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Health Law at the Turn of the Century: From White Dwarf to Red Giant

George J. Annas

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*by George J. Annas**

The evolution of stars is inexorable. From the form in which we currently view our own Sun, it and similar stars eventually expand as their exteriors cool to become red giants. When a red giant runs out of fuel, its exposed core will collapse to form a degenerate white dwarf and, eventually, a dead black dwarf.[1] Health law, as a discipline worthy of our attention, seems to have an opposite trajectory: from black dwarf to white dwarf, it is now on its way to becoming a red giant. The relevance of health law and the reasons for its exponentially expanding influence and importance are the subjects of this introductory article.

In the 1950s and 1960s, "Law and Medicine" courses in law schools were almost exclusively concerned with issues of forensic psychiatry and forensic pathology and were properly considered as advanced courses in criminal law. In the late 1960s, some "Law and Medicine" courses began concentrating on broader medicolegal issues in the courtroom, including disability evaluation and medical malpractice. These courses were properly considered either as advanced torts or trial practice courses.

In the 1970s, the concerns of at least some law and medicine courses expanded to include public policy, including issues of access to health care and the quality of that care. At the same time, advances in medical technology created new legal issues to explore, ranging from brain death to organ donation and from abortion to *in vitro* fertilization. These issues were increasingly incorporated into Law and Medicine courses, which were themselves becoming known by the broader rubric of "Health Law."

Teachers of health law in law schools, medical schools, schools of

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* Utley Professor of Health Law, Boston University Schools of Medicine and Public Health. B.A., Harvard College; J.D., Harvard Law School; M.P.H., Harvard School of Public Health.

1. C. SAGAN, COSMOS 218-43 (1980).

public health, and schools of management began meeting together on a regular basis in 1978, when the first national health law teachers meeting took place at Boston University.[2] It took almost a decade, but in 1987, the American Association of Law Schools sponsored its first teaching workshop on health law.[3] Although this more narrow group convened late in the history of health law, its program and proceedings offer a useful insight into the current state of health law in law schools. As the organizers of the workshop saw it, Law and Medicine (a field having primarily to do with medical malpractice, forensic medicine, and psychiatric commitment) has become a subdivision of the new field of Health Law.[4]

Participants at the workshop analyzed health law as having three additional subdivisions, denoted "The Economics of Health Care Delivery," "Public Policy and Health Care Regulation," and "Bioethics." As one of the participants in the workshop reasonably argued, these three subdivisions are actually three different approaches to the same subject matter: the health care industry.[5] All participants seemed either to admit or to assume tacitly that the essence of health law is a course in *applied* law, much the way astronomy and physics are, to a large extent, simply applied mathematics.[6] As Clark Havighurst persuasively argued, "[I]t quickly appears that the common denominator that best unifies the study of health care law is the health care industry itself."[7]

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2. Approximately sixty health law teachers participated in that workshop, which was sponsored by Boston University's Center for Law and Health Sciences and chaired by the author. The Center was the successor to Boston University's Law-Medicine Institute, a joint project of the Medical School and the Law School that was founded in 1958 under the directorship of Professor William J. Curran. Curran & Russell, *The Boston University Law-Medicine Institute After Ten Years*, 49 B.U.L. REV. 1 (1969). Since 1978, the Health Law Teachers Conference has been held nine times, biannually until 1984 and annually ever since. The 1989 meeting was cohosted by Boston University and Harvard University and chaired by Professor Wendy Mariner of Boston University Schools of Medicine and Public Health.

3. *See Teaching Health Law: A Symposium*, 38 J. LEGAL EDUC. 485 (1988).

4. *See* Law, *Introduction to Teaching Health Law: A Symposium*, 38 J. LEGAL EDUC. 485, 485-86 (1988); *see also* Curran, *Titles in the Medicolegal Field: A Proposal for Reform*, 1 AM. J.L. & MED. 1, 10-11 (1975); Shapiro, *Forensic Medicine: Legal Responses to Medical Developments*, 22 N.Y.L. SCH. L. REV. 905 (1977). The basic text for the standard Law and Medicine course is W. CURRAN & E. SHAPIRO, LAW, MEDICINE AND FORENSIC SCIENCE (3d ed. 1982).

5. *See* Rosenblatt, *Conceptualizing Health Law for Teaching Purposes: The Social Justice Perspective*, 38 J. LEGAL EDUC. 489, 491 (1988).

6. This is the approach I suggested at the first Health Law Teachers Conference, noting that "just as astronomy and physics can be viewed as applied mathematics, health law can be viewed as applied law, concerned with a particular area of human endeavor." T. CHRISTOFFEL, HEALTH AND THE LAW 7 (1982) (quoting George J. Annas).

7. Havighurst, *Health Care as a Laboratory for the Study of Law and Policy*, 38 J. LEGAL

As applied law, health law has immediate relevance to students in medical schools and schools of public health.[8] It has become increasingly apparent to medical school deans that physicians will be at a distinct disadvantage in their practices and, thus, will be both less effective and more frightened than necessary if they do not have a basic understanding of the law as it relates to medical practice. Accordingly, the majority of medical schools now have formal courses in "law and medicine" or "legal medicine."[9] Although the realization that public health measures almost always have a major legal component came late to schools of public health, it has arrived, and virtually all such schools now have health law courses. Boston University's School of Public Health has both a health law concentration and a health law course that is required of all graduates.[10] But where does a course in applied law fit in the law school curriculum?

Obviously, it must be a second or third year course because the students need to know something about law, especially torts, contracts, constitutional law, criminal law, and administrative law, the main types of law they will be applying to the health care field. The more interesting question, however, is what distinguishes law and medicine and health law courses from other "law and . . ." courses. These courses are sometimes referred to generically as "law and a banana" courses (in an attempt to distinguish them from the "basic" or "real" law courses). Such courses are often viewed as luxuries, which professors generally teach not because the course is particularly relevant to a legal career, but because the professor is personally interested in the subject matter.

Traditional law school professors worry that the proliferation of "law and . . ." courses might lead to the neglect of legal practice skills and make law school education even less relevant to legal practice and the legal profession than it already is.[11] Professor Martin Redish of Northwestern University Law School said that these courses made him think of the line in the movie *Dr. Strangelove*: "There will be no

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EDUC. 499 (1988).

8. *See, e.g.*, Annas, *Law and Medicine: Myths and Realities in the Medical School Classroom*, 1 AM. J.L. & MED. 195 (1975).

9. Grumet, *Legal Medicine in Medical Schools: A Survey of the State of the Art*, 54 J. MED. EDUC. 755, 756 (1979).

10. The health law concentration has existed since the school was founded more than a decade ago; the core course requirement in public health law was adopted by the school in 1984.

11. Rothfeld, *What Do Law Schools Teach? Almost Anything*, N.Y. Times, Dec. 23, 1988, at B8, col. 3.

fighting in the war room." In his words, "Now some people say there will be no law in the law schools."[12] Others have concurred, noting that the trend in law school courses that question the underpinnings and legitimacy of current law and legal structures, including the critical legal studies movement, has the potential to turn law schools into academic graduate schools and deflect them from their traditional role of training lawyers for legal practice.[13]

There is much truth to all of these comments, but even if they can be aptly applied to such courses as sports law, education law, energy law, transportation law, entertainment law, or space law (to name just a few), I do not think they have much to say about health law. Rather, health law is worth studying on its own merits for at least five reasons: (1) no other field can match the "magnitude, complexity, and universality of health care";[14] (2) health law introduces lawyers to the problems confronted by the other great profession in the United States, medicine; (3) changes in medicine can directly affect not just what humans can *do*, but how humans think about being human (and, therefore, what rights and obligations humans should have); (4) as issues of public health and safety capture center stage in American culture, the importance of prudent use of law to protect health and safety becomes central; and (5) issues of social justice and resource allocation are presented more starkly in the medical care context than in any other context.

Other reasons could, of course, be added to this list. Health care accounts for almost twelve percent of the gross national product, and costs continue to rise out of control. Legal jobs in health care exist in a wide variety of settings, including local, state, and federal regulatory agencies, private health care facilities, insurance companies, and law firms to name just the major employers. And, perhaps as important to most who teach health law, there is no more intrinsically fascinating area of law than law applied to the health care field. In fact, whole courses in law schools have been taught around just one medical development, such as organ transplantation, and one specialized medical problem, such as human experimentation.

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12. *Id.* (quoting Professor Martin Redish, Northwestern University Law School).

13. For example, Mark V. Tushnet of Georgetown Law Center has noted that the law school "is more an academic department than a professional school." Middleton, *Legal Scholarship: Is It Irrelevant?*, Nat'l L.J., Jan. 9, 1989, at 1 (quoting Mark V. Tushnet).

14. Havighurst, *supra* note 7, at 499.

I. APPROACHES TO HEALTH LAW

Not only does health law provide a uniquely critical and intrinsically fascinating field to which to apply law, but it is also a field that can be fruitfully approached from a wide variety of perspectives. Rand Rosenblatt, for example, has suggested that health law can be approached not only from the traditional law and medicine avenue, but also from three more modern perspectives: a law and economics approach; a social justice approach; and a bioethics approach.[15] A fourth approach would be a public health approach, and a fifth would, of course, try to integrate (or at least expose) all of these approaches.[16] Each approach deserves comment.

A. *Law and Economics*

In ransacking the rest of the university to find relevant disciplines to teach in law schools, economics has become the first to take ascendancy and actually become a method of legal analysis. Based primarily on the work of the Chicago School, and especially that of Judge Richard Posner, the "law and economics" school postulates that most legal problems can be best analyzed or solved by applying the principles of microeconomic theory based on commercial markets, rather than resorting to governmental regulation or other value systems.[17] To oversimplify, health law is approached from the basic viewpoint that private property regimes presumptively serve to maximize social welfare; that, in a many-seller market, goods will be available at marginal cost; that private contracts should be enforced; that relationships among noncontracting parties must be governed by explicit legal rule; and that income distribution is, and should be, primarily a function of productive capabilities.[18]

Even some of its harshest critics concede that the law and economics movement "provides the most coherent and intelligible realization of the liberal social theoretical agenda."[19] My own view is that it is

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15. Rosenblatt, *supra* note 5, at 491.

16. An introductory course that discusses all three approaches can be taught using a casebook that will be available in 1990 from Little, Brown and Company: G. ANNAS, S. LAW, R. ROSENBLATT & K. WING, AMERICAN HEALTH LAW (1990) [hereinafter ANNAS & LAW].

17. *See, e.g.*, R. POSNER, ECONOMIC ANALYSIS OF LAW (3d ed. 1986); Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103 (1979).

18. *See* M. KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 151-52 (1987).

19. *Id.* at 186. Kelman, however, disagrees with much that the law and economics school postulates. As he notes:

The *application* to concrete legal disputes of the ideal of satisfying subjective desire is

extremely strained to try to apply private market principles to the medical field, since none of the classic market assumptions apply in medical care. Specifically, unlike Adam Smith's model market, in medical care individuals do not have perfect knowledge about alternatives, do not shop for the best bargains, and do not (in most cases) pay for their medical care directly (but rather through insurance). Moreover, most of the means of production (physicians, medical schools, nursing schools, and hospitals) are subsidized directly or indirectly by the government, and barriers to entry create governmentally enforced monopolies in many sectors of the health care industry. Nonetheless, if these market "imperfections" are recognized, a reasonable course could be taught from this perspective;[20] and certainly a very worthwhile course in antitrust can be taught by using the health care industry as the only example.[21]

B. *A Critical Legal Studies Approach*

Like the law and economics rubric, the Critical Legal Studies ("CLS") rubric is used here as oversimplified shorthand for a course that is approached from an ideological perspective that dominates the discussion. Unlike the law and economics school with its market model, CLS has no single, coherent set of principles to apply to any given industry. Nonetheless, in describing the approach as a "social justice" one, Rand Rosenblatt at least implies that it will be concerned with questioning the assumptions of capitalism, or at least looking "critically" at those assumptions.[22] It will employ what Duncan Kennedy has described as "fancy theory," by which he means "a melange of critical Marxism, structuralism, and phenomenology."[23] Such an ap-

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> surely far more troublesome than the legal economists concede; philosophical ambiguities in discerning desire, the intractability of the problem of establishing a legitimate rights framework that determines the extent to which a person is empowered to have her desires accounted for, and the difficulty of ascertaining which concrete institutions would meet even a well-defined welfare maximizer's agenda all contribute to the indeterminacy of the program.

Id.

20. The major proponent of applying economics directly to the health care industry is Clark Havighurst. *See supra* note 7; *see also* C. HAVIGHURST, HEALTH CARE LAW AND POLICY: READINGS, NOTES AND QUESTIONS (1988).

21. *See* Miller, *Teaching Antitrust to Health Law Students: Peer Review as a Case Study*, 38 J. LEGAL EDUC. 545 (1988).

22. *See* Rosenblatt, *supra* note 5, at 491. Basic health law texts that can be used to explore the CLS approach include ANNAS & LAW, *supra* note 16, and B. FURROW, S. JOHNSON, T. JOST & R. SCHWARTZ, HEALTH LAW CASES, MATERIALS AND PROBLEMS (1987).

23. Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, With Special*

proach to the health industry will not ignore what got us where we are and will not assume that traditional race, class, and sex power relationships are proper and deserve to be privileged and given presumptive validity. Rather than concentrating on economic efficiency as the primary goal of the health care system, there is likely to be primary commitment to social justice attained by equal access to care and equality of treatment. Cost and quality issues will certainly be considered, but it will be taken for granted that if individuals cannot afford the health care they need, income should be redistributed in a way that insures that they can. Nor will the current health care industry be privileged or seen as an inherently private domain. Instead, it is likely that much class time will be devoted to considering how the system can be made more responsive to the needs of the public, with both national health insurance and the nationalization of the health care industry examined as reasonable policy alternatives.

C. *Bioethics*

Adherents of both the law and economics and the CLS schools are at home on the theoretical and macroeconomic levels. When it comes to dealing with the real problems of real physicians and patients, however, they each have much less to say.[24] Perhaps that is why members of

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Reference to Compulsory Terms and Unequal Bargaining Power, 41 MD. L. REV. 563, 564 (1982). Kennedy also describes the CLS movement as an attempt "to bring together Marxist and non-Marxist radical approaches to law." *Id.* at 564 n.3. He recommends the first two chapters of A. GOULDNER, THE TWO MARXISMS: CONTRADICTIONS AND ANOMALIES IN THE DEVELOPMENT OF THEORY (1980) as a "useful introduction to 'fancy theory.'" *Id.* For a general discussion of CLS, see M. KELMAN, *supra* note 18, and Tushnet, *Critical Legal Studies: An Introduction to Its Origins and Underpinnings*, 36 J. LEGAL EDUC. 505 (1986).

24. What they do have to say often raises serious questions about their ability to deal with the real world. In an example often referred to by CLS scholars, Duncan Kennedy argues that our current laws on competence to refuse treatment are indeterminant by giving an example of what action "you" might take if:

> You are spending the weekend at the house of an old woman— perhaps but not necessarily your mother, perhaps but not necessarily someone you love deeply—who is in the terminal stages of cancer. She has an attack of breathlessness. Gasping, she tells the people present that she doesn't want to go to the hospital, but to stay put and die 'with dignity' in her own bed.

Kennedy, *supra* note 23, at 643.

Kennedy plays out the scenario to conclude that there is "no principled way to find your way through" this problem. But on this conclusion he is surely wrong. His mistake is to equate a stranger with one's mother or "someone you love deeply." Kennedy's hypothesis *may* have something to say in the case of a stranger. But when we are dealing with someone with whom we have had a lifetime relationship, or someone we love deeply and whose wishes we know, making a decision to honor their wishes may be emotionally difficult, but it is not legally indeterminant. By

both of these politically hostile camps agree on at least one thing: issues of medical decisionmaking, such as autonomy and the doctor-patient relationship (the natural focus, for example, of a medical school course), should be relegated to a separate course called "bioethics."[25]

The term *bioethics* itself is extremely unsatisfactory, especially when used in the context of a law course in either law school or medical school. What it really seems to denote is the old 1970s style "law and medicine" course that concentrated on medical malpractice, with the recognition that new technologies have expanded the scope of medicine and, thus, the scope of relevant legal topics.[26] Sylvia Law, for example, sees this area as including termination of treatment, new reproductive technologies, organ transplantation, and definition of death.[27] Alexander Capron sees the utility of a bioethics approach in combining factual knowledge about scientific developments (for example, clinical issues in the neonatal ICU; how genetic engineering is actually done) with a discussion of the most useful and constructive approaches the law can take to the social problems posed by new technologies. As Capron notes in espousing a case-based approach:

> Social policy does not exist solely at the level of abstraction; it emerges also from the resolution of cases . . . . [O]ne of the attractions to the field of law and medicine is that it ultimately involves not only basic values of justice, autonomy, and beneficence but actual minute-to-minute life-and-death decisions in a way most legal decisions do not.[28]

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seeming to treat strangers and close family members identically, and by assuming that prior statements and relationships are irrelevant to real life decisions, Kennedy reaches his counterintuitive, and I think incorrect, conclusion. A better approach is to take the facts much more seriously. Competence may well be treated as a "fact-value hybrid," and may even be difficult to apply, but that does not mean the concept is useless or indeterminant in *every* or even in most cases. *See, e.g.*, Annas & Densberger, *Competence to Refuse Medical Treatment: Autonomy vs. Paternalism*, 15 U. TOL. L. REV. 561, 574-76 (1984).

25. *See, e.g.*, Havighurst, *supra* note 7, at 503; Rosenblatt, *supra* note 5, at 491. Havighurst suggests, however, that his relegation of bioethics to the back of the book is largely a function of time. Havighurst, *supra* note 7, at 503.

26. I assume that pigeonholers would have put the course on "Law, Medicine and Public Policy" I taught at Boston College Law School during most of the 1970s in the bioethics category because I used, as the course's primary text, J. KATZ, EXPERIMENTATION WITH HUMAN BEINGS (1972).

27. Law, *supra* note 4, at 486.

28. Capron, *A "Bioethics" Approach to Teaching Health Law*, 38 J. LEGAL EDUC. 505, 509 (1988). A casebook he coauthored takes this approach. J. AREEN, P. KING, S. GOLDBERG & A. CAPRON, LAW, SCIENCE AND MEDICINE (1984).

D. *The Public Health Approach*

This approach has yet to receive much attention in law schools and is currently used primarily in schools of public health. Nonetheless, as issues of public health continue to dominate the news and public policy development, such as teenage pregnancy, drug abuse, drunk driving, smoking, AIDS, nuclear energy, the quality of the environment, and worker health and safety, such courses will naturally find a home in the law school. When they do, the pioneering work that has been done in the school of public health context will find a ready home in the development of courses that take a public health approach.[29]

II. THE FUTURE

Eleven years ago, it would have been difficult to predict the state of health law today. What will it be in the year 2000? Nostradamus is said to have had a plaque on his wall that read: "Prediction is difficult, especially about the future." Nonetheless, with the aid of futurists and extending current trends, reasonable guesses can be hazarded and a proposal developed. First, the reasonable guesses. French futurist Bertrand de Jouvenel postulated three ages of history: those ruled by priests, by lawyers, and by scientists.[30] The politics of the first age are derived from sacred scripture and the ignorance of the people. The politics of the second are derived from human scripture and the presumption that "we the people" can judge matters of common concern. The politics of the third are anomalous: the people retain the responsibility for judging technology but lose the capacity to judge it. Technological experts, such as scientists and physicians, cannot run society directly but can do so indirectly as experts and pressure groups.[31] This reduces the state to the role of the sorcerer's apprentice.

Is this the future we have to look forward to? One in which we equate the good with the new? One in which we assume that we can live forever and pretend that science and technology can grant us replaceable body parts, and ultimately a replaceable body into which the information stored in our brains can be "dumped?" Can we have it all: economic growth and clean air and water; massive military

29. *See, e.g.*, T. CHRISTOFFEL, *supra* note 6; K. WING, THE LAW AND THE PUBLIC'S HEALTH (2d ed. 1985); G. ANNAS & L. GLANTZ, PUBLIC HEALTH LAW: CASES AND MATERIALS (unpublished course materials) (available from the author).

30. W. MCDOUGALL, . . . THE HEAVENS AND THE EARTH: A POLITICAL HISTORY OF THE SPACE AGE 441 (1985).

31. *See id.* at 440-41.

expenditures and social justice; extreme and expensive rescue medicine and adequate disease prevention programs; human dignity and ruthless human experimentation?

A decade ago, before the Chernobyl and Challenger disasters, before Barney Clark and Baby Fae, before the hole in the ozone layer and flood of medical waste on our beaches, before the AIDS epidemic and the crack epidemic, most Americans would probably have answered a resounding yes. Today only those who live in caves could be so optimistic. We still claim to have the best health care system in the world but now know that more than forty million Americans have no health care insurance at all and that about the same number have inadequate coverage.[32] We still want to live forever but recognize that "miracles" like effective artificial hearts and gene therapy are years, if not decades, in the future. And when that future comes, society will not be able to afford to provide all its members with all of the extreme and expensive interventions medicine will be able to produce.[33] How will we decide which technologies to pursue, which to utilize, and which to make available to all?

Philosopher Daniel Callahan has argued persuasively that medical technology is uniquely powerful in that it not only changes what we can do, it changes the way human life itself can be lived and, thus, can change our very concept of human life itself.[34] The *legal* consequences of medical advances are seldom directly acknowledged, although they are profound. A few examples at the beginning and end of life illustrate the power of medicine to change the way we think about ourselves.[35] The first concerns human reproduction. Oral contraception made sex without reproduction consistently possible for the first time in human history and, thereby, changed the role of women in society by making planned pregnancy possible. The new reproductive technologies, such as *in vitro* fertilization ("IVF"), have now closed a circle by making reproduction without sex possible for the human race.[36] This

32. *See* NATIONAL LEADERSHIP COMM'N ON HEALTH CARE, FOR THE HEALTH OF THE NATION (1989); Himmelstein, Woolhandler & the Writing Committee of the Working Group on Program Design, *A National Health Program for the United States: A Physicians' Proposal*, 320 NEW ENG. J. MED. 102 (1989); Relman, *Universal Health Insurance: Its Time Has Come*, 320 NEW ENG. J. MED. 117 (1989). *See generally* R. FEIN, MEDICAL CARE, MEDICAL COSTS: THE SEARCH FOR A HEALTH INSURANCE POLICY (1986).

33. *See, e.g.*, D. CALLAHAN, SETTING LIMITS: MEDICAL GOALS IN AN AGING SOCIETY (1987).

34. *Id.*

35. *See* L. KASS, TOWARD A MORE NATURAL SCIENCE 48 (1985). Kass notes that "we are involved in nothing less than creating a new conception of what it means to be human." *Id.*

36. Annas, *Making Babies Without Sex: The Law and the Profits*, 74 AM. J. PUB. HEALTH

process generally has been greeted with great fanfare, but we have only just begun to realize the impact this new technology has upon our views of children, gestation, motherhood, and human reproduction.[37] When the embryo created in the petri dish in IVF is transferred for gestation to a woman other than the woman who contributed the ovum, we have an entirely novel legal question: as between the child's genetic mother and the woman who gestates and gives birth to the child, which woman should the law consider the child's legal mother with rearing rights and responsibilities?[38]

Perhaps the most spectacular example of medical technology changing how we think about ourselves at the end of life is heart transplantation. This procedure requires taking the heart of a dead person and transplanting it into a dying person, after the dying person's own heart has been removed. Prior to the advent of this dramatic procedure, the law had always considered a person dead when his heart stopped beating. A strict application of this traditional definition of death would make a human heart transplant a double homicide. To permit transplantation, we needed a new definition of death that took full account of the technological ability to maintain respiration artificially after death of the brain.[39] The death of the brain, thus, became the basis for human death. It was the combination of the technology of mechanical ventilators and heart transplantation that forced our society to reexamine what it means to die and to determine that the death of the entire brain is the equivalent of the death of the person for all purposes.[40] This "new" definition of death permitted the "harvesting" of the heart and other organs from persons who, although dead (by brain death criteria), had their circulation and respiration artificially maintained by a mechanical ventilator. Obviously, an individual who is dead ceases to have legal rights. Prior to redefining death, a person with a dead brain, but whose circulation and respiration was nonetheless being maintained

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1415 (1984); *see* Annas & Elias, *In Vitro Fertilization and Embryo Transfer: Medicolegal Aspects of a New Technique to Create a Family*, 17 FAM. L.Q. 199 (1983).

37. OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS, INFERTILITY, MEDICAL AND SOCIAL CHOICES OTA-BA-358 (1988).

38. See the discussion of this issue and others in S. ELIAS & G. ANNAS, REPRODUCTIVE GENETICS AND THE LAW 238-39 (1987), arguing that the gestational mother should prevail because of her greater contribution to the child, ease of identity, and certitude of presence at birth.

39. Ad Hoc Committee of the Harvard Medical School to Examine the Definition of Brain Death, *A Definition of Irreversible Coma*, 205 J. A.M.A. 337 (1968).

40. PRESIDENT'S COMM'N FOR THE STUDY OF ETHICAL PROBLEMS IN MEDICINE AND BIOMEDICAL AND BEHAVIORAL RESEARCH, DEFINING DEATH: A REPORT ON THE MEDICAL, LEGAL, AND ETHICAL ISSUES IN THE DETERMINATION OF DEATH (1981).

artificially, was a person under the Constitution and retained the legal rights of citizenship. Upon legal acceptance of brain death, however, that same individual, in identical circumstances, is a corpse with no human or constitutional rights and can be used as a source of spare parts for others.[41]

A. *Health Law as a Literary Movement*

It has become increasingly popular to use literature in two different senses in law schools. The first is to actually teach courses in law by using literary works that deal with legal themes for the course readings. The second, and somewhat more interesting, is to use literary theory to analyze judicial decisions and other legal texts. It is through this approach, for example, that the concepts of structuralism have become commonplace in legal discourse, especially notions that language (and, thus, court decisions) is indeterminant.[42] The structuralist view of literature "coincides with that of the twentieth-century physicists who posit a world model of indeterminacy, relativity, and uncertainty."[43] Instead of positing a rational order in which legal opinions can be logically deduced, "structuralists depict a self-reflexive world of language which is attached only arbitrarily and conventionally to things out there."[44] Unfortunately, an observation concerning the use of literary theory in English courses seems equally apt to law school courses: "nothing is more common in contemporary American criticism than a strange combination of elitism and evangelism."[45]

Because of the ability of new medical technologies to change the

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41. The revolution that resulted in adopting brain death criteria was fueled primarily by three medical technologies: immunosuppression drugs (which helped control rejection and made organ transplantation a reasonable procedure to attempt); mechanical ventilation (which maintained respiration and circulation in a corpse until vital organs could be harvested without damage to them); and the electroencephalogram (which permitted physicians to confirm the absence of brain function, thus confirming "brain death" clinically).

42. On law and literature, see generally R. POSNER, LAW AND LITERATURE: A MISUNDERSTOOD RELATION (1988). The *Dictionary of Modern Critical Terms* defines structuralism "as a concept [that] is grand, controversial and elusive . . . . The basic premise of structuralism is that human activity and its products, even perception and thought itself, are *constructed* and not *natural*. Structure is the principle of construction and the object of analysis . . . ." A DICTIONARY OF MODERN CRITICAL TERMS 232 (2d ed. 1987).

43. LITERARY THEORIES IN PRAXIS 4 (S. Staton ed. 1987); *see also* H. FELPERIN, BEYOND DECONSTRUCTION: THE USES AND ABUSES OF LITERARY THEORY (1985); TRACING LITERARY THEORY (J. Natoli ed. 1987).

44. LITERARY THEORIES IN PRAXIS, *supra* note 43.

45. Lipking, *The Practice of Theory*, in LITERARY THEORIES IN PRAXIS, *supra* note 43, at 426, 428.

way we think about ourselves and our place in the world, the subject matter of health law is especially well-suited for explicating structural literary (and legal) theories. It is also by reviewing contemporary literature itself, especially contemporary science fiction literature, that we can gain more of an insight into the potential uses of health law instruction in the modern law school.

Like traditional law school courses, traditional science fiction writing has slipped into familiar plots and patterns, with little left to the imagination and almost no creativity and little relevance to our immediate futures. One reaction against this traditional view has come to be called the "cyberpunk" movement. This movement is probably best represented by William S. Burroughs (although William Gibson has been crowned its ascending prophet). Cyberpunk blends high-tech with an aggressive outlaw culture and underclass to paint visions of our near future by drawing out trends in our society, such as global communications networks, increasingly large corporations and bureaucracies, and use of advanced medical technologies, more to warn us than to entertain us.[46]

One of Burroughs's lesser known works, for example, is a movie treatment of Alan E. Nourse's 1974 novel *The Bladerunner*.[47] Nourse, a practicing physician, concentrated his energies in the novel on exploring the dark side of our health care delivery system. Increasing costs and decreasing access to health care eventually lead to the national health riots of 1994. Two years later, a system of universal health insurance is adopted, and care provided free to all citizens at public hospitals and outpatient facilities. There is, however, a catch. Free care is limited to those who have not been treated more than three times. For treatment after the third time, sterilization is required. These laws are enforced by the health control police. The overall thesis is that our health care system carries within it the seeds of its own destruction: the more sophisticated the medical technology, the better it works at keeping those with serious diseases alive to reproduce. Medicine, thus,

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46. *See, e.g.*, Farrell, *The Cyberpunk Controversy*, Boston Globe, Feb. 19, 1989 (Magazine), at 18.

47. Burroughs's 1979 movie "script" *The Bladerunner* and Nourse's novel are not to be confused with the 1982 Warner Brothers movie of the same name. The movie *Bladerunner* takes place in 2019. Bladerunners are special police whose job it is to kill "replicants," or robots which have become just as intelligent as human beings but much stronger. They are designed for work off-earth, but following a mutiny, some have returned "home." The movie explores issues of control, power, mortality, and identity. Based on the novel by Philip Dick, *Do Androids Dream of Electric Sheep?*, the only thing it has in common with the Nourse and Burroughs works is its title.

continues to do more and more for fewer and fewer people at higher and higher costs. The sickest members of society eat up all the money we can spend on social welfare, and America is in danger of becoming one giant hospital.

Burroughs is faithful to the basic story but, of course, adds his own distinctive touches. He presents an especially compelling view of an underclass served by outlawed underground medicine, whose physicians are supplied with equipment and surgical instruments by couriers known as "bladerunners." In his depiction of the novel, an especially virulent flu virus (which could be taken as a precursor or prediction of the AIDS virus) sweeps the population. It can only be stopped if the underground doctors persuade their patients to be immunized; and this can only happen if the eugenic laws are suspended.

Burroughs began medical school in Vienna but soon dropped out. In *The Western Lands*, his hero, Joe the Dead (a natural outlaw "dedicated to breaking the so-called natural laws of the universe foisted upon us by physicists, chemists, mathematicians [and] biologists"),[48] says of medical school: "By the time a student gets through medical school his brain is so crammed with undigested, often misleading, data that there is no room left to think in. In addition to misinformation, the student has also absorbed a battery of crippling prejudices."[49] Like the best of the modern science fiction writers, Burroughs often comes back to transplantation as a theme. Joe the Dead becomes a transplant surgeon for awhile. "Joe is able to hide his potentials and act like any idiot surgeon, addicted to his operations and the adulation of patients, nurses and colleagues."[50] Transplant surgeons have gained enormous celebrity, and the aspects of their personality Burroughs finds problematic are equally applicable to academics.

Bruce Sterling, science fiction writer and cyberpunk promoter, notes that certain basic themes recur in cyberpunk, especially "the theme of body invasion: prosthetic limbs, implanted circuitry, cosmetic surgery, genetic alteration and the even more powerful theme of mind invasion: brain-computer interfaces, artificial intelligence, neurochemistry—techniques radically redefining the nature of humanity, the nature of self."[51] Genetic engineering and organ transplants are medical tech-

48. W. BURROUGHS, THE WESTERN LANDS 30 (1987).

49. *Id.* at 40.

50. *Id.* at 38.

51. Quoted by Farrell, *supra* note 46, at 56. *See* Sterling, *Preface* to W. GIBSON, BURNING CHROME at ix (1986).

niques whose implications are often explored in this writing. Literary critic Larry McCaffery contends that "[i]ssues such as these which are so massive, troubling, and profoundly disruptive cannot be dealt with by mainstream writers, in part because these issues challenge the normative bedrocks upon which the fantasies of 'realism' are grounded."[52] He goes on to assert that "most contemporary American authors continue to write novels as if these enormous shifts in our world had never occurred."[53]

B. *The Growth of Health Care Issues Will Continue*

It is probably fair to say that the vast majority of law school courses also continue to be taught "as if these enormous shifts in our world had never occurred" and that traditional courses cannot take reasonable account of these shifts. What shifts are we likely to see in the coming decade? One will of necessity involve a strategy to deal with the AIDS epidemic. We will either use it to expose the underlying inequities and inefficiencies in our current health care system and take the epidemic as an opportunity to radically restructure it and provide equal access to it; or we will use it to reinforce and to "legitimize" the notion of an underclass that "deserves" to be sick and die. The AIDS epidemic also provides an almost unique opportunity for lawyers and physicians to work together cooperatively since, as others have noted, the AIDS epidemic is the first modern epidemic where lawyers can be more helpful to most patients than physicians.[54] Medicine is all but helpless in the face of AIDS, and lawyers can at least help prevent discrimination in housing, education, employment, and insurance.[55]

Another shift will involve trying to come to grips with the proper goals of medicine itself. We have seemed to believe that its proper goal is to keep people alive as long as possible and at any cost. This view, never a realistic one, is no longer economically or socially tenable. We will have to confront such boogymen as "the quality of life"; the "right to die"; and meaningless political slogans, such as the "right to life," and the injunction to always "err on the side of life."[56] Death is the central issue in human life, and our mortality is not confronted so

52. Quoted by Farrell, *supra* note 46, at 56.

53. *Id.*

54. *See, e.g.*, Fox, *Physicians versus Lawyers: A Conflict of Cultures*, in AIDS AND THE LAW: A GUIDE FOR THE PUBLIC 210, 217 (H.L. Dalton et al. eds. 1987).

55. *See generally* R. BAYER, PRIVATE ACTS, SOCIAL CONSEQUENCES (1989).

56. *See, e.g.*, Annas, *Trying to Live Forever*, 15 L. MED. & HEALTH CARE 242 (1987).

directly in any other law school course.

A third shift will involve the increasing use of the state's police powers to force its citizens to live healthy lives. How far should the law go in requiring its citizens to eat healthy foods, take safety precautions, such as using seat belts, refrain from using mind-altering drugs and intoxicating beverages, and refrain from performing certain unhealthy acts, such as smoking, in public? We have already seen food transformed into medicine, with advertisements and labeling touting the absence of fat or cholesterol in the various products. Fitness is a fetish, and weight control books regularly appear on the best seller lists. Fields traditionally dominated by other discourses have been preempted by public health. For example, nuclear energy, once seen as the cornerstone of any coherent energy policy (and of any course in "energy law"), is now seen primarily as a public health and safety problem. Highway safety is no longer seen exclusively as a police problem or a transportation problem, but as a public health and safety concern. Drunk drivers are a particularly focused public health issue. Alcoholism, once a crime, is now a medical and public health problem. Drug addiction is still viewed primarily as a law enforcement issue, but the trend is to see it as a public health problem. The safety of our food supply is increasingly viewed as a public health problem. Safety in the workplace, stress on the job, and the quality of environment are increasingly seen as public health issues. Of course, on a global level, disruption of the ozone layer, the fouling of the ocean, toxic chemicals in the air, as well as nuclear fallout, and the AIDS epidemic, are all seen as primary public health problems.

A fourth major shift will occur in the "cyberpunk issues" of changing medical technology. How will we deal with new methods of human reproduction, new transplantation techniques, genetic engineering, and man-machine hybrids?[57] How will we judge what new developments are "good" and can be counted as "progress," and which will create more problems for us than they solve? Is it possible, for example, to develop a "social impact statement" (analogous to an environmental impact statement) to give us some advance warning of where we are going and to help temper our most self-destructive tendencies?

There will undoubtedly be major shifts in each of these four areas

57. One particularly problematic example, which combines the emotion-laden procedure of abortion with the drama of transplantation, is fetal tissue transplants, especially those involving brain tissue. *See* Annas & Elias, *The Politics of Transplantation of Human Fetal Tissue*, 320 NEW ENG. J. MED. 1079 (1989).

in the 1990s. It is in this sense that the field of health law, whose subject matter these developments comprise, will grow from its current white dwarf state into a red giant. How should this growth be accommodated in the law school curriculum?

III. A PROPOSAL

It is no secret to most law students and faculty that the final semester of the third year is often a lost semester. It is also no secret that law school curriculum is becoming increasingly detached from the real world and that lawyers are becoming increasingly alienated from their work and from their fellow citizens.[58] One way to bring meaning to the final semester of law school, and at the same time help equip tradition-bound lawyers for the real world of the twenty-first century, is to devote the entire final semester of law school to an intensive study of health law. As already stressed, health law is *applied* law, and giving students the opportunity to apply what they have learned in law school to a particular field of human endeavor gives them an opportunity to try to synthesize their knowledge and approach the world in an encompassing, rather than a reductive, mode. Of course, experts in other types of applied law might argue for their own fields to be the focus, but health law has unique attributes that especially suit it for this role in revitalizing law school education. As Dean George Schatzki stressed in opening this symposium, "Law is concerned with making the world a better place to live in."[59] Dean Schatzki went on to list the four areas that are central to our lives but are seldom dealt with in law school: family, work, recreation, and health. Health law is the only field that can cover all of these areas and, in this way, can play a key role in humanizing the law school curriculum and in encouraging lawyers and law students to get involved in, and to help solve, critical human problems.

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58. *See, e.g.*, Bok, *A Flawed System of Law Practice and Teaching*, 33 J. LEGAL EDUC. 570, 571 (1983) ("The legal system is grossly inequitable and inefficient . . . there is far too much law for those who can afford it and far too little for those who cannot."); Cramton, *The Trouble with Lawyers (and Law Schools)*, 35 J. LEGAL EDUC. 359 (1985) (a response to Bok); Jost, *What Image Do We Deserve?*, 74 A.B.A. J. 47 (1988); Wellington, *Challenges to Legal Education: The 'Two Cultures' Phenomenon*, 37 J. LEGAL EDUC. 327 (1987); White, *Doctrine in a Vacuum: Reflections on What a Law School Ought (and Ought Not) To Be*, 36 J. LEGAL EDUC. 155 (1986).

59. Welcoming Remarks by Dean George Schatzki, University of Connecticut School of Law Symposium on "Law and Medicine: Unresolved Issues for the 90s" (Mar. 29, 1989). When asked what he considered the "leading issues in the study of law today," the new dean of Harvard Law School listed "health care regulation" first. For the Record, N.Y. Times, Mar. 31, 1989, at B6, col. 4.

In addition, the health care industry has undergone tremendous change in the recent past and continues to change.[60] The model of professional dominance is rapidly giving way to multiple influences. As such, it provides a real world laboratory for examining the influences of law from the courtroom (especially medical malpractice and termination of treatment) to constitutional litigation (especially the right of privacy) to legislation (various proposals of Medicare reform and national health insurance) and regulation (from FDA and revising drug safety rules to state rules on licensing physicians and facilities). New medical technologies present new legal challenges that are so intrinsically fascinating that they form the content of the front pages of newspapers and news magazines and will have no trouble keeping the attention of even hardened third year law students.

The cases of Karen Ann Quinlan, Elizabeth Bouvia, and Mary Beth Whitehead are only a few examples of the health law dramas played out in the courts.[61] *Roe v. Wade*,[62] the premier health law case, continues to be contested, and the right of privacy, so central to medicine and the doctor-patient relationship, continues to play *the* key role in the politics of judicial appointments. Issues of organ transplants, including the case of Barney Clark and Baby Fae, also present particularly compelling case studies that lead naturally to broader policy discussions.[63] Public health issues are of direct importance to the day-to-day lives of students, including drugs, alcohol, tobacco, food consumption, the quality of the environment, exercise, and use of seat belts and motorcycle helmets. And, perhaps as important, health law permits direct study (and possibly joint courses) of the other major profession in the United States, the medical profession. The relationship between the two professions has become increasingly adversarial, and increased knowledge may help restore a more reasonable and socially constructive relationship. Finally, the advice lawyers give their clients in the health law field often has a direct impact on the lives and the manner of deaths of real people. Professional responsibility has an immediacy in this field that is lacking in most others.

There are a variety of curriculum options. One would be to have

60. Havighurst, *supra* note 7, at 500.

61. *See* G. ANNAS, JUDGING MEDICINE (1988).

62. 410 U.S. 113 (1973).

63. *See, e.g.*, Annas, *Allocation of Artificial Hearts in the Year 2002: Minerva v. National Health Agency*, 3 AM. J.L. & MED. 59 (1977); Areen, *A Scarcity of Organs*, 38 J. LEGAL EDUC. 555 (1988); Bovbjerg, *Grafting Perspective into Health Law: Organ Transplantation as a Tool for Teaching*, 38 J. LEGAL EDUC. 567 (1988).

all students take a basic overview course on health law in the fall of the third year, with special emphasis on developing an understanding of the health care industry itself. The second semester would then consist of three or four courses, each approaching the industry from a different perspective (such as law and economics, social justice, bioethics, technology, public health, environmental law, occupational health and safety law, and law and medicine). Students would then each participate in a writing seminar and/or a clinical project, preferably with one or more medical students.[64] Health law presents an opportunity to apply law, including its rules and procedures, to the most intrinsically fascinating and substantively influential industry in the United States. As the subject matter of health law, consisting of medicine and public health, continues to expand, so does the field of health law itself.

CONCLUSION

Mythologist Joseph Campbell has noted that most cultures are held together by mythology that is handed down from one generation to another. "But in America we have people from all kinds of backgrounds, all in a cluster, together, and consequently law has become very important in this country. Lawyers and law are what hold us together. There is no ethos."[65] This is a difficult role for the law to perform, and an impossible one if we insist on acting as if the world is not changing and on teaching law the way we have always taught it. An intense study of health law is not a magic cure-all for alienation, but it provides a way for law students to work on real life problems that both they and society must confront and to do so in a constructive and humanistic manner that has the potential to benefit both them and the society at large. The issues of birth, death, and the quality of our lives are too important to be ignored by lawyers.

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64. This approach should not be confused with the "clinical studies movement" that views medical education as the proper model for legal education, a model properly criticized in Carrington, *The Dangers of the Graduate School Model*, 36 J. LEGAL EDUC. 11 (1986). This is not to suggest that those committed to a career in law and medicine or health law should obtain both a J.D. and an M.D. Only a handful of those who hold both degrees have been able to successfully integrate their careers in both professions; most spend almost all their time in one or the other. *See, e.g.*, Curran, *Cross-Professional Education in Law and Medicine: The Promise and the Conflict*, 24 J. LEGAL EDUC. 42 (1971); Schneller, *Interprofessional Legal Practitioners: The Case of the M.D.-LL.B.*, 27 J. LEGAL EDUC. 324 (1975).

65. J. CAMPBELL, THE POWER OF MYTH 9 (1988).