4</sup>

In such passages George toyed with eugenics – in the ‘perhaps’ zone – but only in the loving sense – linked to families, linked to human dignity, linked to ability to love and be loved. ‘Appropriate’ to George, was, if one might venture upon it, always linked to love. If he was construed in any other sense he was misinterpreted, misconstrued.

George was indeed a ‘pilgrim’ as he has come to call himself,<sup>5</sup> taking time to spend time with all around him. He listened. He gave gentle counsel. He guided. Most of

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<sup>1</sup> Michael D Kirby, ‘The New Biology and International Sharing – Lessons from the Life and Work of George P Smith, II’ (2000) 7 *Indiana Journal of Global Legal Studies* 425, 445.

<sup>2</sup> (1968-69) 67 *Michigan Law Review* 127.

<sup>3</sup> *Ibid* 150.

<sup>4</sup> *Ibid*.

all, he engaged. Like the Clerk amongst the group making the pilgrimage to Canterbury in Chaucer's *Canterbury Tales* (1342-1400), it can be said of George that:

Sounding in moral virtue was his speech:  
And gladly would he learn and gladly teach.<sup>6</sup>

George's path has been an odyssey. Some would say he has 'tilted at windmills'. But, windmills or not, he has engaged, and often driven, a dialogue in bioethics from 1976. In, one might say, a very '70s' fashion, 'love' has been his catchcry. Love/unlove – loving/unloving – have been *leitmotifs* in his writing. His writings show him to be fundamentally a social utilitarian, but one in which utilitarian approaches are as nothing without love. Utility, for George, is an expression of love, but only if it is loving in its ramifications. 'Life should be preserved', yes, but only 'when it holds a potentiality for human relationships'.<sup>7</sup> Life, death, disease, sex, are focused through a 'loving lens'. It is the capacity for love that defines life – and death. The ability to love is the definition of a useful life. But utilitarianism with a loving lens can still be brutal. Love subjectifies the utilitarian: softens it, but it is utilitarian nonetheless.

George's passion and enthusiasm for scholarly engagement – and those who will engage with him – is positively infectious. He has a magic touch. But it is also the touch of the 'Devil's advocate' – as George is not one to back off from an argument. He jousts rigorously and enthusiastically, with an 'utter rejection of quiet orthodoxy and temperate understatement', as the Hon Justice Michael Kirby has remarked.<sup>8</sup> George is socratic in his teaching style and bullish in his writing. He perhaps poses more questions than he answers, but he has never been shy of asking them; and repeatedly. His questions and his manner of asking them have prompted much continuing enquiry and dialogue.

George came to Sydney, a pilgrim again, in 2005. He came as the Distinguished Visiting Professor to Macquarie Law school in a celebratory year – the 30<sup>th</sup> anniversary of the admission of our first law students. He came to present the Macquarie Lecture for 2005 as a special tribute to the Michael Kirby. This was an elegant conjunction. The Hon Justice Michael D Kirby AC CMG had been the Chancellor of Macquarie University from 1984 to 1993. The judge, like many of us, had met Professor Smith in the 1980s and continued a lively conversation from that time.

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<sup>5</sup> 'Pilgrimage' and being a 'pilgrim' is George's own choice of terminology, as he introduced himself in present the Macquarie Lecture in 2005 in Banco court.

<sup>6</sup> General Prologue, lines 307-308: a pdf version of the *Canterbury Tales* was accessed at <http://academic.brooklyn.cuny.edu/webcore/murphy/canterbury/2genpro.pdf> on 23 March 2006.

<sup>7</sup> Smith, above n 2, 62.

<sup>8</sup> Kirby, above n 1, 428.

Justice Kirby paid tribute to George in a particular way in 2000 when Indiana University celebrated the endowment of the George P Smith II Distinguished Visiting Chair of Law and Legal Research to broaden students' exposure to scholars and judges of national and international reputation and to allow distinguished visiting scholars the opportunity to do research at Indiana University School of Law. Justice Kirby delivered an address to inaugurate the endowment of the Chair on Australia Day, 2000.<sup>9</sup> He remarked:

I have watched with fascination and admiration his remarkable career and virtually unequalled scholarly output. He did not choose a safe area of the law with perimeters charted in the Year Books and dilemmas that had been scrutinized for centuries. Instead, his inquisitive mind took him into the most puzzling interface of law and modern technology; he simply could not leave the topics alone. He cogitated, analyzed, lectured, and wrote. All the time, the scientific and technological foundation for his studies was shifting dramatically.<sup>10</sup>

George's foundational principle in love was acknowledged by Justice Kirby when he recalled the words of St Paul's first letter to the Corinthians in his tribute to George.<sup>11</sup> Kirby described these words as 'so familiar to people of all religions, and no religion' and as those that explain 'the dilemmas which bioethicist, lawyer, and philosopher must face and how none of us is excused from the obligation to face them':<sup>12</sup>

Love never faileth: but whether there be prophecies, they shall fail; whether there be tongues, they shall cease; wheterh there be knowledge, it shall vanish away.

For we know in part, and we prophesy in part.

But when that which is perfect is come, then that which is in part shall be done away.

When I was a child, I spake as a child, I understood as a child, I thought as a child: but when I became a man I put away childish things.

For now I see through a glass, darkly; but then face to face: now I know in part; but then shall I know even as also I am known.

And now abideth faith, hope and love, these three; but the greatest of these is love.<sup>13</sup>

The principle of love is one that, in George's theoretical framework, makes sense of human rights. In this Justice Kirby agrees: 'Like Professor Smith, I have always thought that the foundational idea behind respect for the human rights of family and strangers, indeed of every other member of our species and beyond, is a love that

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<sup>9</sup> Kirby, above n 1.

<sup>10</sup> Ibid 429.

<sup>11</sup> Ibid 433.

<sup>12</sup> Ibid.

<sup>13</sup> I Corinthians 13:8.

we potentially feel for them as creatures whose lives are overwhelmingly similar to or shared with our own'.<sup>14</sup>

But law demands more. Love is well enough and good. But law requires pinpoints: definition – beginnings and ends – responsibilities. Love is accepting and forgiving; law is questioning and demanding. In investing in love as a theoretical linchpin George is ultimately tilting at windmills. Beautiful windmills. But windmills still. Law is a harder beast.

George is aspirational. And law – especially medical law – needs its aspirational framework. As Kirby remarked at the end of his address, 'George Smith holds up the light of his scholarship to the rest of us. He sheds light into dark and mysterious places, where the darkness threatens to encircle us and the mysteries deepen and multiply into a gloom. For this we must be grateful'.<sup>15</sup> Kirby 'crossed the world', as he said, to pay tribute to George, and 'to express the gratitude of many outside the United States':

Professor Smith should continue to cajole, stimulate, irritate, and aggravate us. He should continue to seize our attention and to present us with the great puzzles of our time. Given the changes that have come about in the thirty years of scholarship and the acceleration of change we have witnessed, we will need him and others like him to apply human intelligence to great issues as we enter this new century where the dilemmas will only become more difficult.

Can our democratic law-making institutions survive these challenges? Or will our institutions remain as ofent-irrelevant relics of an earlier, simpler age? That is the fundamental question which bioethics presents to the law. Professor George Smith ... is not content to walk away from such questions. He shows the obligations, and the means, to respond. But will we have the imagination and the courage to follow?<sup>16</sup>

### III THE COURAGE TO FOLLOW ...

Professor Smith's paper in this volume is a representation of the Macquarie Lecture he delivered in 2005. This, in turn, was a snapshot of his life's work, even, one might venture to say, an entire scrapbook. There are threads – cameos – drawn from a large volume of published work stretching over a lifetime – a composite of ideas that are difficult to cram into the formal space of an article.

In response to this composite of ideas, we have assembled scholars from across the fields of law, religion and health. George's trumpet has sounded with many echoes. The first of these echoes comes from Associate Professor Belinda Bennett, one of Australian health law's heaviest hitters. Belinda reflects on George's arguments that religious principles can be drawn upon by judges for the resolution of disputes. As

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<sup>14</sup> Kirby, above n 1, 434.

<sup>15</sup> Ibid 445.

<sup>16</sup> Ibid.

Belinda states, with increasing secularisation disputes which were once in the Churches' domain, are now being resolved by the courts.

Our second response comes from Professor Colin Thomson, arguably the father of Australian medical law, being one of the first to teach the subject as a discrete discipline. His response contrasts the American 'public' approach to the discussion of religious values to the inherently private and individualised approach experienced in Australia, and offers insights into how George's ideas might be explored in the Australian context.

If Colin is the father of Australian medical law, Professor Loane Skene might well be described as its 'mother'. Her impact on the field, in all aspects, has been monumental. Her response looks closely at the role of organised religions in the litigation process. While Loane accepts that the Churches have a role in debating social issues, she is critical of Church intervention in litigation, particularly where it seeks to dominate the assessment of 'private' legal claims. For Loane, it is acceptable to present a religious view, but not one which seeks to be conclusive of the debate, merely because it is religious.

The penultimate response belongs to Associate Professor Roger Magnusson, arguably the finest of Australia's second generation of health lawyers. While Roger appears to be interested in George's ideas on religious values, he is suspicious of the ability of institutional religion to act in a principled way, and not give in to its own political agendas. Roger asks the important question of why some health issues are labelled as having religious import, while others, of seemingly equal scope and importance, are not commented on by organised religion at all.

The final response comes from Associate Professor Peter Radan, Macquarie Law's own resident expert on matters of law and religion. Peter's focus is on the issue of 'intelligent design' and the establishment of religion. It flows from George's comments on the notorious *Scopes* trial.<sup>17</sup> Peter's comment focuses on the issue of the appropriateness of allowing courts to be the arbitrators of these issues. Peter asks the question as to whether the continued resort to courts to resolve disputes between religion and science is really going to solve anything. For Peter, the most appropriate forum for debate is the legislature.

#### IV FURTHER CONVERSATIONS

We hope you enjoy this first issue of the *Macquarie Law Symposium*. We would like to thank all our contributors and our administrative staff, Maggie Liston and Jenny Shedden for their tireless work.

In a volume like the *Symposium* it would be wrong to complete our introduction with a conclusion. Instead we invite all our readers to view the contributions, think

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<sup>17</sup> *Scopes v State* 154 Tenn 105, 289 SW 363 (1927).

about them and continue the conversations that our contributors have started. Law, religion and health are universal experiences of being human, and as humans our lives can only be enriched by learning more about their inter-dependence and inter-relationship.