Review of "Health Law and Bioethics: Cases in Context"

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HEALTH LAW AND BIOETHICS: CASES IN CONTEXT


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INTRODUCTION

Preeminent jurist and legal scholar Oliver Wendell Holmes is credited with having said: “It cannot be helped, it is as it should be, that the law is behind the times.” Nevertheless, this innate lag time between science and technology, on the one hand, and law, on the other hand, is rarely explicitly recognized, much less explored in any depth. In Health Law and Bioethics: Cases in Context, however, the notable contributing chapter authors’ and the prominent volume editors expertly illustrate not only how science and technology, as applied in the health care sector, outpace law but also highlight the consequences of such asynchronous development. This is achieved through telling the back stories of seminal health law cases’ within their relevant cultural and temporal contexts.
AN OVERVIEW OF HEALTH LAW AND BIOETHICS: CASES IN CONTEXT

In fact, *Health Law and Bioethics: Cases in Context*, which is replete with photographs, focuses as much—if not more so—on the back stories of the key players (including the attorneys and judges) in each case as on the resulting law. This contextually steeped, humanistic approach is virtually always lost in traditional casebooks and treatises, which concentrate almost exclusively on the legal doctrines, as though they evolve in a “clean room”—a sterile environment devoid of cultural milieu or human experience. But, in certain legal realms, such as health law, the human dramas underlying the cases are not merely triggering events. Rather, these real-life vignettes about the human condition are vital to making sense of the resulting the legal doctrines.

By taking this non-traditional approach, the book enables readers to appreciate the intricate and convoluted nature of a panoply of issues at the nexus of law and bioethics, including: the contours of the patient-provider relationship and the standard of care; patient autonomy versus public health; death and dying controversies that often arise when a patient is diagnosed as being in a persistent vegetative state; medical futility dilemmas; legislatively established presumed consent in the cornea harvesting context; quandaries created by assisted reproductive technologies; and conflicts of interest *vís a vís* human subjects research. In its 11 chapters, the manuscript even covers many of the more traditional, corporate health law concerns, which are not typically viewed as falling primarily within the boundaries of bioethics, such as: institutional liability; fraudulent billing; and charitable status.
Given the breadth of topics, the book could easily serve as the principal assigned text in undergraduate, graduate, law school, medical school, or clinical program bioethics and health law survey courses—if supplemented by the actual cases. The volume would also and unquestionably be highly valuable as a secondary or recommended reading in such courses to reinforce the social backdrop against which health law evolves from truly trying human affairs. Furthermore, for those teaching health law and/or bioethics classes, the text is most definitely a “must read,” as it provides a vast wealth of factual content with which to create perspective around key cases and fundamental topics, as well as to craft a context-rich framework that encourages analytical profundity in the classroom. Moreover, the manuscript is even an excellent recreational read for those with a keen interest in health law and/or bioethics, as it is certain to captivate experts and neophytes, alike.

THE LEGAL-TECHNOLOGICAL TEMPORAL DIVIDE

“*T+he touchstone of science is progress.” The goal of science is to increase the body of knowledge that constitutes humankind’s understanding of the workings of the world. Technology’s aim is, then, to harness such scientific knowledge into valuable, if not always beneficial, applications. The hallmark of law, however, is process. Contrary to popular belief, at least in theory if not in actual practice, the process of making law should not closely resemble that of making sausage. Rather, the process from which law emanates should be much more reserved, thoughtful, selective, and exacting—if not also more hygienic. As a result, so-called “test cases” and “cases of first impression” bring to the fore—albeit, after the fact—questions about how to resolve thorny situations in which a recently developed technology has been applied—or misapplied, as the case may be—and the undesirable result was unforeseen by the realms of both science and law.
While possibly somewhat unsettling, such after-the-fact determinations are the rule, rather than the exception, when dealing with impacts of emerging technologies for a multitude of reasons. First, as a nation that values innovation, the law tends to allow for relatively unfettered scientific and technological advances. Second, for better or for worse, the formalized manner in which law arises and is subsequently amended in democratic societies is both deliberative and time-consuming. Ideally, at least, in democracies, law should, in essence, be the crystallization of the overarching norms held by the majority of the populace in a given era with regard to specific subjects and/or classes of conduct. As a codification of cultural mores, law naturally tends toward the reactionary—an *ex post facto* response to often untoward or, even, catastrophic developments. This retrospective nature of the initial articulation and subsequent modification of legal dictates is particularly pervasive in fields characterized by rapid, if not exponential, change, such as health care and biotechnology. Third, finally, and maybe most notably, accurately predicting the developmental trajectory and associated impacts of nascent technologies have proven, time and again, “to be a loser’s game.” This is so because humankind is “not good at predicting socio-technological change because [people are] not good at determining which variables will shift and which won’t through such changes.”

**CONCLUSION**

While law and technology may naturally be temporally askew, a book like *Health Law and Bioethics: Cases in Context* has long been overdue. It is high time that the law, especially health law, be placed back into the holistic, humanistic context that gave rise to it so that it can be far better understood and appreciated. This is not only an essential reminder for those currently engaged in
the medico-legal field but also an indispensable lesson for those soon to enter it. *Health Law and Bioethics* provides an excellent vehicle for achieving this task.

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5 The famous saying related to this analogy is that “the making of laws is like the making of sausages—the less you know about the process the more you respect the result.”

6 In fact, the U.S. government uses public funds to support scientific and technological research and development (R&D). Specifically:

   In his FY2010 budget request, President Obama sought $147.620 billion for R&D, a $555 million (0.4%) increase from the estimated FY2009 R&D funding level of $147.065 billion (not including FY2009 R&D funding provided under the American Recovery and Reinvestment Act (P.L. 111-5)]. According to the Obama Administration, preliminary allocations of R&D funding provided under P.L. 111-5 brought total FY2009 R&D funding to $165.400 billion.


As to the allocation of R&D funding:

   Six federal agencies received 95.1% of total federal R&D spending in the President’s FY2010 request: the Department of Defense (54.0%), Department of Health and Human Services (21.0%), National Aeronautics and Space Administration (7.7%), Department of Energy (7.3%), National Science Foundation (3.6%), and Department of Agriculture (1.5%). The President’s FY2010 request included $30.884 billion for basic research; $28.139 billion for applied research; $84.054 billion for development; and $4.543 billion for R&D facilities and equipment.

*Id.*

7 Recent examples include the economy-rocking financial scandals of ENRON and WorldCom, which were followed up by the enactment of the Sarbanes-Oxley Act.
