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The Dialogue between Biomedicine and Law in an "IntraAmerican Transnational Perspective"

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As I have in the past, I wish to talk today about the dialogue between biomedicine and law from the perspective of the American legal system. I do so because I believe that perspective may well be helpful in the effort to develop a response to the challenges presented by Judge Santosuosso in his seminal JIBL article[1] – the challenges, particularly in Europe, of the increasing resort to transnational legal standards in dealing with biomedical issues.

In many ways, the American legal system is "transnational." The fifty states are each sovereign in their ability to regulate by law. Each has its own constitution and a supreme judicial body which is empowered to render authoritative interpretations of its state law – including its state constitutional law. The United States Constitution imposes no obligation on the states to achieve uniformity in legal regulation. Indeed, the individual American states have been celebrated as "laboratories of jurisprudence" where "a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[2] And yet, lawmakers in every state draw upon the laws of their sister states for guidance in the framing of their own laws and regulations. This includes, most significantly, state judges, who cite the decisions of judges in other states as sources of "persuasive authority" when they develop case law for their own states.

During the nineteenth century, when American society was being challenged by the technological developments of that era, e.g., the railroad, the telegraph, and mass-production and national distribution of goods by large corporations, American state courts worked in dialogue with each other to establish a body of fairly uniform principles of case law that responded to and facilitated those changes. While each state court had the power to prescribe such rules only for its own sovereign state, the Anglo-American common law tradition provided a strong justification for the export and import of rules between states. Lord Coke's notion of the common law being "fined and refined by an infinite number of grave and learned men"[3] encouraged judges to look for inspiration to any source of good legal reasoning for assistance in deciding the cases before them.

This process was significantly accelerated toward the end of the century when Dean Christopher Columbus Langdell established the "case system" as the fundamental method of law study at Harvard Law School. Under this system, students were not

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[1] Amedeo Santosuosso, *The Worldwide Law-Making Process in the Field of Science and Law: A Laboratory Bench (IBLARC)*, 6 JIBL 1 (2009).
[2] New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis dissent.)
[3] SIR EDWARD COKE, COMMENTARY UPON LITTLETON 97b (Charles Butler ed., 18th ed., Legal Classics Library 1985) (1628).

lectured on the law by their professors, they were required to pore over raw legal opinions and come to class prepared to critique them, compare them, and, through dialogue with their professors and fellow students, attempt to draw from them systematic principles of the various fields of law being studied. The cases were chosen for their pedagogical value and could be from any state. Harvard increasingly attracted law students from across the country and purported to be a "national law school" teaching "national law." The basic principles of the law of contracts, property, and torts that the students were piecing together in their classrooms were, at one and the same time, the law of every American jurisdiction (except, perhaps, Louisiana, whose law drew in part on the French civil system) and no American jurisdiction. They were supposed to represent what was basic to the common law, not the detailed system of law of any particular state.

When students trained by the case system at Harvard (and the other law schools that began to follow Harvard's lead) were admitted to practice in states across America, they took with them their "national law" attitudes and argued their cases in terms that often drew on what were thought to be the better decisions of other states. They also gradually became the judges who decided such cases and the legal scholars who attempted to organize case law into principles that systematized and improved the law. Oliver Wendell Holmes, Jr., one of the most famous and influential judges of the era (Chief Justice of the Massachusetts Supreme Judicial Court 1899-1902, Associate Justice of the Supreme Court of the United States 1902-1932) had been for a short time a professor at the Harvard Law School and had authored (in 1881) "The Common Law," a ground-breaking book in which he applied the philosophical approach of American Pragmatism to a careful study of Anglo-American law. In it, and in later speeches and articles, he promoted the view that the only source of law, properly speaking, was judicial decisions. "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law," he famously said in "The Path of the Law"[4] – his address to students at Boston University Law School in 1897. By this, he meant not to promote cynicism, but to inspire a spirit of reform. If judges and lawyers approached the common law as a human artifact – designed to deal with the problems of the times when the decisions were made but, in some cases, no longer capable of usefully resolving modern disputes, they could engage in a dialogue that attempted to frame new, more appropriate and useful rules of law while remaining true to fundamental principles.

Holmes' views were shared in varying degrees by a growing body of legal scholars. Legal treatises increasingly tended to be organized around collections of judicial opinions that the author struggled to organize into a body of consistent legal principles. Often, they pushed reform efforts as well – by choosing the "better" lines of cases where there was conflict or suggesting directions in which the law should move. This effort reached a new level of magnitude in 1923 with the founding of the American Law Institute (ALI). Its creation had been recommended by a Committee on the Establishment of a Permanent Organization for Improvement of Law – a very distinguished group chaired by Elihu Root (a practicing lawyer as well as a statesman and 1912 Nobel Peace Prize recipient) that numbered among its members such well known

[4] O.W. Holmes, Jr., *The Path of the Law*, 10 Harv. L. Rev. 457 (1897).

intellectual judges as Benjamin Cardozo (then Chief Justice of the New York Court of Appeals and later Associate Justice of the Supreme Court of the United States) and Learned Hand (then a Judge of the United States District Court for the District of New York but appointed in 1924 to the United States Court of Appeals for the Second Circuit) and highly respected scholars such as Harvard Law Professor Samuel Williston, who was the author of the leading treatise on contract law.

The stated mission of the ALI was "to promote the clarification and simplification of the law and its better adaptation to social needs, to secure the better administration of justice, and to encourage and carry on scholarly and scientific legal work." Its first project, completed in 1944, was a comprehensive "Restatement of the Law" covering the subjects of Agency, Conflict of Laws, Contracts, Judgments, Property, Restitution, Security, Torts, and Trusts. They were so-called because, although they often made value choices between conflicting lines of authority, they purported to be, at base, efforts to simply "restate" in definitive, clear "black letter" rules the common law principles the authors distilled from American judicial decisions and to present them in a systematized organization resembling a legal code. Each restated area of the law is divided into numbered chapters and subdivided into topics, titles, and sections. Statements of black letter law are followed by comments written by the drafters for the purpose of explaining the provision and identifying its limitations. They are also illustrated by examples showing how a particular provision would apply to specific fact situations. Later restatements have been accompanied also by "Reporter's Notes" that give a history of the provision and cite to the authority from which the rule has been developed. Over time, these provisions have increasingly found themselves accepted as secondary sources of the law and cited in lawyers' briefs and judge's opinions alongside decisions from sister states.

Early on, the ALI developed a cooperative relationship with the National Conference of Commissioners on Uniform State Laws. The NCCUSL shares many of the goals of the ALI, but it seeks to achieve them in a significantly different fashion. It also comprises lawyers, judges, and legal scholars, but all of its members are chosen by the governors or legislative leaders of the states that are members of the organization. The charge of the organization is the drafting of uniform state laws which, it is hoped, will be enacted in one form or another by the legislatures of all, or at least a significant number of, the American states. Starting with just seven states at its founding in 1892, the NCCUSL achieved representation of every state by 1912 and now includes representation as well from the District of Columbia, the U.S. Virgin Islands, and Puerto Rico. As of this writing, the organization has drafted a total of 113 recommended uniform laws (some updated in one or more later editions). These drafts have received very varied receptions by the state legislatures. As might be expected, the most widely adopted have been those that cover areas where multi-state activities place a high premium on uniformity of regulation. Undoubtedly the most successful is the 1952 Uniform Commercial Code -- which was the result of many years of labor performed by some of America's leading legal scholars under the aegis of both the ALI and the NCCUSL. It has been enacted (with some mostly minor variations) in all of the 50 states, the District of Columbia, Puerto Rico, the U.S. Virgin Islands, and Guam. The ALI has

also drafted one important piece of proposed legislation on its own – the 1962 Model Penal Code. It has been very influential as a basis for replacing and standardizing criminal codes in the U.S. At present, no states have adopted the Model Penal Code in its entirety, but substantial portions are represented in the criminal laws of many states.

I have discussed in detail several times in the past[5] the fashion in which elements of the intra-American "transnational flow of legal standards" described above came together in developing law regarding the "right to die." Starting in the 1960's with decisions that, at first, denied Jehovah's Witnesses a religiously-based right to refuse life-saving blood transfusions, the courts gradually began, in the 1970's, to develop case law that moved in a more libertarian direction and that reached a full-flowering -- as regards recognizing a right to choose death by refusing any and all medical treatment -- in the 1990's. At present, the courts of one state, have established as well a right to physician-assisted suicide.[6] As sources for writing their decisions, the courts have used not only their own state's case law, constitution, statutes, and regulations, but, also, legal materials from other jurisdictions, state, federal, and (occasionally) foreign; books, articles, and other materials produced by legal scholars; and expressions of policy by recognized professional groups within the American health care industry. Beginning with California in 1976, state legislatures began passing "living will" statutes designed to provide patients with the power, through written advance directives, to control treatment decisions at a time when they would no longer be competent to do so directly for themselves. As with case law, statutory approaches have changed over time as a function of the ongoing national legal dialogue. The major moves have been from laws that enable patients to put in writing what they would want done under varying sets of circumstances to laws authorizing the patients, instead, to appoint an agent to make those decisions at any time the patient becomes incompetent, to legislation that combines both those devices but also automatically appoints a family member to serve as the health care agent in a situation where the patient fails to do so. Every state has now adopted one or more of such "living will" provisions. Some states have adopted, in one form or another, provisions of three model statutes drafted by the NCUSSL: The Uniform Health-Care Decisions Act (1993), The Uniform Rights of the Terminally Ill Act (1989), and The Uniform Health-Care Information Act (1985). The federal government, which has largely stayed out of regulation in this area, did pass, in 1990, the Patient Self-Determination Act, which requires all institutional health care providers in the United States to offer patients information regarding living will options in their state.

In all other areas of legal regulation of bioscience and medicine in the United States, we see, as well, the operation of the intra-American "transnational flow of legal standards." In the area of organ transplantation, the NCUSSL's Uniform Anatomical Gift Act (2006) and The Uniform Determination of Death Act (1978, 1980) have been very influential with state courts as well as with state legislatures. With respect to abortion, the ALI's Model Penal Code performed great service in the vanguard of efforts to reduce

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[5] See, most recently, C. Baron, *Bioethics and Law in the United States: A Legal Process Perspective*, 4 DIRITTO PUBBLICO COMPARATO ED EUROPEO 1653 (2008).

[6] Montana, where the decision is now on appeal to the state's supreme court.

the extent of its criminalization before the Supreme Court's decision in *Roe v. Wade*.[7] But, the main engine driving the growth of the law has been, and continues to be, the continuing dialogue among the state (and sometimes federal) courts that are forced to make decisions in the lawsuits brought by parties who seek legal solutions to the biomedical problems with which they are confronted. Thus, for example, in the 2001 case of *Grimes v. Kennedy Krieger Institute, Inc*.,[8] the Supreme Court of Maryland developed new law regulating human experimentation when it made medical researchers civilly liable to human subjects in an experimental program that did not follow appropriate ethical guidelines, in the 1991 case of *Moore v. The Regents of The University of California*,[9] the Supreme Court of California developed new law regarding the right of a patient to be informed of the potential business value of cell lines that were extracted from him during medical treatment, and, in a series of cases over the past twenty years, state courts have struggled to produce consistent principles dealing with the issue of who controls the future of frozen embryos placed and kept in storage for reproductive purposes.[10]

I have argued elsewhere that this judicial activism works well in the United States, in part because the undemocratic tendencies of the process are mitigated by the power that state legislatures possess to override or modify by statute any and all of the substantive principles that result from it. Moreover, the vast majority of state judges in the United States are subject to election of some sort and are thus answerable, at least in theory, to the people of the state for the decisions that they render. And, even in those instances where state courts try to insulate court-made law from legislative reversal by basing them on state constitutional principle, as was the case in early right to die cases such as *Quinlan*[11] and *Saikewicz*,[12] it is still possible for the people of the state to reverse the decision by casting a majority vote in favor of an appropriate constitutional amendment at a state election. As Judge Santosuosso points out in his JIBL article, a major criticism of the extension of Anglo-American common law processes to a truly trans*national* flow of legal standards is that it "suffers from a lack of genuinely democratic accountability." The extent to which this is true when such standards are employed by any national domestic court will depend in part on whether the courts of the particular nation are subject to similar sorts of popular controls.

But, likely to be more important to the acceptance of any resort to transnational legal standards by domestic courts will be the fashion in which the legal dialogue for and against their use in a particular case is conducted. As we know, judicial borrowing of law from non-domestic sources has been criticized as being "like looking out over a crowd and picking out your friends." In answer to this criticism, Judge Santosuosso has pointed to the behavior of scientists, who would be embarrassed not to consider all relevant

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[7] 410 U.S. 113 (1973).
[8] 782 A.2d 807 (Md. 2001).
[9] 793 P.2d 479 (Cal. 1990), *cert. denied*, 499 U.S. 936 (1991).
[10] See, for example, Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992) *cert. denied sub nom* Stowe v. Davis, 507 U.S. 911 (1993); Kass v. Kass, 695 N.E.2d 174 (N.Y. 1998); J.B. v. M.B. & C.C., 783 A.2d 707 (N.J. 2001); and Roman v. Roman, 193 S.W.3d (2006).
[11] 355 A.2d 647 (N.J. 1976).
[12] 370 N.E.2d 417 (Mass. 1977).

elements of the world-wide body of scientific knowledge in building and assessing their own experiments. This body of knowledge may, like transnational law, contain elements which are inconsistent with each other but which, despite that tension, may all play a role in the search for truth. "[F]rom a very practical point of view, we could say that if even a scientific inconsistent theory can be empirically successful and play a legitimate role in science, then also legal standards and rules, which are less familiar with mathematically sound theories, have a chance to work and act in the international arena, of course under the rational scrutiny of the community of jurists, lawmakers, judges and citizens."[13] But, the analogy here breaks down if the scrutiny of the legal community is based upon reason alone – not employing as well adequate means for judging whether borrowed norms have been empirically successful in the jurisdiction from which they have been borrowed and whether they are likely to be empirically successful in the jurisdiction into which they are being borrowed.

Here, again, Justice Holmes shines a guiding light on our subject. "For the rational study of the law," he advised law students in 1897," the blackletter man may be the man of the present, but the man of the future is the man of statistics and the master of economics."[14] In the one hundred and twelve years since he made that prediction, there has been some progress in the United States regarding the availability and proper usage of social science data for measuring the "empirical success" of laws, but, alas, it is still largely true that the lawyer or judge who has mastery of such data is "the man of the future." An attempt to discuss the extent of, and reasons for, that modest progress in the United States must be the project of another talk at another time. But, I would like to end by urging the importance of exploring the question of how such data can be developed and made available transnationally as a critical piece of the ongoing process of development and adoption of transnational legal norms.

[13] Santosuosso, *The Worldwide Law Making Process*, at 8.
[14] Holmes, *The Path of the Law*, at 469.