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• ESTATE OF GELSINGER V. TRUSTEES OF UNIVERSITY OF PENNSYLVANIA • IN THE MATTER OF BABY K. •

Sandra H. Johnson ■ Joan H. Krause  
Richard S. Saver ■ Robin Fretwell Wilson  
Editors



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# HEALTH LAW AND BIOETHICS

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## *Cases in Context*

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of health law teaching. — *Sandra H. Johnson*

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To Mark Ancell, for believing in me and never  
wavering in his support. — *Robin Fretwell Wilson*

## Preface

To our knowledge, this is the first and only book of its kind in health law and bioethics. In it, leading health law scholars tell the stories behind thirteen landmark cases in the field. Each chapter provides insights and details from the parties, attorneys, and expert witnesses — details that frequently are missing from the public record. We also situate each case in the broader historical, political, and social context in which it unfolded. By placing these cases in context, we not only unpack the background, significance, and impact of each case, but we provide provocative and important new insights into health law and policy more generally.

This book includes renowned, highly influential, widely taught cases that have been drawn from the broad variety of subfields within health law and bioethics. It is divided into eleven chapters covering each of the major areas within the field, including the professional-patient relationship and the quality of care; death and dying; reproductive rights; organ transplants, medical futility, and presumed consent; public health; and regulatory, organizational, and business issues. While we believe that few scholars and teachers would agree on a *single* list of *definitive* cases in health law and bioethics, we have included cases that are widely taught and universally regarded as significant, maximizing the book's overall utility as a teaching tool and resource for research.

We believe the book will stimulate a lively and deeper discussion of the leading cases. For brevity's sake, most casebooks offer only highly edited versions of the cases. Compounding this, appellate opinions typically present a narrow, incomplete set of the "facts," glossing over much of what actually occurred and what the underlying litigation unearthed. These abridged facts represent but a small part of the full human drama and the rich, multi-layered context of each case. By contrast, this book presents more engaging personal narratives and provides essential background information that students can use to form a more nuanced understanding of health law and policy as well as the litigation process. The book is purposefully written in a readable and accessible style, with concise chapters and minimal endnotes.

For law school classes, *Health Law and Bioethics: Cases in Context* can be used to supplement any one of the popular casebooks because it contains many of the cases that appear in these texts. Because the coverage is broad, this book offers considerable flexibility in use, allowing teachers to pick and choose which areas to emphasize. The book's in-depth coverage also makes it well suited to serve as the primary text for law school seminars, courses in legal history, and advanced or specialty courses in health law and bioethics.

In medical schools, schools of public health, graduate health care administration programs, and undergraduate programs in health law, policy, and bioethics, this book can be used as a primary text for courses. It offers a more

accessible and intriguing means for exposing non-law students to concepts in health law and bioethics than the traditional law school casebook. The concise, user-friendly format and the presentation of engaging personal narratives make the book well suited for interdisciplinary use. The supporting website for the text ([www.aspenlawschool.com/johnsonkrause](http://www.aspenlawschool.com/johnsonkrause)) includes the original judicial opinions, discussion questions for each chapter, and other materials useful to teacher and student alike.

Behind the stories presented here are interviews with and insights shared by the key figures in the litigation, their families and counsel, and scholars in the field. We are deeply grateful to them for helping us to put flesh on the skeletal record left behind by the courts. Their generosity and willingness to revisit what in many cases were painful times of their lives enriches this book as a teaching and learning opportunity. We are also immensely grateful to Aspen Publishers for believing in this project and to the anonymous reviewers for their candor and constructive suggestions.

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# INTRODUCTION

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## *Putting Health Law Cases in Context*

### **A. Health Law's Context**

This book's publication occurs as health law enjoys expanded importance, commanding attention and exerting considerable impact on many levels. As a personal matter, virtually all of us will face difficult health care decisions for ourselves and our loved ones. Current legal rules highly influence the process by which such treatment decisions are made and the information disclosed; more fundamentally, the law helps define the nature of the provider-patient relationship. Many of us will face the additional challenge of navigating the Byzantine system that governs payment and access to care, where intricate legal rules figure prominently. At a professional level, issues of health law deeply affect the medical professionals and institutions that provide care, helping to set common standards and practices and also addressing quality problems and unprofessional conduct through liability, regulation, and related means. Health law also affects the businesses that shoulder much of the economic burden associated with making health insurance available to employees and their families. At a societal level, the provision of adequate and affordable health care continues to loom as a major policy and political issue not only in the domestic context, but also internationally. It is no wonder, then, that attention increasingly focuses on the underlying laws and regulations, as well as the broader legal, regulatory, and professional structures and systems, that govern the delivery of health care services.

Yet in many ways health law lacks consistent features and attributes, making it a difficult area in which to conduct research as well to teach. Various legal rules develop seemingly haphazardly or by accident and often change. Issues apparently long settled, such as the whole brain death standard as the legal determination of death, often become contested and unresolved all over again. In short, health law is quite messy. The basic doctrine and rules often appear to be driven more by politics, history, medical culture, institutional and professional power struggles, the emergence of novel technologies, and similar external forces, than internal logic, intellectual refinement, and a commitment to doctrinal consistency. Indeed, the degree of coherence and theoretical unity within the field has been the subject of recurring debate and commentary.<sup>1</sup>

Yet the essence of health law, at its core, concerns how the law accounts for the unique features of medicine and the special relationships that form in medical encounters, especially the interaction of provider and patient.<sup>2</sup> Health law derives its meaning, direction, and content from considering how the healing process occurs and what it means to be ill, including patients' vulnerability and dependency, and by further considering what it means to care for individuals as a health care provider. Thus, conventional legal rules and doctrine, adapted to the

medical context, focus on the many special relationships formed in health care between providers, insurers, employers, family members, and many others, with the patient at the center.<sup>3</sup>

Apart from appreciating the field's constant struggle with complexity, change, and imprecision, what is necessary to understanding health law? Most commentators can agree on one core conclusion: *context matters*. As students learning health law soon come to appreciate, the field is more complicated than simply a mix of tort, contract, and other basic legal doctrines applied by chance to the health law setting.<sup>4</sup> Whether to be a successful practitioner in the field, or to explore the theoretical roots of health law, one needs to have a deep understanding of the health care industry and the actual experiences of patients, providers, payers, and other key players. Health law is anything but insular. Context matters, not just a bit, but enormously. This is not to say that the background conditions in which health law operates deterministically define the field; but recognizing and accounting for this context remains indispensable to following the how and the why of health law.

In part, context features so heavily because of health law's close connection to the delivery of health care. Developments that occur within the practice of medicine and the other health professions help determine health law's direction. Consider, for example, the risks and opportunities posed by new medical discoveries, the historically privileged role of medical professionals, the informational problems that exist in evaluating the quality of health care services, the cultivation and powerful influence of medical norms, and the rise of integrated delivery systems and managed health care organizations as viable business structures within the health care market—such diverse phenomena have provided the very basic issues for health law to address. Likewise, the law greatly impacts the experiences of health care providers and patients. But health law is more than just a conduit for reciprocal influence between law and medicine. Health law has historically tried to bridge the gap between law and the health professions, attempting to reconcile differing values, develop further dialogue about critical issues, and improve processes for conflict resolution among patients, health care professionals, payers, and other stakeholders. In performing this connecting function, health law continually looks to, and derives much of its vitality from, the practice of medicine and the other health professions. In short, “[h]ealth law draws its identity as a field from the commitment to work from a deep insight into the [health care] culture and *context* in which the law will operate.”<sup>5</sup>

Context matters apart from the close law and medicine connection. Another distinguishing feature of health law is the extent to which many external forces, including political and economic interests, continually become intertwined with and exert pressures on the legal rules and regulatory systems. Health law often implicates not only immediate questions of specific legal duties and ethical obligations within the narrow confines of particular provider-patient relationships, but also much larger societal questions, including the health care system's constant struggle to balance adequately competing considerations of cost, access, and quality. Pertinent examples can be found in nearly all the cases developed in this book, such as when treatment can be withheld and organs harvested from critically ill newborns (discussed in Mary Crossley's chapter, *In re T.A.C.P. and*



*In the Matter of Baby K.: Anencephaly and Slippery Slopes*), to what obligations health care institutions have to treat under-insured and uninsured patients (discussed in John Colombo's chapter, *Utah County v. Intermountain Health Care: Reconsidering the Charitable Status of Nonprofit Hospitals*). Beyond the immediate parties involved, such cases had important meaning for a much broader and diverse group of stakeholders, including not only health care professionals and their patients, but taxpayers, health care insurers, and businesses. These constituencies, with their distinct agendas, have closely monitored the underlying legal events and have exerted differing degrees of influence on how health law has developed. As Ted Ruger has observed, "[h]ealth law is a legal field shaped dramatically by external dynamics: the surrounding political and economic climate, interest group pressures from various organized actors, and institutional change and interaction among the bodies that apply and shape the law."<sup>6</sup>

Another way in which context matters for health law concerns the social factors and highly personal interests that animate the legal disputes. Many of the issues are related to treatment decisions and the highly individualistic, subjective factors that influence patient decision-making, including the obvious high-stakes questions of life and death, such as deciding when to withhold life-sustaining treatment. How such intimate decisions are made can turn on a party's deeply held personal beliefs, including religious convictions. Moreover, such disputes can often best be understood by looking to the actual relationships formed and the particular family dynamics at play, which can range from supportive to highly charged and volatile (as discussed in Sandra Johnson's chapter, *Quinlan and Cruzan: Beyond the Symbols*).

But as other chapters in this book vividly illustrate, even health law matters seemingly of a less intimate nature, such as compliance with governmental payment rules, can take on a surprising personal dimension. *United States v. Krizek*, one of the leading health care fraud and abuse cases, morphed from a seemingly routine governmental audit into lengthy, expensive, and enormously complicated litigation. To appreciate why the case became so heavily contested and complex, and left the physician-defendant and his family so completely devastated, one must, among other factors, consider the physician's and his wife's personal histories as immigrants who fled a communist regime in Eastern Europe and who remained highly distrustful of governmental authorities (discussed in Thomas Greaney's and Joan Krause's chapter, *United States v. Krizek: Rough Justice Under the Civil False Claims Act*). Such cases reveal how personal struggles, individual pressures, and private grievances figure prominently in the development of substantive health law.

Finally, context matters because of the dynamic quality of health law. The field is in constant motion. Because the health care industry remains highly regulated, a plethora of new laws, administrative rules, professional licensure requirements, and accreditation standards hits the books each year. New advances continually change the very way in which medicine is practiced, forcing reconsideration of existing legal approaches and ethical standards. This elasticity, including a remarkable capacity for reconsideration and reinvention, is what makes health law so bewildering yet also quite exciting to follow. Broader background developments often function as the change agent; this context becomes critical to understanding health law's constant drive and energy.