I. The Multiple Roles of Bioethicists

This essay offers a condensed critical user’s guide to bioethics and the roles of bioethicists as ethics experts. The goal is to aid those who employ the expertise and guidance of bioethicists so that they can better gauge what bioethicists can offer. The purpose is as well to support a better assessment of the claims bioethicists make regarding the ethical or unethical character of choices and policy approaches to health care and the biomedical sciences. This is undertaken with a special emphasis on the concerns for profit in the development of new pharmaceuticals and medical devices.

The roles of ethicists or bioethicists\(^1\) are complex. They are a collage of different undertakings.\(^2\) Seven roles must in particular be noted.\(^3\) Bioethicists

(1) analyze moral concepts and propositions;

(2) assess the soundness or at least the validity of arguments;

(3) display the range of possible approaches to and views regarding particular issues;

(4) mediate conflicts among physicians, nurses, patients, patients’ families, and others regarding choices in the clinical context;

(5) provide legal advice in hospitals about clinical choices (without being admitted to the bar);

(6) advance their own views as to which clinical or policy choice is morally proper; and
serve as experts socially in authority regarding appropriate choices in health care and the biomedical sciences.\(^4\)

The first three roles are those generally shouldered by philosophers or humanists in the Academy. Bioethicists bring those roles into a new venue: the clinic, advisory committees, or other non-academic contexts. The fourth and fifth roles are integral to clinical-ethical consultations. The sixth role is one often assumed by academics, but rarely with the bully pulpit offered by the setting of the clinic or an advisory committee. The seventh role is a new and specific one in which the bioethicist possesses a recognized social authority. It is the sixth and seventh roles that are the primary focus of this essay. These roles bear immediately on the ways in which attorneys and pharmaceutical corporations may engage bioethicists for direction; they are the most significant focus of controversies regarding the appropriate function of bioethicists.

This paper explores how moral and political commitments frame the advice given by bioethicists when they advance their moral opinions, especially as socially and legally recognized experts. Though this analysis might be read as a critical exposé, it bears no animus against either the field or its practitioners. The goal instead is to put bioethics into perspective. After all, bioethics is a novel area of scholarship and practice that emerged as if from nowhere in the 1970s, and is only beginning to be carefully assessed.\(^5\) At the very least, one must better appreciate how the roles played by bioethicists can be importantly misunderstood. There is a need as well to develop a more nuanced appreciations of the profit motive and its relationship to the production of innovative pharmaceuticals and medical devices.\(^6\)
This essay has begun with a brief overview of the multiple roles played by bioethics. The next section offers a prefatory warning regarding the nature of bioethical advice. The third section shows why it is impossible to secure a canonical, common, secular morality: moral pluralism defines the human condition, so that there is foundational disagreement about what is morally required. This essay then rehearses some of the differences between the law on the one hand and morality, ethics, and bioethics on the other. It is argued that the law functions in liberal secular pluralist democracies such as the United States to establish norms that can unite partisans of disparate moral, bioethical, and moral-theological perspectives in limited collaboration, so that it is important not to confuse what is morally required with what is legally required. This section then indicates why bioethicists in secular pluralist societies are unavoidably sectarian and partisan, or must settle for merely providing the geographies of competing moral positions and analyses of procedures for grounding agreement. The fifth section brings all of this to bear on the challenges of creating health policy in a world of infinite expectations but finite resources for the support of innovation in pharmaceuticals and medical devices. The next section offers a brief account of the emergence of the field of bioethics itself, showing how bioethics was created to supply the secular equivalent of a moral theology with a social democratic bias. Against this background, this section puts into perspective concerns regarding the role of money and the market in the pursuit of medical innovation in general and that regarding pharmaceuticals and medical devices in particular. The essay concludes with ten summary maxims designed to aid in disclosing the commitments of bioethicists regarding the business of developing innovative pharmaceuticals and medical devices.
II. A Prefatory Warning: Bioethicists Carry Hidden Biases

Bioethicists bring moral and political biases to their roles as experts, consultants, and advisors: they are usually partisans of particular moral perspectives or of particular ideological agendas. Their partisan commitments are nevertheless often underappreciated, even though it is fairly well recognized that social scientists and other humanists incorporate into their recommendations for action thick value, moral, and political agendas. Because economics and sociology are involved not just in explaining economic and social reality (i.e., knowing reality), but also in reforming, changing, revising, recasting, and otherwise reshaping economic and social reality (i.e., in achieving certain goals), economic and sociological accounts incorporate value-laden perspectives. Even in choosing among programs, policies, and recommendations in terms of what works, one must have standards of success. A standard of success involves a particular value perspective.

In asking a bioethicist to assess a charge that someone has acted unethically, for example, one must inquire regarding the ethics applied by the applied ethicist. Particular moral viewpoints involve different orderings of cardinal human values, so that one should (1) determine the bioethicist’s particular ranking of such values, and (2) regard bioethicists as advocates or partisans of particular moral and political understandings and agendas. A good analogy in such assessments is the role of religious or moral-theological advice. When securing the guidance of a moral theologian, one is already alerted that the theologian’s religious commitments will produce recommendations of a particular character. So, too, one should always carefully examine the moral, political, economic, and legal implications of adopting any one among the numerous competing bioethical accounts. A recognition of the
partisan character of ethics and bioethics will require critically assessing bioethical judgments about the role of the market, profits, and corporate goals in health care. When examining the roles of markets, profits, and innovations in the pharmaceutical industry, one must lay out with care the geography of moral commitments that underlie different moral positions.

III. Clement of Alexandria and Agrippa Are Right: We Do not Share a Common Morality

The defining challenge for ethics, law, and public policy is that people do not affirm a common, content-full morality. This is not to deny that there is an objective morality; it is to deny that we agree about its character. It may be the case that all moralities concern when it is improper, licit, or obligatory to kill or to lie. Moralities nevertheless differ in their settled judgments about when such actions are prohibited, licit, or obligatory. Furthermore, one cannot compare different polities, different legal systems without in advance choosing a particular view of the good and the right by which to make the comparisons. A standard is needed so as to compare costs and benefits. Imagine that one wanted to decide which political system is best in terms of which best realizes liberty, equality, prosperity, and security. One cannot make a determination until one first determines how one should rank these values. If one ranks liberty as individual freedom first, prosperity second, security third, and equality last, then one will identify the Republic of Texas as the ideal polity. If one ranks security first, prosperity second, equality third, and liberty last, then one will identify Singapore. To determine the best social structure, one must first determine the correct background ordering of goods and values. Here, of course, is where the foundational disagreements lie.
To determine the correct ordering of primary human values, one cannot simply appeal to intuitions to establish the standard because others can meet one’s particular intuitions with their contrary intuitions. How, then, can one determine which moral intuitions should govern? One cannot appeal to a proper balancing of intuitions because each party will have his own intuition about which intuitive balancing is correct. One cannot appeal to what works, because “what works” requires a particular standard of success. One cannot appeal to a plurality of considerations unless one already knows how rightly to weigh and balance such considerations. There will not be an agreement about which higher-level consideration rightly weighs the object-level considerations without a background standard. One cannot appeal to what rational decision-makers or contractors would choose, because they must first be fitted out with a particular moral sense or thin theory of the good to guide them, and that is what is in question. The determination of which moral sense is canonical itself requires a background moral vision. As a result, people find themselves embedded in incompatible sets of moral judgments, in different moralities, without an ability to resolve their differences by sound rational argument. If they wish to collaborate despite these differences, they must engage a practice such as the market or limited constitutional democracies, which draws authority from the limited agreement of the collaborators but requires no particular view of the wishes of God or of the requirements of a content-full morality. Disputes as to which account of justice, fairness, and morality should guide public interaction can be substituted by a procedural mechanism for limited collaboration, such as laws set within the constraints of a limited constitutional democracy.
The inability to resolve moral controversies by sound rational argument has been recognized since at least the time of the Sophists. The Sophist Protagoras (480-410 B.C.) correctly diagnosed the moral situation of a culture cut off from transcendence\(^\text{10}\) (i.e., a secular culture that cannot appeal to God for direction and that therefore can only appeal to humans and their judgments\(^\text{11}\)) by correctly recognizing the impossibility of resolving moral disputes by sound rational argument without first conceding basic premises and rules of evidence. As Protagoras put it, “there are two sides to every question, opposed to each other....”\(^\text{12}\) Given different initial premises and rules of evidence, one can produce quite different conclusions. A similar point was made half a millennium later by Clement of Alexandria (A.D. 155-220). “Should one say that Knowledge is founded on demonstration by a process of reasoning let him hear that first principles are incapable of demonstration; for they are known neither by art nor sagacity.”\(^\text{13}\) Like the Sophists, Clement appreciated that, unless one concedes basic premises and rules of evidence, participants in moral or ethical controversies will speak past each other, thus anticipating the character of current bioethical controversies.\(^\text{14}\)

This state of affairs was summarized in the five tropoi or modes attributed to the philosopher Agrippa, a 3\(^{\text{rd}}\)-century Greek skeptic and member of the late Academy, who recognized that secular philosophy cannot establish the correct account of morality (or of other issues, for that matter). The first tropos acknowledges that, despite centuries of analysis and argument, philosophers have failed to produce a general consensus regarding matters of metaphysics and morality, and that therefore one has good grounds to conclude that there is little hope that philosophers will do so in the future. The second tropos notes that
philosophical arguments unavoidably engage an infinite regress in pursuit of canonical content; any moral account presupposes a foundational background account, and so on for ever. The third tropos emphasizes the contextual character of any particular argument: any disputant’s position is always articulated within his own presuppositions. The fourth tropos underscores that arguments tend to be question-begging, and the fifth tropos recognizes the circular reasoning involved in attempting to establish a final foundational justification for one’s position. The force of this analysis is that secular philosophy cannot establish which morality is canonical. Philosophers and bioethicists cannot know that they know truly what moral truth is without begging the question, arguing in a circle, or engaging an infinite regress. Bioethicists cannot identify the correct ranking of cardinal human goods, unless one first concedes basic premises and rules of inference. To pick out the right account, one must first have an immediate encounter with the Truth.

IV. Why Law is Other Than Ethics or Bioethics: Making Do in the Face of Moral Pluralism

An adequate appreciation of bioethics and of the role of bioethicists requires confronting the limits of secular morality and its relationship to law. Secular, democratic polities tend to be defined by moral pluralism. The civil societies of secular democratic states span different moral communities with moral perspectives that are to various degrees incompatible and in conflict. For this reason such polities are characterized by culture wars: complex struggles among partisans of different moral perspectives and communities as to who should shape law and public policy. As a result, secular, limited, democratic polities such as the United States lack both an established religion, as well as, apart from law, an established morality (i.e., they lack a common, content-full, canonical, moral perspective).
Such polities are instead characterized by legal procedural mechanisms for resolving controversies among the competing moral perspectives.

Historically, secular, limited, democratic polities arose as a solution for political governance in the face of robust religious and moral disagreement. If citizens of a country are separated by different moral theologies and moral views, then the common framework for their governance cannot rely on an authority derived either from God or from a particular, content-full morality (or a particular ethics endorsed by particular bioethicists). Since the theological and moral disagreements of the citizens guarantee that they cannot agree about a common thick moral perspective from which to derive political legitimacy and moral authority, such polities are compelled by default to derive their authority from the limited agreements of the participants to common projects. In the absence of the ability to draw authority for common endeavors from either God or a particular, thickly-framed moral rationality or content-full vision of justice, fairness, or human flourishing, authority must be derived from the agreement of the collaborators (e.g., the consent of the governed). Such polities are constitutionally limited and democratic as accommodations to irresolvable moral and religious disagreements.

The paradigmatic example is the American Constitution, which establishes no content-full account of justice or fairness, enshrines no material claim rights, but functions instead as a formal procedural framework: the American Constitution is a formal-right rather than a material-right constitution. Secular, limited, democratic polities do presuppose a background morality of sorts. Since secular, limited, democratic polities derive their authority from the consent of the governed, they have a robust moral commitment against the use of citizens
without their consent. Their sparse procedural morality recognizes the wrongness of battery, theft, rape, and murder, though it has no a priori position regarding consensual touchings, consensual transfers, and consensual sex. Any particular constraints must be created by law. Nor does such a limited constitutional regime have any a priori moral position regarding welfare rights, including rights to health care. These rights must be created by law. Hence, it must once more be noted that the United States possess a limited constitutional framework: a formal-right constitution, not a material-right constitution. The United States Constitution guarantees procedural justice, but no substantive view of justice or particular claim rights.

In this context, bioethicists can assume a fairly uncontroversial role: they can identify the cardinal place of forbearance rights, agreements, contracts, and consensual accommodations. When they play this role, bioethicists call attention to the common procedural background morality of a limited, secular, pluralist democratic polity. In secular bioethics, for example, one may not be able to secure wide agreement as to what physicians should be forced to do for their patients or what treatment competent adult patients who are not dangerous to others should be compelled to accept from physicians, but there can be wide agreement that persons should be free to refuse to participate in procedures or receive treatments they find unacceptable (e.g., that a practice of free and informed consent should be accepted). Bioethicists play a radically different role when they endorse a particular content-full moral vision, account of justice, or view of fair collaboration within a polity, since there is no such particular view of justice, fairness, or moral rectitude established for, or acknowledged by, the society as a whole. In the face of moral diversity, all one has are the accommodations reached by common agreements, that is, established at law. In this sense,
there is nothing to which judges and juries ought strictly to appeal beyond that which is
required at law and the procedural morality that underlies it. A secular pluralist society not
only fails to share a religion or a theology; it also fails to share a content-full morality. Insofar
as this is the case, citizens will not share a content-full bioethics; the most they can hope for is
a common legal system. The law becomes the point of view to which persons who disagree
about theology and morality can appeal in common collaboration.

This default explanation of human collaboration, grounded in the agreement of
participants in common projects, can account for the worldwide success of contracts, markets,
and limited democracies. Moral pluralism puts in central place contracts, market transactions,
and secular, limited democracies. These are the structures that successfully function where
there is robust moral disagreement, because such structures do not require prior concurrence
concerning the nature of the human good, human flourishing, substantive justice, or the
wishes of God. All that is required is that the participants peaceably derive common
authority from their agreement. It is for this reason that consent and forbearance rights are
cardinal in such a moral context. Within such structures, moral and religious strangers (i.e.,
persons separated by moral and religious views) can understand the moral status of their
collaboration, even when they disagree concerning significant religious and moral issues.
This procedural morality also shows why this is all that one can hope for within a secular
pluralist society.23

This account of the relationship between law and morality is in preface to a critical
appraisal of the role of bioethics and of bioethicists as ethics experts. Insofar as one entertains
the view that bioethics and bioethicists can unambiguously guide legislators, judges, and
juries in determining what the law should be or how it should be applied, this essay’s analysis is in great measure deconstructive. Many of the claims advanced by ethicists and bioethicists for what they can contribute cannot be taken at face value as a claim regarding a common morality. Rather, they should be regarded as particular pleadings on behalf of how the law should have been framed in the light of their particular morality. When bioethicists forward a particular account of justice, fairness, and content-full, right action, they are partisans of a particular view of what laws ought to be enacted or of how courts should hold. Instead of regarding bioethicists as able to give guidance grounded in uncontroversial objective standards (i.e., in the sense of standards reflecting a commonly accepted moral perspective) as to how laws ought to be interpreted or juries ought to decide, bioethicists should rather be regarded as offering particular partisan views about how they would wish the law to be framed, but is not now framed.

When this state of affairs is underappreciated, bioethicists can engage in an adroit form of special pleadings on behalf of particular legislation to be enacted, particular positions to be taken by courts, or decisions to be rendered by juries, because they can speak as if they were declaring uncontroversially and objectively what the law already should be or how it should be interpreted, without being understood as simply giving their views as to how the law should have been, but is not now established. In this way, bioethicists are able to advance a particular party’s interests, as for example by inviting a favorable jury verdict through conflating a particular moral perspective with established norms for common conduct. If ethicists and bioethicists are able to convince legislators, courts, and juries (1) that there is such an accepted common morality, and (2) that they are experts able to expound it, then
they ( ethicists and bioethicists ) can appeal to that morality ( as one can appeal to a moral 
thought in a theocracy ) ( 1 ) in interpreting the law , ( 2 ) in further developing the law , ( 3 ) in 
guiding judges in applying the law , ( 4 ) in inspiring judges creatively to scry new implications 
of the law , and ( 5 ) in appealing to juries on behalf of rendering a particular verdict .

It is in the interests of such bioethicists ( i.e. , those who wish to impose a particular 
position without having it first enacted through legislation or established through court 
holdings ) and those who engage such bioethicists to act as if there were a commonly 
uncontroversially accepted, content-full morality so that their views can then be used as an 
extra-legislative and extra-juridical source for health care policy and court rulings. It is in the 
interests of the partisans of any particular morality to deny the diversity of moral views and 
to argue that their morality is the common moral vision that should guide law, public policy, 
and court decisions. In a theocracy with a single established religion, this maneuver could be 
accepted. In such circumstances, the established religion justifies, determines, and guides the 
elaboration of law and anoints theologians and priests as its expositors. This was generally 
the case for English common law, when England was unambiguously part of Christendom 
with lords spiritual possessing significant influence. There was an established church with an 
established moral theology with an established moral vision. None of this is the case with 
regard to the United States at the beginning of the 21 st century .

If this diagnosis of bioethics and the human condition is correct, then in a secular 
society moralists and bioethicists who plead on behalf of particular ways to pursue the 
human good and achieve human flourishing are moral partisans. They can function well as 
ideologues or partisans of particular legal and political agendas, 24 but they cannot be those
who uncontrovertially disclose a canonical, content-full, moral agenda that transcends such partisan agendas. Given this state of affairs, one must be careful in one’s selection of a bioethicist. To select a bioethicist is to choose a person committed to advancing a particular moral, legal, and political agenda. Again, the choice of a bioethicist is analogous to choosing a particular theologian. In matters religious, one will secure different guidance depending on whether one has selected a Baptist, Islamic, Jewish, or Roman Catholic theologian. One’s choice of theologian will have important implications for the morality, law, and public policy endorsed. So, too, with regard to the choice of a secular bioethicist, one will secure different moral guidance with different public policy and legal implications, depending on which bioethicist one consults (e.g., liberal, libertarian, conservative, social democratic, or pro-market). Bioethics can function relatively neutrally in displaying the geography of moral commitments of different choices. Partisanship emerges in the selection of a particular moral or bioethical perspective, which carries with it particular implications for law and health care policy.

V. The Agonies of Finitude: Most Want the Best of Health Care at Once and for Free

The human condition is defined by limits, by finitude. Much of the character of these limitations is unpleasant. Seven marks of human finitude are cardinal to understanding the root challenges of finitude:

1. All humans will die; no amount of health care will postpone death forever.

2. Almost all humans will suffer sometime before death; no amount of health care will fully eliminate all human suffering, disability, injury, and pain.
3. Human resources, including financial resources, are limited; if one invests all one’s resources in health care, one may marginally extend life and decrease suffering, but one will have no resources to enjoy the extra years secured.

4. Medical knowledge is generally probabilistic; one usually cannot with certainty know what will work in a particular instance.

5. Medical progress requires investing resources now for possible future benefits.

6. Human secular moral knowledge claims are the subject of persistent controversy (as shown in sections III & IV).

7. There is no agreement about how one ought to gamble with life, death, and suffering.

In short, all of life is a contentious gamble, and health care choices about approaches to innovation in pharmaceuticals and medical devices involve deep disagreements about which wagers are worth what investments of time, money, and energy. Choices among policies bearing on innovation in pharmaceuticals and medical devices are consequently marked by the agonies of human finitude. All humans are forced to make decisions about how to gamble with their lives and the lives of those whom they love, as well as the lives of anonymous strangers and enemies. There is no common understanding of the right way responsibly to approach such gambles.

In response to the human condition, in particular the threat of death and suffering, one can attempt to

1. guarantee everyone some level of health care as decided by democratic process;
2. not interfere with those with sufficient resources and the desire to purchase luxury care and better basic care; and

3. not interfere with those with funds who wish to invest in the development and marketing of pharmaceutical and other innovations.

If this approach is embraced, which approach in various degrees underlies public policy in every major polity (with the exception of Canada), one has decided (as in every limited democratic polity) to recognize the unavoidability of inequality among patients at any particular time, as well as between current and future patients. This approach to health care policy is based on providing

1. a basic adequate health care package, recognizing that there will be

2. unequal care, while allowing

3. innovation to be driven by consumer demand, investments, and free-market, profit-driven forces.

This approach recognizes that the human condition sets limits to the pursuit of health and equality, that there are both private and public resources, and that there are disparate views as to how these resources should be used. Within these constraints, there can be cost-containment.

Though this approach in fact generally structures actual American health care delivery, many Americans nevertheless embrace a health care ideology affirming a manifestly non-existent state of affairs, leading to significant cost overruns as well as disquietude when all do not secure the best of care, much less equal care. This contemporary American health care ideology purports that it is obligatory
1. to provide all with the best of care (i.e., not denying anyone access to any health care innovation necessary to save life or ameliorate significant morbidity, no matter how expensive),

2. to provide equal care to all, and

3. to maximize patient and physician choice.

The difficulty is that this constellation of goals is unrealizable if resources are limited.

Coming to terms with the human condition requires abandoning an egalitarianism of envy (worrying about who has more) in favor of an egalitarianism of altruism (seeking cheaply to provide a robust basic package of health care for all as a default position).25

Coming to terms with human finitude requires recognizing as well the role of profits and the market in medical innovation: humans are not moved by love alone, but also by greed. A well-structured society harnesses greed, the desire for profit, in a way that increases the good available to all. Capitalist systems, for example, by rewarding those who succeed in the market tend to increase the standard of living and the amount of resources generally available. On the other hand, societies that suppress the pursuit of profit tend to be marked by scarcity. Accommodating to the human condition requires recognizing the finite ability of humans to be moved by altruism or love, that is, charity. If it is the case that medical innovation requires the investment of capital, and if it is the case that the market is the most efficient means for securing and productively directing such investment, then markets and the pursuit of profit are essential to decreasing mortality and morbidity risks. Moreover, in a world of disparate moral views, the market, like limited democracies, is one of the prime
modes of peaceable collaboration in the face of numerous and competing views regarding the proper goals of health care and the biomedical sciences.

A bioethics of money and markets can then be recognized as integral to the human condition (e.g., through recognizing the limits of central planning and the limits of charity), at least if one wishes to accelerate medical technological progress. These considerations can be summarized as follows.

1. In the face of a moral pluralism and a diversity of goals proposed for health care and the biomedical sciences, the market provides a peaceable procedural means for large-scale collaboration towards the realization of those goals.

2. If markets driven by the profit motive are generally the most efficient means for nurturing technological innovation, they should be affirmed as integral to relieving the human condition and to achieving progress in health care and the biomedical sciences.

3. If resources are needed for innovations with respect to pharmaceuticals and medical devices, and if such innovation is desired, then, given the limits of human altruism (i.e., the limited inclination of persons to support research and development through charitable donations), and given the limited readiness to be taxed to support such research (not to mention the greater efficiency of market responses in comparison to governmental central planning in many of these areas), the pursuit of profit will prove indispensable. As a fact of the matter, the profit motive (greed, if one will) will be a cardinal source of the financial resources and the human energy needed to support the development of new pharmaceuticals and medical devices.
In short, the very character of human finitude, including the finitude of secular moral reflection, places the market, money, and profit as central elements of the human endeavor to improve the human condition.

Any choice to limit profits reflects values in conflict with a peaceable, efficient pursuit of postponing death and decreasing suffering. Such choices may result from assigning equality a priority over concerns for security from death and suffering, as well as from interests other than prosperity. Since bioethics is a plural noun in the sense of compassing disparate views as to how one ought to rank values, and therefore as to how one should regard the market, money, and profit, one is again given good grounds for examining with care the value commitments of any bioethicist one consults for guidance in these matters. One will need to determine the bioethicist’s ranking of cardinal human concerns such as postponing death, relieving suffering, achieving prosperity, or realizing an egalitarianism of envy.

VI. Bioethics: The Ordination of a Secular Priesthood

Assessments of bioethicists and the role of their background moral commitments in the advice they forward can be better appreciated in light of the history of the field’s development. Bioethics emerged in the United States as if from nowhere at the beginning of the 1970s. It took shape as an attempt to secure secular moral guidance in the face of rapid biomedical progress and dramatic changes in American society. Three developments tied to scientific and technological innovation in the mid-20th century created a hunger for concrete medical-moral direction.
1. In the second half of the 20th century, medicine for the first time was able dramatically to postpone death and ameliorate suffering: health care and the biomedical technologies became clearly and broadly effective.

2. In the second half of the 20th century, the emergence of effective, highly technological medical interventions requiring highly trained, highly paid personnel caused the amount of the Gross Domestic Product dedicated to health care to increase: health care became expensive.

3. With these technological interventions came new medical-moral puzzles, as with regard to the definition of death, the proper circumstances for the acquisition of organs for transplantation, and the appropriate uses of genetic knowledge and genetic engineering: biomedical technology generated seemingly novel moral questions.

Just as this demand for moral guidance in the use of health care and the biomedical technologies emerged, the traditional sources for such guidance were marginalized or deconstructed.

Physicians entered the 20th century as members of a profession that de facto functioned as a guild, internally producing the norms for the conduct of its members.27 In the 20th century, Supreme Court holdings recast the status of medicine from a guild into a trade,28 thus implying that the moral norms that should guide it should come from society as a whole, not from within the profession of medicine29: medicine was progressively deprofessionalized and the field of medical ethics was marginalized, if not brought into question.
2. America entered the 20th century as a *de facto* and *de jure* Christian polity;30 during the mid-20th century, through a series of Supreme Court holdings, America was effectively *de jure* deChristianized in favor of an explicitly secular understanding of law and public policy.31 The result was that the traditional guidance of priests and ministers, as well as rabbis and other religious representatives32, regarding the use of health care and the biomedical sciences was marginalized: the public forum was secularized, and medical-moral theological reflections were no longer seen as appropriately guiding public policy.

In summary, just as the need for medical-moral guidance became acute, a moral vacuum was created by the deprofessionalization of medicine and the secularization of American society.

In this circumstance, one can understand why many would seek to fashion a field of reflection and practice to guide medicine and the biomedical sciences.33 Against the background of what had been available in a theological context or in a context of a professional ethics that had encompassed nearly all practitioners,34 it seemed to many plausible that rational reflection should produce a surrogate for this religious and professional guidance that had been lost. This field became bioethics. The term bioethics was likely coined in 1970 by Van Rensselaer Potter who had in mind an environmentally friendly ethos or way of life.35 The current meaning of the term stems from its use by the Kennedy Institute Center for Bioethics, Georgetown University in Washington, D.C. Claims have been made for an independent coinage by the Institute’s first director, André Hellegers, as well as by Sargent Shriver.36 In any event, the current meaning is that provided by Hellegers and Shriver, not by Potter.
That bioethics as we now know it was nurtured at a Roman Catholic academic institution should come as no surprise. Roman Catholic moral theological assumptions regarding natural law made it seem plausible that philosophical reflection could produce a canonical, content-full account of the morality able to guide health care and the biomedical sciences, as well as develop the guideposts necessary for a cadre of clinical ethics practitioners. The result was the creation of an order of secular priests, persons accepted as authorities regarding the canonical medical morality and as in authority to serve as experts for commissions and courts. The difficulty is that in a secular pluralist society such a canonical morality is not uncontroversially unavailable. In addition, given the pronounced influence on the early leaders of bioethics of social democratic approaches to health care, there tended to be a suspicion of profit and market solutions. All of this brings this essay back to one of its recurring themes: it is important to recognize the value assumptions (i.e., biases) brought by bioethicists to the analysis of any problem or policy choice. One must appreciate the multi-valent agendas of bioethicists so as to reclaim a more balanced appreciation of the morality of profits and medical innovation.

VII. Summary: Some Basic Caveats

Bioethicists have succeeded best in giving general moral advice when they have not acted as partisans of a particular moral vision or perspective, but instead have aimed at mediating disputes on behalf of contractual or consensual resolutions of disagreements, as well as the production of consensual bases for collaboration (e.g., through procedures of free and informed consent). They have also become well accepted as investigators of the pedigree of consent: students of who consents to what and under what circumstances. Despite such
legitimate success in this cluster of undertakings, there has been a temptation to assume the role of an expert regarding and a defender of a particular moral view as if that were held uncontroversially by society as a whole so as to guide legislation, court holdings, and jury decisions.\textsuperscript{40} Within a secular pluralist society, bioethicists can claim a powerful rhetorical advantage when they confront legislatures, judges, or juries as purported bioethics experts who can testify as to what is just, fair, or morally right as if there were a substantive, uncontroversial morality accepted by all decent citizens as binding, regarding which the bioethics expert is both an authority and in authority to opine.

In the light of these considerations, one should direct critical attention to the value commitments of bioethicists, in particular analyzing the assumptions, implications, and consequences of different bioethical views or positions. When addressing issues bearing on the bioethics of business ethics and the moral norms that should guide health care and the pharmaceutical industry, one should lay out the geography of the views embraced by any bioethics consultant regarding profit motive, markets, and innovation. This can be done by reference to ten heuristic, practical, moral maxims. A bioethicist’s considered judgment regarding these maxims can aid in rendering explicit the bioethicist’s presuppositions and the implications of the position he takes.

1. When one pays the piper poorly, one generally gets little and/or poor music. The availability of good profits and good pay in general tends to attract individuals who are creative and able, so that a scarcity of profit and financial reward in those industries producing pharmaceutical innovations and new medical devices will disadvantage future patients.
2. There is no such thing as a perfectly safe drug or medical device. The choice to market a less-than-perfectly-safe pharmaceutical or medical device is not in and of itself unethical, but rather reflects a recognition of human finitude. Whether such a choice is unethical depends on whether the manufacturer followed publicly established procedures to establish safety and efficacy, while openly and clearly identifying the risks.

3. The choice generously to compensate current injured patients for damages from pharmaceuticals and medical devices implicitly involves the choice to offer less innovation to patients in the future, insofar as the costs of such compensation when imposed on the makers of pharmaceuticals and medical devices will in any way hinder the pace of innovation. There is no moral claim right, *ceteris paribus*, to be made whole for damages from pharmaceuticals or medical devices when one knew or should have known that their use offers not only benefits but risks to those who employ them.

4. The choice between providing greater financial rewards either to plaintiff legal firms or to firms engaged in the production of pharmaceuticals and medical devices depends on where one wishes to reward and encourage innovation.

5. Since there are only three ways to acquire resources to support innovation in pharmaceuticals and medical devices, namely, through love (i.e., charity), coercion (e.g., taxation), and greed (e.g., the pursuit of profit in the market), one must always consider which avenue is more likely to advance the goals one endorses.
6. The choice to make pharmaceuticals and medical devices cheaply accessible to current patients is undertaken at a cost to patients in the future, insofar as any decrease in profits hinders the pace of innovation.41

7. A decision to limit patent protection for expensive drugs in the developing world represents a choice (insofar as profit attracts investment, and investment supports innovation) to help current patients in the developing world at a cost to future patients in the developing world. All else being equal, such choices will also benefit future patients who will not likely suffer from diseases and disabilities in countries where patent protection will not be limited and where profits will be attractive.

8. The unavailability of cheaply priced pharmaceuticals and medical devices for persons in the United States or the Third World is not to be ascribed solely to the companies producing them, but to all governments that do not tax to provide funds to purchase those pharmaceuticals and medical devices and distribute them cheaply (i.e., absorbing the costs), as well as to individuals who fail to contribute funds towards that goal.

9. The choice not to interfere with higher prices for pharmaceuticals and medical devices in the United States represents a choice to advantage patients in the future.

10. Insofar as profit and financial reward are contributed in an important degree to innovation, and insofar as such innovation is necessary for improving the human condition, and insofar as the pursuit of such improvement is, all things being equal, a moral obligation, then interfering with profit and financial reward in the
pharmaceutical and medical-device industries through (a) lowering the prices of drugs and medical devices, (b) limiting patent protection, or (c) providing large awards to injured patients will be immoral.

These maxims display the intractable bond among profit, innovation, and a philanthropic regard of humans in need. The profit motive underlies the possibility of lowering morbidity and mortality risks.

This state of affairs does not foreclose pursuing goals other than the peaceable development of innovative pharmaceuticals and medical devices. Some may in fact value aiding patients in the present more than being able better to aid patients in the future. Others may value the pursuit of equality over the realization of greater liberty, prosperity, and security. Judgments in these areas are complicated by the circumstance that emerging antibiotic resistance and the threat of new pathogens (e.g., SARS) may require pharmaceutical innovations simply to maintain the status quo. Insofar as one wishes to secure a future in which humans will likely have a better life expectancy characterized by less disease and disability, one will wish to reward the pursuit of profit in pharmaceuticals and medical devices.
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1 In this essay, the term ethicist is used interchangeably for bioethicist, with preference being given to bioethicist. In either case, an individual is identified who can provide moral guidance for individual and public policy choices, bioethicists being those whose interest is directed primarily to choices involving health care and the biomedical sciences.


4 Bioethicists have been acknowledged as moral experts in the sense of giving testimony in court. See, for example, Kevin Wm. Wildes, S.J., “Healthy Skepticism: The Emperor has Very Few Clothes,” *Journal of Medicine and Philosophy*, vol. 22 (August 1997): 365-371. See also Kenneth Kipnis, “Confessions of an Expert Ethics Witness,” *Journal of Medicine and Philosophy*, vol. 22 (August 1997): 325-343. Bioethicists also play a quasi-juridical role on certain ethics committees in a fashion that appears to presuppose that they have expertise regarding a guiding, content-full morality. See, for example, Texas law with respect to certifying that a treatment is “inappropriate” and can be withheld, despite the protests of the patient and/or the patient’s family. Texas Statutes 166.045.


7 In this essay, no distinction is made between morality and ethics, though such distinctions carry important weight in particular philosophical accounts such as that of G.W.F. Hegel, in *Philosophie des Rechts*, § 141-157.

8 In this essay, a contrast is drawn between content-full versus procedural moralities. A content-full morality embraces particular normative claims that involve particular orderings of right-making conditions and cardinal human values. A procedural morality
eschews directly affirming any such ordering and instead proposes a procedure for establishing a moral framework. The first focuses on discovering a concrete pattern of appropriate behavior; the second focuses on creating a concrete pattern of appropriate behavior.

9 The author’s defense of a secular moral philosophical skepticism should not be interpreted as a metaphysical skepticism. It is one thing to hold that secular moral philosophical reflection is insufficient to identify moral truth, and another to hold that such truth does not exist. The author is a practicing Orthodox Christian. See Engelhardt, *The Foundations of Christian Bioethics* (Lisse, Netherlands: Swets & Zeitlinger, 2000).


11 “Man is the measure of all things, of things that are that they are, and of things that are not that they are not.” Diogenes Laertius, *Lives of Eminent Philosophers*, IX.51, trans. R.D. Hicks (Cambridge, MA: Harvard University Press, 2000), vol. 2, p. 463, 465.


14 Alasdair MacIntyre has aptly summarized this state of affairs. “The most striking feature of contemporary moral utterance is that so much of it is used to express disagreements; and the most striking feature of the debates in which these disagreements are expressed is their interminable character.” MacIntyre, *After Virtue* (Notre Dame, IN: University of Notre Dame Press, 1981), p. 6.


16 The only escape from the impasse described by Protagoras, Clement of Alexandria, and Agrippa lies in restoring a noetic faculty, a way of knowing directly, so that the knower can come directly into union with the known, a point acknowledged by the Christian philosopher Clement of Alexandria. For a reflection on these matters, see John Romanides, *The Ancestral Sin*, trans. George S. Gabriel (Ridgewood, NJ: Zephyr Publishing, 2002).
17 American society, for example, is broken into various communities with conflicting views regarding issues such as abortion, physician-assisted suicide, homosexual marriage, tax law, and health care reform.

18 The cultural struggle to shape the character and content of law and public policy has been characterized by James Davison Hunter as the culture wars. Though he focused primarily on America, the issues he explores apply to liberal democratic societies generally. The character of the conflict in each polity depends on the relative strength and character of the different contending moral perspectives. Where one perspective predominates, the cultural struggle may be relatively obscured. See Culture Wars: The Struggle to Define America (New York: Basic Books, 1991). In this analysis, “culture” and “cultural framework” identify world-views, comprehensive thought-styles, or paradigms. Such moral and metaphysical perspectives shape how a community regards and appreciates morality, reality, and religious issues. The tie between morality, metaphysics, and religion must be noted. The Latin cultus involves both agricultural cultivation and religious reverence, as does the noun cultor. By the end of the Roman Republic and the time of Cicero, cultura designated agricultural cultivation as well as that refinement exemplified by philosophy and manners at court. Religious commitments tend in various degrees to shape a culture. A culture, a paradigm, a thought-style frames and sustains an appreciation of morality. There is often more than one culture competing for dominance in one geographical area. One might think, for example, in the United States of the competition among various secular cultural perspectives and various religious cultural perspectives. Fleck influenced Thomas Kuhn and Kuhn’s The Structure of Scientific Revolutions (Chicago: University of Chicago Press, 1962; 2nd ed., enlarged, 1970). The point is that one appreciates facts and findings within a social context, a thought-collective, that brings with it a particular way of discerning what counts as the basic furniture of the universe, the proper ways to achieve knowledge, and the correct ways to order values, both epistemic and non-epistemic. Knowledge is socially and historically located. See, for example, Ludwik Fleck, Entstehung und Entwicklung einer wissenschaftlichen Tatsache (Basel: Benno Schwabe, 1935); Genesis and Development of a Scientific Fact, eds. T. J. Trenn and R. K. Merton, trans. F. Bradley and T. J. Trenn (Chicago: University of Chicago Press, 1979).

19 Christendom (i.e., legally established Christianity) fell into ruins in stages, a crucial step occurring in 1648. “The Treaties of Westphalia finally sealed the relinquishment by statesmen of a noble and ancient concept, a concept which had dominated the Middle Ages: that there existed among the baptized people of Europe a bond stronger than all their motives for wrangling—a spiritual bond, the concept of Christendom. Since the fourteenth century, and especially during the fifteenth, this concept has been steadily disintegrating.... The Thirty Years’ War proved beyond a shadow of a doubt that the last states to defend the idea of a united Christian Europe were invoking that principle while in fact they aimed at maintaining or imposing their own supremacy. It was at Münster and Osnabrück that Christendom was buried. The tragedy was that nothing could replace it; and twentieth-century Europe is still bleeding in consequence.” Henri Daniel-Rops, The Church in the

20 The default secular morality embraced in the face of numerous content-full moral-theological and moral-philosophical perspectives is one that does not have the characteristics of those that define the pluralism of contemporary society. As a consequence, it is articulated as a different level from them and therefore is not one more among the content-full moral visions competing for dominance.

21 The Western European religious conflicts of the 16th and 17th centuries produced different accommodations to moral and religious diversity in Britain versus the Continent. The Continent, especially central Europe, sought to avoid a direct confrontation with moral and religious diversity. As a result, the Peace of Augsburg (1555) and the Pax Westphalica (1648) affirmed a sociopolitical structure that accommodates religious moral diversity through segregating disagreeing groups into different regions, each generally (with some exceptions) possessing a preponderance of one religion. The formula of “cuius regio, eius religio” allowed the continuance of political structures that did not need to confront head-on moral and theological diversity within one region. Instead, religious diversity was exported into a patchwork of predominantly Roman Catholic or Protestant sovereignties. In contrast, in the United Kingdom, especially in England, such an accommodation proved less workable. After the Civil War (1642-1647), the Revolution of 1688, and the Declaration of Rights in 1689, England through a number of steps progressively came to terms with religious diversity within one territory. The result was a resolution of the religious and cultural wars and conflicts in a fashion not achieved in central Europe until the second part of the 20th century. It was this solution (i.e., providing for moral and cultural diversity within one society and polity) that became most influential for the United States.

22 Such polities, in order to function, must invoke a moral perspective that is not simply one more among the various content-full moralities competing for dominance. It is for this reason that the United States Constitution is a formal-right constitution, not a material-right constitution.

23 For a further account of the character of secular pluralist societies and the role of limited constitutional governments see H. T. Engelhardt, Jr., The Foundations of Bioethics, 2nd ed. (New York: Oxford University Press, 1996), chaps. 1-4.


25 One can distinguish between an egalitarianism of envy and an egalitarianism of altruism by reference to three fictive worlds, each with ten persons. In World One, the reference world, all ten persons have 6 units of the good. In World Two, nine persons have 6 units, and one has 10. If one holds World One to be preferable to World Two, then one
affirms an egalitarianism of envy. One is committed to making one person worse off (reducing the person with 9 units to 6), as well as decreasing the total amount of good in the world (i.e., reducing the quantity of good from 63 to 60), in order to achieve an equality that provides no benefit beyond the equality itself. World Three has nine persons each with 6 units of the good, and one person has 1 unit. If one attempts as cheaply as possible to raise that one person towards the level of the other nine, one is an egalitarian of altruism. One is concerned with inequalities not for the sake of inequality, but because some have less of the good than others.

26 For an overview of this history of the emergence of bioethicists as quasi-secular priests and an analysis of the geography of the history involved, see H. T. Engelhardt, Jr., “The Ordination of Bioethicists as Secular Moral Experts,” Social Philosophy & Policy 19 (Summer 2002), 59-82.

27 In the United States, as in Western European countries, physicians developed a code of ethics fashioned by the profession itself. These undertakings were heavily influenced by individuals such as Gregory and Benjamin Rush. See, for example, Laurence B. McCullough, John Gregory and the Intention of Professional Medical Ethics and the Profession of Medicine (Dordrecht: Kluwer, 1998); John Gregory, Observations on the Duties and Offices of a Physician (London: Strahan, 1770), Thomas Percival, Medical Ethics (Manchester: Russell, 1803); Jacqueline Jenkinson, Scottish Medical Societies 1731-1939 (Edinburgh: Edinburgh University Press, 1993); and Benjamin Rush, Observations on the Duties of a Physician and Methods of Improving Medicine (Philadelphia: Prichard and Hall, 1789). These issued in a set of ethical guidelines for the conduct of physicians. See, for example, Medical Association of North Eastern Kentucky, A System of Medical Etiquette (Kentucky: Maysville Eagle, 1839); Samuel A. Cartwright, “Synopsis of Medical Etiquette,” New Orleans Medical and Surgical Journal 1, 2 (1844): 101-104; and Code of Medical Ethics Adopted by the American Medical Association at Philadelphia in May, 1847, and by the New York Academy of Medicine in October, 1847 (New York: H. Ludwig, 1848). For an overview of these developments, see Donald E. Konold, A History of American Medical Ethics, 1847-1912 (Madison, WI: The State Historical Society of Wisconsin, 1962).

28 Through a number of holdings, the United States Supreme Court transformed the American medical profession from a self-regulating guild to a trade regulated by society at large. See, for example, The United States of America, Appellants, v. The American Medical Association, A Corporation; The Medical Society of the District of Columbia, A Corporation; et al., 317 U.S. 519 (1943). American Medical Assoc. v. Federal Trade Comm’n, 638 F.2d 443 (2d Cir. 1980).

29 As medicine ceased to function as a quasi-guild, it became implausible that it should possess internal norms independent of those as society as a whole. Medical ethics was then placed within a general ethics for health care and the biomedical sciences, which is what bioethics offered.
The extent to which Christianity (in particular, Protestant Christianity) was the normative American religion is now often overlooked. “Evidence that Protestant Christianity was the functional common religion of American society would overwhelm us if we sought it out.” John Wilson, “Common Religion in American Society,” in Leroy S. Rouner, ed., Civil Religion and Political Theology (Notre Dame, IN: University of Notre Dame Press, 1986), 113. Even the United States Supreme Court noted with approval a Pennsylvania state court case holding [Updegraph v. The Commonwealth, 11 S & R 394, 400] that “Christianity, general Christianity, is, and always has been, a part of the common law of Pennsylvania; … not Christianity with an established church, and tithes, and spiritual courts; but Christianity with liberty of conscience to all men.” Church of the Holy Trinity v. United States, 143 US 457 (1892) at 470. As late as the 1930’s, the Supreme Court could opine, “We are a Christian people, according to one another the equal right of religious freedom, and acknowledging with reverence the duty of obedience to the will of God.” United States v. Macintosh, 283 US 605 (1931), at 625. In 1951, the United States Supreme Court could still characterize Americans as a religious people, albeit not a Christian people. “We are a religious people whose institutions presuppose a Supreme Being.” Zorach v. Clauson, 343 U.S. 306 (1952) at 313. On April 22, 1864, the United States Congress authorized the motto “In God we trust” to be placed on American coinage. The Congressional Globe, p. 144. In 1864 this motto appeared for the first time on the two-cent coin. The Coinage Act of February 12, 1873, states, “the Director of the Mint, with the approval of the Secretary of the Treasury, may cause the motto ‘In God we trust’ to be inscribed upon such coins as shall admit of such motto....” Appendix to the Congressional Globe, February 12, 1873, Chap. CXXXI, Sec. 18, p. 237. On July 30, 1956, the 84th Congress declared that “The national motto of the United States is declared to be In God We Trust” (P.L. 84-140), Law 36 U.S.C. 186. The secularization of America left a vacuum of authoritative moral leadership, which various genre of secular moral experts have sought to fill.

The 1950’s and early 1960’s radically recast U.S. constitutional presumptions about the place of religion in public life, in particular through applying the First Amendment to the U.S. Constitution to the states, so as not just to forbid a preference of a particular religion (in that sense, its establishment), thus requiring a strict separation of church and state. See, for example, Torcaso v. Watkins, 367 U.S. 488 (1961), in which the United States Supreme Court held that Maryland could not require a state officeholder (in this instance, a notary public) to affirm belief in God. In Abington School District v. Schempp, 374 U.S. 203 (1963), the US Supreme Court held that public schools cannot require that passages from the Bible be read or that the Lord’s Prayer be recited. In the wake of these holdings came a recasting of the established morality bearing on sexuality and reproduction. See, for example, Griswold v. Connecticut 381 U.S. 479 (1965), which prohibited restricting access by married couples to contraceptives, Eisenstadt v. Baird 405 U.S. 438 (1972), which extended this access to unmarried persons, and Roe v. Wade 410 U.S. 113 (1973), which required the legalization of abortion.

33 Before the appearance of bioethics proper, there were numerous considerations concerning how to gain a source for guidance regarding the developments in health care and the biomedical sciences. Many of the important essays were authored by Edmund D. Pellegrino and collected in Humanism and the Physician (Knoxville: University of Tennessee Press, 1979). See, also, Maurice B. Visscher (ed.), Humanistic Perspectives in Medical Ethics (London: Pemberton, 1973).

34 In the first part of the 20th century, it was nearly impossible to practice medicine without being a member in the local county medical society. Such is no longer the case. As for the American Medical Association, less then 50% of physicians in the United States are now members.


36 For an account of coinage of the term bioethics, see Warren Reich, “The Word ‘Bioethics’: Its Birth and the Legacies of Those who Shaped its Meaning,” Kennedy Institute of
The Kennedy Institute of Ethics, Center for Bioethics, Georgetown University, began to run yearly summer intensive courses in bioethics in order to train a genre of clinical consultants distantly equivalent to secular hospital chaplains. They carried with them into their work a set of four basic moral principles (i.e., the principles of autonomy, beneficence, non-maleficence, and justice), which came to be known as the Georgetown mantra. This practical secular moral theology came first to be expressed in Tom L. Beauchamp and James F. Childress, *Principles of Biomedical Ethics* (New York: Oxford University Press, 1979).

A formative event in the development of bioethics was the role played by bioethicists in the fashioning of health care policy bearing on the use of human subjects in research. See National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research, *The Belmont Report* (Washington, DC: U.S. Government Printing Office, 1978, DHEW [OS] 78-0012). It is only later when it became clear that each president will choose his own commission reflecting as far as possible his own moral perspective that the partisan character of bioethical advice became more apparent. One might consider the differences between the National Bioethics Advisory Commission of Bill Clinton and George Bush’s President’s Council on Bioethics.


Here the author must report that, in various consultations with law firms, he has encountered the submission of statements by bioethicists purporting to be ethics experts able to judge how parties to a law suit ought to have acted, apart from what the law strictly requires.

One must critically regard any health care policymakers who bemoan the contribution to higher health care costs made by innovative pharmaceuticals and new medical devices. Such policymakers fail to recognize that they are lamenting the necessary condition for lowering morbidity and mortality risks in the future.