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## Dedicatory Essay: Honoring Ian McColl Kennedy

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## DEDICATORY ESSAY

### HONORING IAN McCOLL KENNEDY

*Lawrence O. Gostin, J.D., LL.D (Hon.)\**

I have set as my task the unmasking of medicine. It is not that I think there is something sinister behind the mask. But I do detect a sense of curiosity, of concern if not disquiet. The practice of medicine has changed. There is a feeling abroad that all may not be well. This feeling grows out of a sense of distance, out of a sense that medicine is in the hands of experts and sets its own path. We can take it or leave it. Heart transplants, the definition of death, the treatment of the dying, the sad fate of Karen Quinlan, the selective treatment of handicapped newly-born babies, the treatment of the mentally ill—there is a long list of issues which are deeply troubling but which seem effectively to be kept under wraps. One of the most successful ways of doing this is by making the issues and problems appear to be medical, technical ones, not really for the rest of us at all.<sup>1</sup>

These were the words with which Ian McColl Kennedy began a series of BBC Radio Reith Lectures in 1980, entitled “Unmasking Medicine.”<sup>2</sup> I recall listening to this gentle, well-educated voice from my small flat in Highbury (North London) thinking that these lectures would inspire a revolution in medicine. Immediately, the medical profession, with all of its formalism and intimidating authority, descended on this bold legal academic, calling his ideas “ludicrous” and an “ill conceived public rant.”<sup>3</sup>

Ian Kennedy is perhaps the best known and most important figure in

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1. Reith Lectures, *THE LISTENER*, Nov./Dec. 1980.

2. *Id.*

3. See Ian Kennedy, *The Reith Lectures—A Response to Critics*, 7 *J. OF MED. ETHICS* 23 (1981).

health law and ethics in the United Kingdom, and probably one of the most significant in Europe and North America. How did his life and career evolve to the point where he would wield such influence? In thinking about Ian Kennedy, a dear friend and admired colleague, I believe it would be helpful to explain his career to those who know him less well by examining the leadership, erudition, and passion he has brought to the field of health law and ethics. It is perhaps not an overstatement to suggest that Professor Kennedy virtually invented the field in the United Kingdom. He did so through his scholarship, public advocacy, and influence in shaping institutions, both governmental and professional.

### I. SCHOLARSHIP

Professor Kennedy formalized and expanded the Reith Lectures in a book that received considerable attention among academics and the public.<sup>4</sup> At that time, he was a Reader in English Law and the Director of the Centre of Medical Law and Ethics at King's College, University of London. The Centre stands as the oldest and most recognized institution in health law and ethics throughout Europe. Professor Kennedy had already published extensively before the Reith Lectures and was well known and regarded among legal academics on both sides of the Atlantic. He received several visiting academic appointments in American law schools, notably the University of California, Los Angeles, and the University of San Diego, and his thinking was certainly influenced by bioethics discourse in the United States. (This is not to mention the influence of his spouse, a bright, energetic American lawyer!)<sup>5</sup>

At the time of his Reith Lectures, Professor Kennedy had already published widely in prestigious law journals and medical periodicals in the United States and the United Kingdom.<sup>6</sup> I recall reading one of his publications repeatedly as a young scholar and activist in London. In 1976, Professor Kennedy put forward the proposition that competent adults,

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4. IAN KENNEDY, *THE UNMASKING OF MEDICINE: A SEARCHING LOOK AT HEALTH CARE TODAY* (rev. ed. 1983).

5. Ian Kennedy's wife is Andrea Kennedy, J.D. Mrs. Kennedy, a member of the California Bar, is a legal services consultant who advises Barristers' Chambers on organization, management, marketing, and legal development. Previously, she worked for three large law firms.

6. See, e.g., Ian Kennedy, *The Kansas Statute on Death—An Appraisal*, 285 *NEW ENG. J. MED.* 946 (1971); Ian Kennedy, *The Legal Definition of Death*, 41 *MEDICO-LEGAL J.* 36 (1973); Ian Kennedy, *The Karen Quinlan Case: Problems and Proposals*, 2 *J. MED. ETHICS* 3 (1976).

even if terminally ill and aged, had the right to self-determination.<sup>7</sup> I was particularly struck by his definition of paternalism: "decisions concerning a particular person's fate are better made *for* him than *by* him, because others wiser than he are more keenly aware of his best interests than he can be."<sup>8</sup> Professor Kennedy contrasted this definition of paternalism with the right to self-determination "whereby a person is deemed entitled to make his own decisions concerning himself, within tolerable limits, free from the interference of others."<sup>9</sup>

This seminal essay in the *Criminal Law Review* was frequently discussed and cited widely in the literature. The article markedly informed my thinking as Legal Director of the National Association of Mental Health, and its reasoning became influential in cases before the European Court of Human Rights<sup>10</sup> and in the ultimate reform of the Mental Health Act of England and Wales.<sup>11</sup>

Following the Reith Lectures, Professor Kennedy began some of the most serious scholarly commentaries on a variety of subjects at the intersection of science, law, and medicine. His scholarship ranged from torts<sup>12</sup> and products liability<sup>13</sup> to central tenets in health law such as informed consent,<sup>14</sup> along with contemporary issues such as the moral status of embryos,<sup>15</sup> research on human tissue,<sup>16</sup> living wills,<sup>17</sup> and HIV/AIDS.<sup>18</sup>

Professor Kennedy has had an abiding interest in advancing the legal

7. Ian Kennedy, *The Legal Effect of Requests by the Terminally Ill and Aged Not to Receive Further Treatment*, 2 CRIM. L. REV. 217, 218 (1976).

8. *Id.* at 219.

9. *Id.*

10. See Lawrence O. Gostin, *Human Rights, Judicial Review and the Mentally Disordered Offender*, 7 CRIM. L. REV. 79 (1982).

11. This was a subject that Professor Kennedy clearly had in mind. See Ian Kennedy, *Reform of the Mental Health Act*, BBC Radio Broadcast, Feb. 17, 1978, published in WORLD MEDICINE 37, Mar. 22, 1978.

12. Ian Kennedy, Book Review, *Tort Law in America*, 98 LAW Q. REV. 656 (1982).

13. IAN KENNEDY, PRODUCT LIABILITY IN THE PHARMACEUTICAL INDUSTRY—THE DOCTOR AS RESPONSIBLE INTERMEDIARY AND THE EFFECT OF STRICT LIABILITY ON PATIENT INFORMATION (1983).

14. Ian Kennedy, *The Patient on the Clapham Omnibus: Informed Consent in English Law*, 47 MOD. L. REV. 454 (1984).

15. Ian Kennedy, *The Moral Status of the Embryo*, THE TIMES (London), May 26, 1984.

16. Ian Kennedy & Gerald Dworkin, *Human Tissue: Rights in the Body and its Parts*, 1 MED. L. REV. 291 (1993).

17. IAN KENNEDY, LIVING WILLS: CONSENT TO TREATMENT AT THE END OF LIFE (1988).

18. See, e.g., Ian Kennedy & Andrew Grubb, *Testing for HIV Infection: The Legal Framework*, LAW SOC'Y GAZETTE, Feb. 15 and 22, 1989.

and human rights of people. His publications passionately argue that all individuals be treated with respect. Consequently, his writing dwells on the rights of patients in the United Kingdom and Europe,<sup>19</sup> discrimination based on health status,<sup>20</sup> and international human rights.<sup>21</sup> He signaled this intense concern with legal and human rights in the Reith Lectures as he developed the notion of self-determination and respect for the decisions of patients. He also understood that medicine plays only a marginal role in human health—poverty, malnutrition, stress, and unemployment are critically important—and these goals can be achieved principally by political action.<sup>22</sup>

Professor Kennedy consolidated many of his finest essays in an anthology entitled, *Treat Me Right: Essays in Medical Law and Ethics*.<sup>23</sup> This text is vintage Kennedy, using a classic style of elegant rhetoric, rigorous logic, and fierce advocacy.

Perhaps Professor Kennedy's most enduring and systematic scholarly endeavors are more recent, and co-authored with his colleague at King's College, Andrew Grubb. Borrowing from the American casebook style, which is not traditional in the United Kingdom, Kennedy and Grubb published *Medical Law: Text with Materials* in 1989.<sup>24</sup> The volume was immediately acclaimed in legal academia, and the authors published a second edition in 1994. This volume, 1403 pages in length, is astonishing in its insight and breadth. Another publication, *Textbook in Medical Law*, is forthcoming from Kennedy and Grubb later this year.

## II. A PUBLIC FIGURE

It may come as no surprise from what I have said about Ian Kennedy that he is one of the leading public figures in the United Kingdom. Even before the Reith Lectures, Professor Kennedy was involved in serious journalism. His BBC radio documentary on legal and ethical issues in the

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19. IAN KENNEDY, HEALTH LAW—RIGHTS OF THE PATIENT, WORKING DOCUMENTS, WHO COURSE ON HEALTH LEGISLATION, WHO Copenhagen (1984).

20. IAN KENNEDY, DISCRIMINATION ARISING FROM DISEASE, 7TH COLLOQUIUM ON EUROPEAN CONVENTION ON HUMAN RIGHTS, Council of Europe, Strasbourg (1990).

21. IAN KENNEDY, *Patients, Doctors and Human Rights*, in HUMAN RIGHTS FOR THE 1990s (Blackburn ed. 1990); IAN KENNEDY & ANDREW GRUBB, *AIDS and Human Rights, in CHALLENGES IN MEDICAL CARE* (Grubb ed. 1991).

22. KENNEDY, *supra* note 4, at ix.

23. IAN KENNEDY, *TREAT ME RIGHT: ESSAYS IN MEDICAL LAW AND ETHICS* (1988, corrected and expanded 1994).

24. IAN KENNEDY & ANDREW GRUBB, *MEDICAL LAW: TEXT WITH MATERIALS* (1994).

treatment of the terminally ill was selected as the BBC's nomination for the Italia Prize in April of 1978. In the following year, Kennedy won the Glaxo EEC Fellowship for most outstanding science writing for his two-part BBC documentary on the treatment of severely handicapped newborns and the ethics of genetic screening. He followed this work with documentaries ranging from the limits of scientific inquiry and the accountability of professionals to psychosurgery.

In discussing the Reith Lectures, Kennedy explained his philosophy about the importance of lay influence:

It is for me virtually an article of faith that issues of great importance, touching on the way we live, ought to be aired and discussed as widely as possible. It is equally my strong conviction that there is no issue which is too complicated to be discussed before an interested and alert audience, provided it is presented in terms which are readily comprehensible. To argue otherwise is to surrender the power to decide to those who would claim the appropriate expertise, and thus to surrender part of that which is one's citizenship.<sup>25</sup>

Following the Reith Lectures, Kennedy put these words into sharp focus. Professor Kennedy wrote and hosted a BBC television series on medical ethics entitled "Doctors' Dilemmas" in which he explored the difficult choices and tradeoffs that occur in the practice of medicine. The program received critical and popular acclaim.

### III. SHAPING INSTITUTIONS: BOTH GOVERNMENTAL AND PROFESSIONAL

Ian Kennedy has had a remarkable impact on legal academia, government, and medical practitioners in the United Kingdom. It is not just that Professor Kennedy created, directed, and then became president of the major center for medical law and ethics in Europe; he also recruited some of the finest young scholars in the country, perhaps most notably Andrew Grubb, with whom he has written extensively. More importantly, he built King's College, University of London, into one of the preeminent law schools in the United Kingdom. After his appointment as Reader in English Law from 1978 to 1983, he became the first Professor of Medical Law and Ethics in England. From 1986 to 1989, he served as head of the Law Department. Since then, he has served as head and dean of the law school. As a member of the Board of Governors of the Institute for Ad-

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25. KENNEDY, *supra* note 4, at viii.

vanced Legal Studies, and a member of the Association of Heads of Law Schools, Professor Kennedy has had a profound impact on legal academia in the United Kingdom.

It is not traditional for legal academics in the United Kingdom to closely advise government and to be actively involved with public policy. Yet, Professor Kennedy's counsel consistently has been sought at the highest levels of government, both Conservative and Labour. Most recently, Kennedy chaired the Secretary of State for Health's Advisory Group on Xenotransplantation. The Kennedy Committee published a bold report urging caution in future implementation of xenotransplants.<sup>26</sup> The report concludes that xenotransplantation raises ethical and scientific questions, both because of the possibility of transmitting animal diseases to human beings and concerns about animal welfare. It therefore recommends that a National Standing Committee be established to supervise developments and that legislation be enacted to bring xenotransplantation under regulatory control. His report ought to be viewed in juxtaposition to a similar report in the United States, where the Institute of Medicine, far less rigorously, appeared to give a green light to such research, despite the risks and moral considerations advanced by the Kennedy Committee.<sup>27</sup>

Professor Kennedy has served with equal distinction on many public bodies, both in the United Kingdom and in Europe. As a member of the General Medical Council from 1984 to 1993, he was actively involved in setting standards for the medical profession, and developing guidelines on issues such as confidentiality and HIV/AIDS. Professor Kennedy also has served as a member of various working groups for the Department of Health, the Nuffield Council on Bioethics, and the Archbishop of Canterbury.

As mentioned, the Reith Lectures incited much of established medicine in the United Kingdom. Professor Kennedy himself describes the response of the profession as hurt, wounded, and hostile.<sup>28</sup> But the *British Medical Journal* quite rightly cautioned that "Kennedy's views have to be taken seriously, both for their own sake and because they are representative of the forces which seek to effect a radical change in the focus of medicine." The *British Medical Journal* could not have been

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26. Ian Kennedy (Chair), ANIMAL TISSUE TO HUMANS: REPORT OF THE ADVISORY GROUP ON THE ETHICS OF XENOTRANSPLANTATION (1996).

27. See generally, INSTITUTE OF MEDICINE, XENOTRANSPLANTATION: SCIENCE, ETHICS, AND PUBLIC POLICY (1996).

28. KENNEDY, *supra* note 4, at xiv.

more prophetic. It is ironic that Kennedy, once shunned, is now embraced by much of established medicine. He has been a fellow, member, or executive in a variety of distinguished medical organizations, including the Royal Society of Medicine, the British Medical Association, the Royal College of General Practitioners, and the London Medical Group. He is frequently asked to lecture and advise physicians at the highest levels.

Professor Kennedy does not express opinions that are outside the mainstream of medical, and perhaps political, thought for the purpose of being controversial. Yet, he will always state, and rigorously defend, bold positions where necessary to maintain scientific and ethical integrity. He is a man who is true to his conscience, and it does not matter whether established medicine or law or politics holds a contrary view. His principled position favoring physician-assisted dying, to be sure, was not popular with traditional medicine. Yet he would wait until a major speech to the Royal Society of Medicine to enunciate his position on the classic "double effect:"

A doctor who administered morphine to kill pain which he knew would incidentally hasten the patient's death committed no crime. But the doctor who ended a patient's suffering by administering a drug not recognized as a painkiller was branded a murderer. Dr. A goes home to his family. Dr. B gets a mandatory life sentence.<sup>29</sup>

#### IV. PROFESSOR KENNEDY'S IMPACT ON THE FIELD OF HEALTH LAW AND ETHICS

Some of us, if we are very fortunate, will excel in the scholarship of the field we have chosen; some will have such extraordinary breadth and vision to produce scholarship across disciplines; some will broadly influence the public perception of ideas as fundamental as the health of the population; and some will have shaped government, public policy, and the professions. But few, if any of us, can say that we have had such remarkable influence in each of these venues. Ian Kennedy is a consummate scholar, public advocate, and leader.

To really know Ian Kennedy, however, is to understand his wit and humor, as well as his intellect. In discussing *The Unmasking of Medicine*, he recounts how it felt when the book was scathingly reviewed: "It is fair

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29. Clare Dyer, *Ethics Expert Calls for Legal Euthanasia*, THE GUARDIAN, Apr. 26, 1994.



to say that the reception which the book received from some reviewers when it first appeared was not ecstatic," he wrote with characteristic understatement. "Indeed, reading some reviews which friends (?) [it was not me!] kindly sent, I was put in mind of a book review I once read in an American legal periodical which began, 'This is not a bad book. It is a very bad book!'"

So too, in his book *Treat Me Right*, did Kennedy poke fun at himself and the academic world of health law and ethics. He reproduced a cartoon from *The New Yorker* depicting a slick dinner party conversation with this caption:

Me? I'm just one of those shadowy figures who inhabit the mysterious twilight world where the medical and legal professions meet.

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