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The U.S. Supreme Court and Medical Ethics: From Contraception to Managed Health Care

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Book Review

Bryan Hilliard. *The U.S. Supreme Court and Medical Ethics: From Contraception to Managed Health Care*. St. Paul, MN: Paragon House, 2004. 425 pp. $19.95, paperback.

Reviewed by George J. Annas, Boston University

Philosophy professor Bryan Hilliard begins this unusual medical ethics textbook, composed of selections from U.S. Supreme Court cases, commentaries, and discussion questions, by addressing a question he was once asked after a presentation on death and dying: "Does the United States Supreme Court do medical ethics?" Put another way, what is the relationship between law and medical ethics? In my *Standard of Care: The Law of American Bioethics*, from which Hilliard quotes, I asserted that "American law, not philosophy or medicine, is primarily responsible for the agenda, development, and current state of American bioethics. . . . And in America the state of the law often depends on the U.S. Supreme Court's interpretation of the Constitution" (Annas 1993, 3).

This is why President Bush's nomination of Judge John Roberts to replace Chief Justice William Rehnquist on the U.S. Supreme Court is so important. The crucial question for American Constitutional law (and thus for American bioethics) is not whether Roberts is a "good" person or a good lawyer—although both of these are important—but how he will interpret the U.S. Constitution. In fact, virtually all of the commentary about his nomination (which at the time was to replace Justice Sandra Day O'Connor) during July and August 2005 focused on what the "right" way to interpret the U.S. Constitution might be. As Stanley Fish put it, although the debate centers on words like "strict constructionist" and "judicial activist," these and other labels are meaningless in practice.

What happens in real life is that Justices use various methods and materials to interpret the meaning of the Constitution based on either what they believe the framers could actually have foreseen, or what they think the framers would have said if they knew what we know now (Fish 2005). Since Roberts is Catholic, it has been asked whether his religion can legitimately play a major role in how he interprets the Constitution. *Sanford V. Levinson* has noted that in contrasting the ways in which Catholics and Protestants interpret the Bible, for example, we can discern different ways in which Justices approach the U.S. Constitution. Catholic tradition, he suggests, provides for doctrinal development and evolution based on a changing world. Protestants, on the other hand, may be much more canonical about the Bible, and see its text as the sole legitimate source of truth (Bennett 2005). Of course, this "protestant" mode of interpretation is the one two prominent Catholics on the Court, Justices Thomas and Scalia, say they follow in dealing with the text of the Constitution.

Hilliard is interested in methods of interpretation used (and misused) by the Justices when they are dealing with "medical ethics" issues, but primarily his collection of U.S. Supreme Court cases seeks to provide students "with a deeper, richer, and more comprehensive understanding of the ethical issues in health care than they might otherwise receive from conventional books on medical ethics" (4).

There is no shortage of judicial opinions from which to choose, and even limiting one's universe of decisions on medical ethics issues to those decided by the U.S. Supreme Court requires both the choices of cases and the editing of them. Law professors are seldom, if ever, happy with the way law school casebook editors edit cases, so it is no surprise that I would have liked to have seen different choices made by Hilliard. To take a prominent example, *Roe v. Wade* has been the most controversial case the Court has decided in the past three decades—and probably the past century, and is the most important health-law/medical-ethics case it has ever decided. Given its status, I think almost the entire opinion should be included in a text like this—especially since almost everyone seems to have an opinion about *Roe*, and almost no one has ever read it. Short of this, however, my own view is that it is critical to include the language Justice Harry Blackmun uses to describe the role of physicians in abortion, especially because he viewed his opinion when he wrote it as primarily vindicating the rights of physicians to practice medicine—and not as a woman's-rights opinion. Specifically, as Blackmun put it at the end of his opinion (in a section that does not appear in the book): "The decision [*Roe v. Wade*] vindicates the right of the physician to administer medical treatment according to his professional judgment up to the points where important state interests provide compelling justifications for intervention. Up to these points, *the abortion decision in all its aspects is inherently, and primarily, a medical decision, and basic responsibility for it must rest with the physician.* If an individual practitioner abuses the privilege of exercising proper medical judgment, the usual remedies, judicial and intraprofessional, are available" (*Roe v. Wade*, 410 US 113 (1973). 410 US 113; emphasis added).

On the other hand, Hilliard does include an excerpt from *Roe*'s companion case, *Doe v. Bolton* (410 US 179) (1973) which, as he rightly notes, is often ignored. It shouldn't be. In it Blackmun concludes that a state requirement that a physician consult with a hospital staff abortion committee (an early precursor of "ethics committees") or even obtain a second physician's concurrence, is an unconstitutional burden on the physician's right to practice medicine according to the physician's own "best clinical judgment." In this context, Blackmun expanded on the language in *Roe*, quoted above, by saying "If a physician is licensed by the State, he is recognized by the State as capable of exercising acceptable clinical judgment. If he fails in this, professional censure and deprivation of his license are available remedies. Required acquiescence by co-practitioners has no rational connection with a patient's needs and unduly infringes on the physician's right to practice." Toward the end of his career on the bench, Blackmun came to believe that women's rights were central to the abortion debate, but he also said that he believed that in 1972–73, equal protection was simply not a possible basis on which he could have gotten a majority of the Justices to rule against the Texas abortion statute (see, e.g., Greenhouse 2005).

At his Senate confirmation hearing, Judge Robert Bork (who found *Roe* and its right to privacy incomprehensible as Constitutional doctrine) was asked how he could uphold a woman's right to use contraception if he did not believe in a woman's right to privacy. He had no response, saying he would have to think about that. Judge John Roberts will not likely to be asked this question—but instead will likely be asked how strong a precedent he considers a case like *Roe v. Wade*, that is controversial yet has been re-affirmed over and over by the Court, and what factors he would use to determine whether he would vote to modify or overrule it. Not a bad question for students either.

The entire book could have been devoted to continuing controversies over abortion after *Roe*, but Hilliard, usefully I think, puts the "partial-birth abortion" case in a section on the regulation of medical treatment, and the abortion financing case in a section on the right to health care. Other sections include sexual autonomy, reproductive freedom, religious objections to medical treatment, confidentiality, mental illness, and the right to refuse treatment and the assisted suicide cases.

There are other textbooks of edited legal opinions related to bioethics, including Arthur LaFrance's *Bioethics: Health Care, Human Rights and the Law*, Matthew Bender, 1999; Janet Dolgin and Lois Shepherd's, *Bioethics and the Law*, Aspen, 2005; and my own favorite, now in its 5th edition, the *Bioethics* section (which is published as a separate book, and which I have used many times in a law school course) of Barry Furrow, Thomas Greaney, Sandra Johnson, Timothy Jost, and Robert Schwartz's now classic textbook, *Health Law*. Hilliard's book nonetheless has two advantages over these texts: first, it is written for nonlaw students and can be used by a teacher who is not a lawyer; and second, it is very reasonably priced. So even if you are using another basic text for your bioethics course, you should consider using this text as well—even if you don't assign it all—because American bioethics really is dominated in the public arena by American constitutional law. ■

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Susan Merrill Squier. 2004. *Liminal Lives: Imagining the Human at the Frontiers of Biomedicine.* Durham, SC: Duke University Press. $23.95, 350 pages, hardcover.

Reviewed by Carol C. Donley, Hiram College

Susan Squier adopts the term "liminal" from the anthropologist Victor Taylor, who meant by it "being—on a threshold" or in an in-between state. She applies the term to beings—from embryonic stem cells and "incubabies" to artificially rejuvenated elderly people—all of whom are changing the definition of what it is to be human. These "brave new beings" challenge many boundaries, from the understood time frame of a human life to accepted notions of identity.

Squier takes an especially interesting and fruitful approach to these liminal lives. She explores how literature has always helped us anticipate, explain, and find meanings