

**Understanding Bioethics and the Law: The Promises and Perils of the Brave New
World of Biotechnology**

By Barry R. Schaller

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In a world where advances in biotechnology are occurring every day and there are consistently headlines trumpeting some new discovery in cloning or stem cell research, legal and ethical arguments are moving more and more to the forefront of the debate and the front page. Biotechnology can be described as the “use of living things, especially cells and bacteria in industrial processes” and applies to many areas of science. As new technologies develop in the biotechnology arena, they are usually met with both support and opposition, often taking the form of litigation or legislation. The variation in support versus opposition is often based on varying ethical beliefs as to whether certain areas of biotechnology should be utilized and implemented into every day life. Justice Schaller explores the developing area of bioethics and how the judicial system has been involved in the ethical debate regarding advances in biotechnology.

The Honorable Barry Schaller was appointed to the Connecticut Supreme Court in 2007 and prior to that he served as a justice for the Appellate Court beginning in 1992. In addition to his duties as a judge, Justice Schaller acts as a visiting lecturer at both Trinity College and Wesleyan University, where he teaches courses on bioethics, human research ethics, and public health law and ethics. Justice Schaller has written numerous articles on bioethics and public health law and ethics, and recently completed his first

book on the subject, Understanding Bioethics and the Law. Due to his background as a judge, Justice Schaller has a unique perspective to bring to his analysis of bioethics and the role he believes the court should play in defining the complex biotechnology issues that are brought before it on a daily basis. In presenting his analysis of the courts' response to biotechnology issues, Justice Schaller presents specific areas of biotechnology that have seen various forms of litigation and offers examples of the cases that have been decided within those areas. The areas that he explores are legal regulation of human research; legal actions brought for wrongful birth, wrongful life, and wrongful living; legal regulation of organ transplants; arguments and legislation regarding stem cell research; and the legal rights of a person to end his or her own life.

The strength of Justice Schaller's presentation is in the multiple cases that he presents to demonstrate the effect of the courts on bioethics in individual areas of biotechnology. The point is stressed from the very first page is that the court is not the instrument that should be used to define bioethics. An examination of any ethical issue involves so many underlying policies and beliefs that to form those issues into a legal question to be presented to a court causes a large number of the underlying policy issues to be ignored. Some areas of biotechnology may benefit from courts' assistance, but in many situations the true depth of the ethical analysis can not be considered in a litigation setting.

Justice Schaller provides multiple cases for each area of biotechnology that he examines. When examining the issues around the right to die, he provides *In re Quinlan*¹ as an example of how the judicial system created the first identified right to die. Justice Schaller presented the background and the procedural history of the case and then

¹ 355 A.2d 647 (N.J.1976).

followed with the decision made by the court and the standard they established for determining when a person may be removed from life support. This case triggered the right to die movement and was followed by other cases that clarified this right, such as *Cruzan by Cruzan v. Director, Missouri Department of Health*². After the cases were described in detail, Justice Schaller presented reasons for why the Court deciding such influential matters was not the best recourse and provided his recommendations of how the cases should have been resolved.

By presenting unique cases for each area of biotechnology examined, Justice Schaller is able to demonstrate the underlying ethical issues that are not addressed when the case is litigated. In addition, Justice Schaller is able to show the limitations of the courts in their ability to decide cases. Specifically, courts are precluded from considering facts that are not presented and must decide a case based on a specific legal question that may not adequately encompass the real ethical questions at issue. However, Justice Schaller does not identify the need for more in depth ethical analysis as being only a problem of the courts, instead he directs the reader to broaden her search and see that bioethics requires some form of legislation so as to present policy boundaries and actual rules. In the few areas in which legislation has been passed, Justice Schaller examines and demonstrates how the court is able to utilize the legislation in making its decisions. In addition to demonstrating why legislation is needed, Justice Schaller also presents situations where politics takes control, detailing incidences where legislation is passed which has no place in the field of biotechnology or bioethics and how the courts react to those situations.

² 497 U.S. 261 (1990).

When examining whether courts should be establishing policy for biotechnology in an area of science that is constantly changing Justice Schaller looks to the accountability of the courts and the effects of their decisions. His argument is that when policy is created in a legislative setting law makers are expected to answer to the views of the public and so will take into consideration public views that an unbiased court system should not consider. This creates greater accountability to the public. In addition, when an appellate court makes policy decisions, those decisions are binding in that state or district and are viewed as persuasive for courts in other districts. When binding precedent is established in this way, the only way to change the policy is through an additional appeal to a higher court. In comparison, decisions that are made through the legislative process, as Justice Schaller suggests, can adapt to changes in technology and public opinion much more easily, making legislative regulations for biotechnology a more attractive option.

By concluding the biotechnology journey with questions regarding end of life decisions, Justice Schaller challenges the reader to consider the individual's right to autonomy, a discussion presented in the previous chapters, and to determine if that culminates in a right to make certain end of life decisions or to have a loved one make those decisions for the individual. These thought provoking questions regarding an individual's autonomy lead into Justice Schaller's ultimate conclusion that in order for these issues to be properly examined, it can not be done in a judicial setting. After challenging the reader to look beyond the court system for the resolution of policy issues with regard to bioethics, Justice Schaller presents his own recommendations for how the justice system should be involved in the establishment of public policy in this area.

Justice Schaller presents a unique view of how the court system has to structure and analyze the ethical issues that are presented as legal questions. A thorough examination of the limitations of the court system is presented for the reader who is new to the analysis of ethical issues by the courts. By presenting a background on the limitations of litigation with regards to biotechnology and the analysis of ethical issues that are presented as legal questions, Justice Schaller is able to challenge the reader to determine if the court system really is the best way to establish policy with regards to bioethics. This book would be beneficial to anyone who has an interest in policy making in the field of public health and biotechnology.