

Preface

The idea for *Bioethics in Law* began more than a decade ago, while I was studying social science and law. I was particularly interested in the collaborations that comprised social science *in* law. Economic and social data in the pioneering Brandeis brief had been used to defend an early 20th-century labor law; surveys of consumer confusion had helped resolve trademark infringement cases; psychologists' predictions of future violence had informed capital sentencing decisions. Additionally, Kenneth Clark's "doll studies," cited by the Supreme Court in *Brown v. Board of Education*, had helped change the course of American history.¹

During that time, however, I was most intensely interested in bioethics, a relatively young field whose relationships to law had not been well analyzed. I wondered whether there could or should be a bioethics *in* law, because bioethics, unlike the social sciences, was not only in its infancy, but also had distinctly normative features, which might not mesh easily with law's own normativity.

Bioethics commission reports were appearing; bioethicists were starting to testify as experts; the *Karen Ann Quinlan* court had decided that ethics committees, rather than courts, should make decisions about forgoing life-sustaining treatment. Legal scholar George Annas would occasionally analyze the contributions of bioethics to law in a column in the *Hastings Center Report*. For the most part, however, bioethicists, who were pleased to have professional opportunities outside the classroom, did not engage in analysis of how and why their contributions were used—or not used—in law. Their participation as expert witnesses, as well as in health care ethics committees, institutional review boards, and bioethics commissions seemed to be enough; as one prominent bioethicist put it, they were now "players."

For their part, legal scholars were more interested in the legal implications of medical technologies, such as organ transplantation and life-sustaining treatments, than they were in how that law had been informed—or not been informed—by resources from the field of bioethics.

Bioethicists have since broadened their professional engagement with the world and grappled with more recent developments including pharmacogenetics, biobanking, and nanotechnology. Legal scholarship on these issues, as well as scholarship on “law and norms,” has flourished. Scholars of social science in law have broadened and deepened their inquiry and even judges now acknowledge that the proposition relied on in *Brown v. Board of Education* was a product of normative judgment rather than Clark’s studies. However, analysis of bioethics’ input to the legal system is scant and remains undeveloped.

This book begins to develop an analysis of bioethics in law. It expands on an approach used in an earlier work. That approach was characterized as one of two key directions for the future of scholarship in bioethics and law: the “law of bioethics.”² Bioethics in law as illustrated here involves applying legal norms to bioethics, as would a “law of bioethics” approach; but preceded by steps such as receiving and assessing bioethics resources.

The focus of analysis here is bioethics as it has come to law during the last decade. This is not bioethics in an abstract or idealized sense, but the bioethics in actual communications that have found their way to law: health care ethic committee recommendations, institutional review board determinations, bioethics commission reports, bioethics research notes, briefs of bioethics amicae curiae, and bioethics expert testimony. Although *Bioethics in Law* touches on traditional legal and bioethical topics such as constitutional law, tort law, assisted suicide, and new reproductive technologies, analysis of those topics is incidental to the task of analyzing how judges have invited, accepted, relied on, followed, critiqued, ignored, rejected, overridden, transformed, distorted, forced disclosure of, and otherwise responded to bioethics communications.

I am grateful to George Agich, who collaborated with me on my first exploration of bioethics expert testimony. I am also grateful to the bioethicists who generously shared their testimony and briefs with me, especially Judith Andre, the late John C. Fletcher, Thomas R. McCormick, John J. Paris, Clayton Thomason, and Robert M. Veatch. Thanks are also due to legal scholars David Jake Barnes, Edward Imwinkelried, Stephen Latham, Mary Anderlik Majumder, Lawrence J. Nelson, and philosopher Kenneth Kipnis, who participated in the Bridging Bioethics and Evidence Law Symposium at Seton Hall School of Law, and especially to my co-chair Ben A. Rich and Dean Kathleen Boozang, who generously supported that project. I owe an intellectual debt to John Monahan. Without Sarah Peters' efforts, the manuscript would not have been completed on time. Without the support of my husband, Keith Miller, it would not have been completed at all. This book is dedicated to him, with gratitude.

Bethany J. Spielman, JD, PhD

Footnotes

¹ Brown v. Board of Education, 347 U.S. 483 (1954).

² Wolf S. Law & Bioethics: From Values to Violence. J. Law Med. & Ethics 32: 293–301 at 300 (2004).



<http://www.springer.com/978-1-58829-434-0>

Bioethics in Law

Spielman, B.

2007, 186 p., Softcover

ISBN: 978-1-58829-434-0

A product of Humana Press