THE LAW OF BIOETHICS: INDIVIDUAL AUTONOMY AND SOCIAL REGULATION

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In memory of my mother and grandmother,

Helen Ware Garrison (1922–1950)

Mary Parker Ware (1891–1984)

To Joan

For thy sweet love remember'd such wealth brings
That then I scorn to change my state with kings.

*

Preface

You may be taking this course for a number of reasons. You may be interested in the kinds of topics with which bioethics deals. You may be planning a practice in health law. You may like the professor who teaches the course. You may find the hours the class meets convenient. But whatever your motive, one thing you should expect of every course in law school is that it will not only teach you the relevant legal doctrines, but that it will also teach you, in the classic phrase, to think like a lawyer. Virtually every law school course does this by asking you to practice reading legal documents and analyzing the legal issues they raise. A central purpose of this casebook is to offer you many such opportunities. But really good lawyers have learned to deepen their skills by thinking systematically about some of the recurring substantive issues in governance through law and some of the recurring questions in shaping legal institutions. In this casebook, we strive to assist you in becoming truly excellent lawyers by emphasizing three themes of this kind.

First, we look systematically at one of the most imposing substantive ideas in American law and, for that matter, American life—the principle of individual autonomy. We make autonomy central in this casebook because it is central to understanding contemporary bioethics and the law that affects it. However, we do not stop with the autonomy principle in bioethics. We also look at the ways American law in general has implemented and limited the principle. For example, one of the primary ways law has promoted autonomy is by attributing rights—especially constitutional rights, but also statutory rights—to people. That has been one of the most common but also most controversial responses to many bioethical issues, notably questions of ending treatment at the end of life and of creating new lives. Finally, we will deepen our understanding of the law of bioethics by putting the legal principle of autonomy into its crucial cultural context.

One aspect of our examination of the autonomy principle deserves special mention. Autonomy is about making decisions. We attribute autonomy to people partly because we think they will make good decisions for themselves. The success of the law's autonomy principles critically depends on the quality of decisions people actually make. The law of bioethics regulates areas in which the decisions people make are intensely important to them. But many of those decisions are also decisions experts might claim to make better than the laity. We will thus pay special attention to the ways individuals make decisions.

A second theme informs this casebook. In pursuing its goal of regulating social behavior, the law may call on a wide range of tools. It may employ the criminal law. It may give citizens a range of rights against each other—especially rights in contract and in tort. Or it may establish

administrative agencies empowered to write and enforce regulations. The law of bioethics deploys all these devices. It matters which tool the law uses, since different tools have different effects. We will therefore regularly ask you to reflect on the kinds of regulatory approaches the law has available, on why it made the choices it did, and what consequences those choices have.

Our third theme grows out of our embarrassed observation that law professors deplorably tend to believe that law's function is to build more stately mansions—to construct beautiful theories that are logically consistent and intellectually elegant. Judges and even lawyers are not immune to this tendency. But law is more than a pleasing system of rules. Law is an attempt to make the world work well. This means we must always ask how rules work out in practice and whether their benefits outweigh their costs. This kind of evaluation is surprisingly difficult because laws rarely work the way we expect:

> Some of the most fascinating modern legal scholarship reminds lawyers how removed their talk is from the world's ken. That literature reveals that, to the lawyer's chagrin, businesses resist using contracts, ranchers do not know what rules of liability govern damage done by wandering cattle, suburbanites do not summon the law to resolve neighborhood disputes, engaged couples do not know the law governing how they will own property when they marry, citizens repeatedly reject the due process protections proffered them, and, what is worse, all these people simply don't care what the law says.
>
> Much the same can be said of many of the law's recent bioethical reforms. There is evidence that as few as ten percent of us have made an advance directive, that only a quarter of us have signed an organ donor card (despite the swarms of us who say we want to be donors), that even competent patients are not widely consulted about do-not-resuscitate orders, that doctors have reduced informed consent to one more bureaucratic chore, and that plaintiffs rarely win informed-consent suits.

Carl E. Schneider, *Bioethics in the Language of the Law*, 24 HCR16 (1994). This is the celebrated distinction between the law in books and the law in action. It will be repeatedly be our reminder to ask not just whether legal doctrines are logical, but also whether they meet the test of experience.

The law of bioethics deals with some of the most consequential and meaningful questions people face in their lives. We have tried to make this study of those questions as engaging and inspiriting as possible. We wish you much joy and many rewards in your study.

This leaves us to make only one comment about this volume. We have tried to strike a blow for freedom from the inanities of the *Bluebook*. Thus, for the reasons given in Richard A. Posner, *Goodbye to the Bluebook*, 53 U Chicago L Rev 1343 (1986), we follow the *University of Chicago Manual of Legal Citation* (Lawyers Co-operative, 1989). In addition, we have used the following abbreviations:

Annals of Internal Medicine:	AnIM
Archives of Family Medicine:	ArFM
Archives of Internal Medicine:	ArIM
British Medical Journal:	BMJ
Family Practice News:	FP News
Hastings Center Report:	HCR
Health Affairs:	HA
Journal of the American Medical Association:	JAMA
Journal of Health Politics, Policy & Law:	JHPPL
Kennedy Institute of Ethics Journal:	KIEJ
Mortality & Morbidity Weekly Report:	MMWR
New England Journal of Medicine:	NEJM
Public Health Reports:	PHR

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