

## Law And Bioethics: An Introduction

by Jerry Menikoff

Washington, D.C.: Georgetown University Press, 2001. Pp. 506.<sup>1</sup>

"FOR MANY OF YOU, this will be an entry to a new kingdom, with its own unique language. Perhaps it is not quite as magical as Harry Potter's world, but you might be pleasantly surprised to find that it does indeed possess a magic of its own."<sup>2</sup> On this note, Jerry Menikoff ends his introduction and invites the reader into the selected cases, analyses, and questions that together constitute this book about "*the law relating to bioethics*."<sup>3</sup> The text is designed with the non-expert audience in mind, those with little or no training in the law, and approaches its subject in a textbook-style format (this is discussed more below). As such, I will review this book both from a pedagogical perspective—would I want to use this text in a course on bioethics or bioethics and the law—and from the perspective of the non-expert reader (no formal training in law).

The range of issues and topics covered in this book well map those typically found in introductory health care ethics texts. With 16 chapters in total, this book covers such topics as reproduction (*e.g.*, the right to privacy, abortion, sterilization); the patient-doctor relationship and standards of care (*e.g.*, the limits of informed consent, alternative medicine); end-of-life decisions (*e.g.*, the right to refuse care, "futile" medical care); genetics (*e.g.*, patenting genes, health insurance and one's genetic predisposition to certain diseases); the definition of death; and, organ transplantation. Menikoff follows a similar format for each chapter with a brief introduction to the topic and some prefacing remarks to the cases. The selected portions of the included cases are substantial and each case is followed by a list of questions and/or comments. With this format, the text is probably best read in a group setting (classroom, seminar, or otherwise) with those willing and interested in exploring the various paths Menikoff lays before the reader in his notes and questions. Although an interested reader could work through this text alone, it seems most suited for a teaching context. Indeed, Menikoff indicates that a "Teacher's Manual," that gives an overview of the issues discussed, suggestions for use in teaching, and possible answers to the questions posed throughout the text, is available.

It is also worth noting at the outset that this text is clearly best read in order. While one could pick and choose among the chapters, and even among the different cases, the flow is most obviously from the first to the last

1. Thank you to Jeff Kirby for his helpful suggestions in developing this review.

2. Jerry Menikoff, *Law and Bioethics: An Introduction* (Washington, D.C.: Georgetown University Press, 2001) at 3.

3. *Ibid.* at 1 [Author's emphasis].

chapter. Menikoff provides “teasers” of what is to come later and notes at different points, things worth keeping in mind or comparing/contrasting with either earlier or later cases in the text. This definitely helps to unify the book and provide relevant ethics-related links between seemingly disparate cases, but this can make it more difficult to select sections to cover in class, if not reading the whole book or a whole chapter.

This systematic investigation of the law as it relates to bioethics has lessons to teach that go beyond the actual content. For example, there is value in truly appreciating that judges and the courts can sometimes get it wrong, i.e., that the reasoning is not always clear and that good decisions can be overturned by higher courts, and that judges can reach what is considered to be the right conclusion, but on very different grounds and reasoning than one might think. Most lay readers and students already know this, but having the opportunity to engage with the reasoning first-hand is not as common. Understanding and gaining insight into the fact that good precedent can be established, even if based on poor reasoning, counterbalances the far-reaching effects of particular decisions. It also emphasizes, for students and lay readers, that simply because one may be an expert or have professional training, does not mean one always gets it right. In other words, there is reason to continue challenging what one is taught or believes and to carefully examine the arguments employed to reach a particular conclusion.

Although the law and bioethics may have different frameworks within and from which disagreements can be heard, engaging in the debate is worthwhile. The design of Menikoff’s book, particularly the questions that follow each case, promotes this sense of engagement and encourage even the beginner to form opinions about what he or she has just read. The relatively recent date of some of these cases (*e.g.*, *Roe v. Wade*<sup>4</sup>) and their pivotal after-effects in terms of ethics theory and practice can shock one out of a sense of complacency and add currency to these issues for students and non-expert readers alike. Appreciating that the decisions could have gone differently illustrates how essential it is that we keep talking about, for example, the extent of and/or limits to the rights to privacy and to refuse care from both legal and ethical perspectives.

More questions that would help to bridge the gaps between legal decisions and bioethics theory would be useful additions to this text. Although Menikoff specifically states at the outset that very little of what most would consider to be “traditional” ethics (terminology, ideas, etc.) will be found in the book, some questions or commentary in this direction would have assisted in demonstrating how differently or similarly the law and bioethics understand certain issues—and how each is constrained and informed by what has preceded. One thing that sometimes frustrates me about bioethics

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4. 410 U.S. 113, 93 S. Ct. 705 (1973).

is that certain examples become so entrenched that it seems literally every paper that follows, at least for a certain period of time, has to touch on them. Judith Jarvis Thompson's analogy of the relationship between a woman and her fetus with that of a person waking up one morning attached to an unconscious violinist with a fatal kidney ailment, who is now using the person's kidneys to stay alive, is one such example.<sup>5</sup> It even shows up in Menikoff's discussion of maternal-fetal interests.<sup>6</sup> The reasoning in law based on precedent and in bioethics based on these entrenched examples highlights the tension that exists, for me, in trying to balance knowledge of the law and of bioethics with the stimulation of creative and innovative approaches to these difficult issues—without necessarily being constrained by what has gone on before. Although Menikoff's use of this example most clearly bridges the gap between bioethics and the law, drawing the two fields together for the reader, it also flags this tension in how we teach students to think and reason. To his credit, Menikoff then proceeds to bring in other points of view that critique the value of this analogy.

While readers with more training in the law might take issue with the cases selected for this text or the questions/comments Menikoff includes, I believe this text works hard at encouraging one to go beyond a narrow or restrained understanding of the legal and ethical ramifications of the cases. For example, in his discussion of *Katskee v. Blue Cross/Blue Shield*,<sup>7</sup> Menikoff suggests that the reader consider what constitutes an illness or disease that should be covered by health insurance.<sup>8</sup> Does a genetic predisposition to a disease make one currently ill or uninsurable for that disease in the future? Is alcoholism or homosexuality or deafness an illness? What are the advantages and disadvantages to defining certain "conditions" or "states of being" as a disease or illness? What information is relevant to making these decisions? Further, in his introduction to the chapter on the definition of death, Menikoff invites the reader to compare the various technical definitions of death with one's own understanding of death.<sup>9</sup> Bringing in issues of personal identity, Menikoff also asks whether death is really about the loss of personhood and, if so, whether this should alter or change how the law, and by extension ethics, defines and examines topics related to death.

By explicitly setting out to design a text about the law relating to bioethics that is accessible to those with little or no background in the law, Menikoff both did and did not achieve this goal. With respect to the former, the overview of federalism and bioethics is both accessible and concise with

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5. Judith Jarvis Thompson, "A Defense of Abortion" (1971) 1 *Philosophy and Public Affairs* 47 at 48-49.

6. Menikoff, *supra* note 2 at 137.

7. 515 N.W.2d 645, 245 Neb. 808 (1994).

8. Menikoff, *supra* note 2 at 382-384.

9. *Ibid.* at 443-444.

enough depth, I believe, to situate the reader for the following case analyses and enables one to check back easily. However, the reader can quickly bog down in the number of questions that Menikoff lists for each case. Without some recourse to others to discuss the twists and turns of the cases and the judges' reasoning, it is possible that the non-expert reader could become frustrated, rather than intrigued, by the complexity and levels of debate. If using this text to teach undergraduates, it would be worth thinking carefully about the pace of the text and about how to introduce the various topics, aside from what Menikoff provides.

One may wonder whether this text has value for the Canadian reader or teacher, even though it is about United States law. My answer is yes for the reasons that follow. For better or worse, the Canadian bioethics scene is often shaped by American legal cases and their ethical analysis in ways not always recognized nor appreciated. Given that bioethics theory and practice is heavily influenced by these pivotal cases, we (Canadians) can benefit from learning more about the context within which these decisions were made and on what basis. As many readers of this review are aware, most introductory texts for bioethics often include snippets of, for example, the cases about Karen Ann Quinlan<sup>10</sup> or Helga Wanglie.<sup>11</sup> The extended selections from these cases that Menikoff's book provides, along with related cases, can assist in generating greater interest by students in the related ethical issues and ideas. It could also assist students in better differentiating, for example, the American and Canadian health care systems and the ways in which the values that support these systems may play out differently both in the courts and in health care practice. Reading parallel cases, where appropriate, in Canadian law concurrently with the American cases would likely be very illustrative. Cases such as *Reibl v. Hughes*<sup>12</sup> with respect to informed consent, and *Rodriguez v. British Columbia Attorney General*<sup>13</sup> with respect to the issue of assisted suicide seem appropriate; no doubt, others have come to mind for readers of this review as well.

Although it becomes clear that one is necessarily receiving Menikoff's perspective on these cases, especially in terms of the questions he asks, he is careful to remind you of this at times by inserting a personal comment or remark. This is helpful both for personalizing cases and reasoning that can, at times, for the non-lawyer reader seem quite distant or foreign and for inviting the reader to disagree or ask another question not listed. His interjections, rather than distract, give the impression of an author lovingly crafting and weaving together the various pieces of this text. Unlike

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10. *Re Quinlan*, 70 N.J. 10, 355 A.2d 647 (N.J. Sup. Ct.) (1976).

11. *Re Wanglie*, No. PX-91-283 (Prob. Ct. Minn. Dist. Ct. July 1, 1991), reprinted in 7 *Issues L. & Med.* 369 (1991).

12. [1980] 2 S.C.R. 880, 114 D.L.R. (3d) 1.

13. [1993] 3 S.C.R. 519, 107 D.L.R. (4th) 342.

most texts, the reader gains a sense of the author who is lurking behind the words and paragraphs, wondering whether you will be drawn into the magic of the law, as he has.

In my estimation, there is one area of this book that could be strengthened and two things that are missing. The former is a longer glossary; the current glossary is very short and could be added to, especially with respect to some of the ethics and legal terms utilized. For the lay reader, these terms—at least in their technical sense—may be unfamiliar and it would be helpful to be able to refer to a quick explanation or definition (*e.g.*, autonomy, beneficence, euthanasia). The first of the latter is a discussion of and inclusion of cases that speak to organizational health care ethics. Given that this area is a growing edge of bioethics research, it would be a wonderful addition for Menikoff to include cases that could contribute to a better sense of an institution's responsibilities with respect to its employees and staff, as well as patient care, or even whether and in what ways it will be possible for legal cases to have an impact on this area of ethical theory. Finally, this reader misses a conclusion for the book. Although I came to the end of the chapter on organ transplantation knowing it was the last one, I still wanted more, or at minimum, some wrap-up comments from Menikoff. While I appreciate that a conclusion is atypical for a text-book format, some final thoughts on the connection between bioethics and the law would have helped round out this book and bring the reader back to Menikoff's original aims in writing this text. His perspective on where, for example, he sees the law possibly extending in the near future and its relation to bioethics or some suggestions on how to consider current cases from this perspective would have been an interesting way to end things off.

In ending this review, I return to how it begins. Menikoff's book does indeed create a sense of magic, breathing life into the kingdom known as "*the law relating to bioethics*,"<sup>14</sup> leaving this reader with a desire to visit again and learn more—a worthy achievement for a book well suited for both the classroom and the non-expert reader.

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14. Menikoff, *supra* note 2 at 1 [Author's emphasis].

