

WORLD HEALTH ORGANISATION

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BOOK REVIEW

George J Annas, Judging Medicine, Humana Press, New Jersey

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George J Annas, Judging Medicine, Humana Press, New Jersey, i-xviii, 1-406; References 407-421; Index 423-438, hardcover \$US29.95, cloth \$US24.95.

One of the first tasks given to the Australian Law Reform Commission, soon after I was appointed chairman in 1975, was to look into Australian laws on human tissue transplantation. At the time I thought that the Attorney General had taken leave of his senses when he assigned such an apparently unlaywerly task to the Commission. Why not something comfortable and familiar to review: like a statute of limitations or the law of cattle trespass? The Commission assembled its team to work on the project. They included Sir Zelman Cowen (later to become Governor General of Australia) and Sir Gerard Brennan (later, and still, a Justice of the High Court of Australia). As the problems unfolded and the Commission tackled the legal issues of transplantation, I came to see how wise was the Attorney General's decision. For here, in microcosm, was an aspect of the future of the law.

Before science overcame the body's immune rejection of transplanted tissue, the problems for the law of transplantation of tissues and organs were confined to those which could be received without rejection: for example, compatible blood and corneas. Science then presented the new

legal problems. And they had to be solved. Should a child be permitted, under some circumstances, to donate an organ to a sibling in a life-threatening situation? Should the law require the destruction of organs taken from coroner's cadavers? Should the family be able to override the wishes of a deceased person as to the use of his or her organs? Should we adopt a principle of presumed donation of organs so that only those who "opted out" of such a régime should be taken, on death, to be "donors" for transplant purposes? On these and many other questions, the Commission, led by Mr Russell Scott, produced a carefully reasoned report, together with a draft statute. The legislation was quickly adopted throughout Australia. The report was an influential document at home and abroad. It opened my eyes to the interaction of law and biotechnology.

Some seven years after I began my labours in Australia on the subject of transplantation, Professor George Annas was named chairman of the Massachusetts Task Force on Organ Transplantation. This was likewise a multidisciplinary group. It was charged with developing policies for the introduction of advanced transplant procedures in that State of the United States. The immediate concern was the proposed introduction of heart and liver transplant services. The necessity to develop policies to meet the many practical and ethical problems gave him a "somewhat broader perspective on the subject". It stimulated him to think of the "headline-grabbing experiments on artificial hearts and

xeno-grafts" in a way not previously done by him. In this sense, his experience paralleled my own. His primary appointment was as Professor of Health Law at Boston University School of Medicine. Yet from his university qualifications, it appears that he began life as a lawyer. But he soon became interested in the law as it concerns medical practice. In the early 1970s he became a leading proponent of patients' rights. He approaches the subject of medico-legal controversies, freed from a deferential respect for judges and armed with a wide-ranging knowledge of the fascinating problems which are now presenting themselves to society and the law.

The structure of Annas' book derives from what it is. It is made up by the republication of essays originally prepared by him for the Hastings Center Report. This is a bimonthly publication on bioethical questions. Since 1976 Annas has provided a column. His object is to write a short essay of interest to health care professionals, lawyers, law-makers, judges and anyone else interested in bioethics. Nowadays that includes a large public audience constantly stimulated, shocked, alarmed and amazed by advances in biotechnology.

Each of the essays is about seven printed pages in length. The occasion of the book has been taken to rearrange the collection under various major headings. The list of those headings gives the clue to the concerns of Professor Annas: patient's rights; conception; pregnancy and birth;

reproductive medicine; medical practice; the mentally retarded and mentally ill patient; death, dying and refusing medical treatment; government regulation; transplants and implants.

Inevitably with the reprinting of such a collection of essays there is a variation in their quality, interest and continuing relevance. An essay may have been stimulated by a high profile case. Rushing to his typewriter, fresh from the report in the daily press, Annas composed another well constructed contribution for the prestigious Hastings Center. It is no good saying that work written under such pressure is as likely to lose inspiration as the obligatory poem of the Poet Laureate, producing his verse for a State occasion whatever the state of his liver. Some people just work better under pressure of this kind. Mozart is an example. By the time you get to the end of Professor Annas' book you realise that he had the technique of essay-writing down to a fine art.

His typical essay begins with a catchy title designed to bait the reader. There is nothing wrong with this. In an often tedious and busy world, bombarded by too much information, the clever intellectual will use every wile to snare the attention of the reader. Take "Forced Caesareans: the most unkindest cut of all" or "Let them eat cake" - a quote from Justice Harry Blackmun in the Supreme Court of the United States concerning the attitude of the law to abortion for the poor. And who would not be tempted by a bioethical

essay titled "The Prostitute, the Playboy and the Poet"?. As it happened it was about rationing schemes for organ transplantation. Why should one person have priority over another?

After the catchy title the temptation to read on is usually maintained by an interesting opening allusion to literature. This displays the wide reading of this author - beyond law and medicine. Then Annas plunges into the case in hand. And the cases are not only the great decisions of the United States Supreme Court. His eagle eye combs the popular press for a judgment of the State courts or other Federal courts. And then he pounces. And pity help the judge who is guilty of superficial, ignorant or prejudiced treatment of a sensitive subject of bioethics.

I suppose that it is the streak of masochism in me that what I enjoyed most in this book were the nasty attacks on judges who did not make Annas' grade. Thus poor Judge Eugene M Premo of the Juvenile Court in San José, California, little suspected that his logic and style would be taken to pieces when he gave an ex tempore judgment on a case concerning the need of a Down Syndrome child to have radical surgical treatment. The judge dismissed a challenge to the parents' decision not to consent to such an operation. Judge Premo's treatment is described as "rambling". He is criticised for not reserving to think about the evidence, legal authority, and ethical principles. But the judgment of the California Appeals Court on the appeal is denounced as "if anything less

well reasoned". The resulting precedent is criticised as evidencing a "remarkable eugenic policy" whilst paying lip service to the "best interests of the child".

This is a typical instance of the cases which Annas examines. He is not "Pro Life" in the political sense of that term. But he is in the mainstream of American concern about the rights of the individual. And that includes those to whom according rights might be difficult for some: the senile, the mentally ill and the mentally retarded especially. Annas expresses the view that the mentally retarded are the most deprived of all of the American minorities; neglected, ignored and even denigrated by the highest courts.

The criticism of the reasoning of the judges is one of Annas' chief concerns. He is unsatisfied by the mere fact that a judge reaches the right conclusion. Often the way the judge has done this is described as involving "appalling methodology". For Annas it is at least important that the right conclusion should be reached as that it should be arrived at by logical steps of insightful ethical reasoning.

Of course it is easy for a professor writing, even under the stimulus of a regular column, to reflect deeply and in a few pages to criticise the judicial rationalisation of deeply-felt conclusions. Spare a thought for a judge of the Juvenile Court, in the midst of a busy case list, disposing of a case without adequate research help or the luxury of reflective contemplation. Just the same, as Annas constantly

points out, we are dealing with some of the most precious features of existence - human life, respect for individuals at a time of vulnerability and the entirely novel problems presented by new technology. Someone has to demand high standards and to contribute to the fashioning of those standards. Annas takes this burden on himself. He gnaws away at the problems, often presenting them from different perspectives in succeeding essays. For me one of the most interesting sections of the book was in Annas' treatment of the approach by medicine and the courts to the problem of terminating life-support systems to a person who has reached an irreversible, permanent or chronic vegetative coma. The well known American cases of Quinlan and Saikewicz are the subjects of several essays. The judges, particularly in Quinlan get taken to task. One suspects that, had they been sitting in Professor Annas' class in Boston, they would have just scraped a pass or even - horrors - suffered a fail grade.

These observations are not to suggest that Annas falls victim to the American error of thinking that judges and the law have the solutions for all problems. Nor does he suggest that courtrooms and the forensic technique, are the best media for solving bioethical questions. On the contrary, he repeatedly stresses his opinion that judges do not belong in delivery rooms and that it is more important for medical ethics to be worked out and applied by health care workers themselves. But sometimes the law provides an important

corrective against unthinking routine or inherited prejudice. Especially in the United States, legal rights have developed over two centuries around the Bill of Rights. It is therefore possible to resort to the law for access to certain fundamental principles concerning the individual and authority. These may sometimes provide the key to solving hard new problems of medical ethics.

Apart from the fact that the book is well written, interesting and readily digested (served as it is in handy slices), it has many other strengths. It exposes the unsatisfactory nature of the generalities to which lawyers often resort to solve hard problems. Thus references to the "best interest" of a child or a patient can sometimes, as Annas points out, involve little more than an incantation which masks (perhaps for the lawyer too) the unravelling of the many issues which need to be considered and which are not susceptible to the application of such a simple formula.

Another strength of the book is the stress which Annas places upon the need for lawyers and other persons involved in public health decisions, to strive for neutral and principled decision-making. Such an ambition is elusive in the types of decisions that are mentioned here. Life and death tend to evoke emotion. The blood rushes to the head of the decision-maker. Greater insight on the part of the decision-maker into the complex of considerations is necessary if a just and informed decision is to be made. In tune with this realism, Professor Annas refuses to

acknowledge that ethics committees, made up of many worthy people, are necessarily the best place in which to solve questions such as the dilemmas of transplant patients, scarce resources, terminating life support, artificial conception etc. Choose the personnel of such a committee and, effectively, you may choose the result at which it will arrive. This is the theme in his criticism of the constitution of the United States National Advisory Commission on Health, Science and Society. "Those who like 'blue ribbon committees' will like this one", Annas declares. For his part he is sceptical. Instead of being made up of legal scholars, philosophers and ethicists it was heavy on representatives from medicine and research. Yet footnotes to this chapter illustrate the honesty of the author. Annas acknowledges that staff members were later hired who ensured that the Commission did "wide ranging and in depth work". Just the same, a final footnote records that the Commission "did not propose any major changes".

Inevitably there are weakness in a book of essays of this kind. The treatment of subjects is necessarily brief and therefore can rarely be in depth. There is some repetition in discussion of particular cases. Thus the predicament of Brother Joseph Fox who sustained substantial brain damage and a coma - and the part in his end of his close friend Father Phillip Eichner - so troubled Annas that he wrote several essays on the issues raised. Some of them overlap.

There is also occasional apparent inconsistency in the basic principles which Annas urges to govern the solution of particular problems. For example, in resisting the notion of the development of a tort of wrongful life, he advocates that the law should protect parental good faith judgments and steer clear of developing a legal "right to normalcy". This seems a trifle inconsistent with the strict position adopted by Annas in relation to the rights of mentally retarded neonates. There, parental wishes and "rights" have no weight. Another individual is involved. So the law and ethics must protect that individual - particularly because of its vulnerability. Of course, a book of ethics would not be human but divine if it lacked an occasional mortal inconsistency.

Some of the essays now seem a little dated. Certainly virtually all of them are related to controversies of the United States scene. A number have not troubled other countries. Some are unlikely to do so. Thus the chapter on "creation science" is fascinating but monumentally irrelevant to ethical debates in, say, Australia. Also irrelevant is the discussion of whether there is a privacy right under the United States Constitution. These are important questions for the US readers of the Hastings Center Report. But where the writ of the US Constitution does not run, the fine distinctions of that country's Supreme Court seem tortuous and irrelevant to a universal discussion of bioethics. In short, this is principally a book on American perspectives of

global questions. But such is the secular, technological and free-thinking character of this United States expert that the book, nonetheless, retains a universal appeal. Such is the vigour and energy of the US legal system that the discussion of the cases gives a pointer to lawyers in other lands of what possibly to expect, to copy, and (sometimes) to avoid.

There are two subjects which are not covered in the book but which are now central to bioethical concerns in the United States. These involve the coming review of the US Supreme Court's decision in Roe v Wade 410 US 113 (1973). Sixteen years after that leading decision on the law of abortion, the trimester system which it sanctioned is coming up for review. Not only is this because of the changed composition of the US Supreme Court and changing attitudes in a more conservative society. It is also because the decision rested on the science and technology known in 1973. Developments since then make earlier births "viable" and also later abortions safer to the patient. So this is another case where science has overtaken the law and rendered old judgments - arguably right for their time - in need of fresh consideration.

The other major bioethical issue not covered in the book is Acquired Immuno-Deficiency Syndrome (AIDS). There are now whole books - let alone brief essays - on the ethical implications of AIDS. It is a sign of the change of the times that a book published in 1988, and containing essays up to 1986, could omit entirely the many new and unexpected

problems presented by this deadly disease and its epidemic spread. I have no doubt that Annas has already put pen to paper about the Rock Hudson estate litigation. Was the big verdict for the movie star's lover a disaster for the respect for privacy and intimacy of human relationships? Or was it a salutary warning of the moral duty of people at risk to learn whether they are infected and to inform those with whom they share intimacy? We have the jury's decision. But we will have to wait for Professor Annas' verdict.

If I have a criticism of the substance of the book it is its Americo-centrism. There is scarcely a mention of any other country. Nor is there more than a passing thought for the different kinds of bio-ethical problems that exist in, say, developing countries. There, many of the issues exposed by Professor Annas will seem exotic in comparison to the very hard choices that had to be made in dividing the scarce funds available for public health. But even in the American context there is insufficient attention to the economics of ethical decisions. It is one thing to insist upon the supreme rights of the mentally retarded neonate who needs radical surgery to survive. But the cost-intensive support of such people, often abandoned by their families, presents particular problems to strapped communities. And not least in a country such as the United States without a publicly funded universal national health scheme. Scarce resources necessitate allocation. The ethical quality of allocating advanced technology to districts and to individuals deserves

a more intensive treatment than appears in this book. Perhaps this was to be found in an essay which ended on the editor's floor.

Reading this book and the truly perplexing and controversial decisions which it surveys makes the ordinary decisions of life - even of a judge's life - seem simple by comparison. I shall now return to judgment writing, relieved that I shall not today face the quandaries which Annas considers. But even more relieved that I will not face Annas' critical review of my efforts.