



THE 'ETHICALIZATION' OF LAW

FUNDAMENTAL QUESTIONS, DANGERS AND OPPORTUNITIES FROM AN INTERDISCIPLINARY PERSPECTIVE



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“LAW, MARCHING WITH MEDICINE BUT IN THE REAR AND LIMPING A LITTLE – ETHICS AS “FIRST AID” FOR LAW

(Abstract)

**Margaret Somerville
(Mc Gill)**

Prof. Dr. Silja Vöneky (editor).

Max-Planck-Forschungsgruppe
Max-Planck-Institut für ausländisches
öffentliches Recht und Völkerrecht
Im Neuenheimer Feld 535
69120 Heidelberg, Germany
ethikrecht2011@mpil.de

Institut für Öffentliches Recht
Abt. 2 (Völkerrecht und Rechtsvergleichung)
Rechtswissenschaftliche Fakultät
Universität Freiburg
Platz der Alten Synagoge 1
79098 Freiburg im Breisgau, Germany
voelkerrecht@jura.uni-freiburg.de

www.ethisierungrecht.de

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Law, Marching with medicine but in the Rear and Limping A Little

Ethics as "first aid" for law

Abstract

I will describe how the phenomenon of "ethics informing law" began in the 1970's, in particular, when the law couldn't keep pace with issues presented by rapidly evolving science, especially medical science. The courts – and legislatures to some extent – faced with cases involving organ transplantation, especially heart transplants, and, a decade later, reproductive technologies and the first in vitro fertilized baby, turned to ethics.

The field of "applied ethics" emerged, at that time, and with it a new profession, that of ethicists. At first, the courts' used ethics as an add-on to the law and ethicists as expert witnesses to inform their decisions from an ethics perspective, although there was, and continues to be, debate about who qualifies as an ethicist.

In the early 1990's the order of analysis changed from law first and ethics second, to ethics first and law second, that is to ethics informing law and not vice versa. This change was not neutral with respect to the decisions reached by courts and legislatures. I will discuss the example of the recognition of access to pain management as ethically required and as a human right to illustrate this point.

I will also propose that "human rights" are best seen as one entry point into a tripartite concept that consists of "human rights, human responsibilities and human ethics" and that this tripartite concept can allow us to see more clearly the relation and interaction between law and ethics.

The second example of ethics informing law and supplementing it is in relation to reproductive technologies. I will argue that ethics requires that the law governing these technologies must be child-centered, not adult-centered, as is mostly true at present, and that the recognition of certain fundamental human rights of children can act as a bridge between ethics and law to implement the former. I will argue that the most fundamental human right of all is that of a child to come into existence from natural, untampered-with human origins.

I will also discuss a recent Canadian case in which a young woman conceived through artificial insemination successfully argued that it was legally actionable

discrimination not to legislatively provide that she had a right to know the identity of her biological father.

My most radical suggestion will be that the Canadian Charter of Human Rights and Freedoms, which is part of the Canadian Constitution, is in fact an ethical declaration enacted as law. Moreover, I will propose that if we accept that is correct, it can affect how the Charter is interpreted and applied, whether with an ethical perspective taking priority or a legal(istic) one doing so, when there is not concordance between them.

I will also address the issue of the cumulative impact on society and its values of decisions by individuals to use technologies, such as pre-natal testing. This enquiry provides an insight that we need to examine the ethics that should govern such technologies, not just at the individual level, but also at institutional, societal and even global levels. It is a further question how the law should respond when conflict among the ethics at the different levels is found to be present.

Finally, in exploring how ethics is currently informing law or otherwise, I will refer briefly to present debates in many countries concerning the legalization of euthanasia and physician-assisted suicide.

The concluding section explains why ethics in medicine and science matter more generally, well beyond those contexts, because they are the forums where many contemporary shared societal values are being upheld, negated or new ones forged.

All of which raises the issue of whether lawyers need some basic education in applied ethics.