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Law, Humanities and Equipoise in the Ethics Education of Physician Assistants

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Abstract

The humanities have been defined as a group of academic subjects united by a commitment to studying aspects of the human condition and a qualitative approach that generally prevents a single paradigm from coming to define any discipline. In the medical humanities context, the most quickly growing area is the field of literature and medicine. The use of literature in bioethics education plays a number of well-recognized educational roles. Herein, we argue that the law is relatively overemphasized in bioethics education and that one heretofore ignored yet important role of the humanities is to serve as a counterbalance to the pernicious influence of legal hegemony in the field of bioethics. In the process, we consider the special circumstances surrounding the fields of philosophy and jurisprudence; we discuss the 1998 American Society for Bioethics and Humanities "Core Competencies" report; and we use examples (drawn from teaching materials employed at the University of South Florida College of Medicine and Nova Southeastern University's Naples-based Physician Assistant Program) to contrast the law's narrowness with the richness and ambiguity of the humanities.

Introduction

It has been our experience that discussion of the legal framework applicable to a particular clinical situation will preempt bioethical analysis. We have observed this bioethical "short-circuit" in both the medical (undergraduate and graduate) and physician assistant (PA) education settings. Indeed, more often than not trainees will themselves raise the issue of what the law has to say regarding the matter under consideration, in an apparent attempt to "cut-to-the-chase." While certainly a thorough bioethical inquiry must take into account what the law has to say regarding the matter at hand (according to Bernard Gert, "obey the law" is one of the moral rules—the others being: do not kill; do not cause pain; do not disable; do not deprive of freedom; do not deprive of pleasure; do not deceive; keep your promises; do not cheat; and do your duty),² the inquiry is inchoate if it begins with the legal question and ends with the legal answer.

What role(s) should the humanities play in PA education? Herein we submit that one important role is to serve as a counterbalance to the pernicious influence of legal hegemony in the field of bioethics.

Defining the humanities

The humanities have been defined as "a group of academic subjects united by a commitment to studying aspects of the human condition and a qualitative approach that generally prevents a single paradigm from coming to define any discipline." While the contents of the humanities "are nowhere particularly prescribed" and a precise listing of those disciplines comprising them is difficult, we submit that a reasonable listing would include: [area studies](#), ethnic studies and gender studies (cultural studies); art; the [classics](#), including ancient [Greek](#) and [Latin](#); film studies and theatre; history; jurisprudence; [literature](#); [philosophy](#); and [religious studies](#). Herein, most (though not all) of our discussion will center on "the most quickly growing area of the medical humanities, the field of literature and medicine."³

The special circumstances surrounding philosophy and jurisprudence

Considering that the humanities arguably include philosophy and given the omnipresence of philosophers in the field of bioethics, it might seem strange to bemoan the "elephant in the living room" that is law while ignoring

the “blue whale in the bathtub” that is philosophy. However, ethics refers to moral philosophy and bioethics to moral philosophy as it relates to health care and the biological sciences.⁴ Thus, philosophy is the very substratum of bioethics; stated otherwise, philosophical content is, or should be, a given in bioethics.

Likewise, it might seem *prima facie* paradoxical to argue in favor of the humanities as a bulwark against the pernicious effects and hegemony of arguably one of its own subdivisions (jurisprudence). I say “arguably” because others might regard jurisprudence as a branch of sociology (and hence within the social sciences).⁵

However, *Jurisprudence* refers either of two things. First, in [common law](#) jurisdictions, it means simply “[case law](#)”, i.e. the law that is established through the decisions of the courts and other officials. Second, it means the [philosophy of law](#), or [legal theory](#), which studies not what the law is in a particular jurisdiction (say, Turkey or the United States) but law in general—i.e. those attributes common to all legal systems.⁶

We would distinguish between the second usage of jurisprudence, which properly pertains to the humanities, and the first, which does not and which is more properly considered part of the practice of law or the legal profession. Hereinafter, we shall refer to jurisprudence in this latter usage as *law*; and we submit that it is this usage of jurisprudence which is most commonly encountered in the bioethics setting. Thus, if one peruses the tree for “Jurisprudence” on the Ovid MEDLINE database,⁷ one finds the following subheadings: advance directives; compensation and redress; confidentiality; contracts; criminal law; duty to recontact; expert testimony; forensic psychiatry; informed consent; intellectual property; judicial role; legal liability; malpractice; mandatory reporting; mental competency; ownership; presumed consent; resuscitation orders; Supreme Court decisions; wills; and wrongful life. On their face, these are practical legal topics, a far cry from the more ethereal questions of legal philosophy, questions which “concern the relationship between law and morality; the logical status (as descriptive or prescriptive) of propositions of law; the possibility of separating adjudication from politics; and the distinction between law and organized force.”⁸

The pernicious influence of legal hegemony

Commentators have disagreed over whether law’s influence in bioethics is good or bad. Some have argued that law has “sharpened thinking, helped define the stakes, and ultimately allowed a practical (if still debatable) solution.”⁹ Others have “blamed law for hijacking bioethics and stunting moral reflection,”¹⁰ and argued that the law “too often reduces bioethics to questions of process and regulation, stunting reflection on substantive questions of what constitutes the good.”¹¹

Herein we do not undertake to demonstrate the correctness of either position. Rather, we shall assume that both camps are correct—that the law’s influence in bioethics has been good and bad. Further, it seems reasonable to believe that as the law’s influence in bioethics waxes vis-à-vis other fields (including the humanities), its weaknesses, and hence its deleterious effects will be accentuated.

What evidence have we of legal hegemony vis-à-vis the humanities in bioethics beyond our own anecdotal observations? We would offer the 1998 report of the American Society for Bioethics and Humanities (ASBH) entitled “Core Competencies for Health Care Ethics Consultation” (hereinafter the “Core Competencies” report) as an example.¹²

In that report, the ASBH Task Force lists as potential individual consultants clinicians, lawyers and philosophers;¹³ the involvement of non-philosopher medical humanists is nowhere contemplated.

With regard to the core skills required for ethics consultation, the Core Competencies report listed among those skills the ability to “access,” “critically evaluate” and use “relevant knowledge” in a number of areas including bioethics, law, institutional policy, professional codes and religious teachings.¹⁴ Except for the belated mention of religious teachings, knowledge in the humanities is not mentioned. We wonder, too, whether in the context of clinical ethics consultation religious teachings are utilized, and/or viewed by ASBH as a surrogate for a rule of law. (See, for example, the other areas listed, such as “law,” “institutional policy” and “professional codes.”)

With regard to the core knowledge required for ethics consultation, the Core Competencies report included knowledge in the following areas as they relate to ethics consultation: 1. moral reasoning and ethical theory; 2. common bioethical issues and concepts; 3. health care systems; 4. clinical context; 5. the local health care institution; 6. the local health care institution’s policies; 7. the beliefs and perspectives of the local patient and staff population; 8. the relevant codes of ethics and professional conduct and guidelines of accrediting organizations; and 9. relevant health law. Again, apart from philosophical knowledge, no mention is made of knowledge in the humanities.

We submit that the Core Competencies report significantly undervalues the humanities in the context of clinical ethics consultation. It is particularly vexing since the report was promulgated by an organization which calls itself the American Society for Bioethics *and Humanities* (italics added).

The humanities as a counterbalance

While we understand that the medical humanities comprise much more than the solitary field of literature

and medicine, for the sake of simplicity and conciseness we will limit ourselves hereinafter to a discussion of the value of literature and medicine in medical and PA education and clinical practice.

The contributions of literature and medicine to clinical practice¹⁵ and medical ethics¹⁶ have been summarized elsewhere. Briefly, the contributions of narrative to medical ethics come primarily in two ways: firstly, from the use of stories (narratives) for their mimetic content—that is, for what they say; and secondly, from the methods of literary and narrative theory for their analysis of the diegetic form—that is, for their understanding of how stories are told and why it matters.

With regard to their mimetic content, stories have been important to medical ethics in at least three major ways: firstly, as case examples for the teaching of principle based professional ethics . . . ; secondly, as moral guides to living a good life, not just in the practice of medicine but in all aspects of one's life; and thirdly, as narratives of witness that, with their experiential truth and passion, compel re-examination of accepted medical practices and ethical precepts.

With regard to the methods of literary criticism and narrative theory, the former helps students “to read in the fullest sense,^{17, 18} a skill that helps prepare them for the clinical work of listening to and interpreting patients' stories¹⁹ as well as reconfiguring and retelling those stories as medical cases with plots and causality.²⁰ To read in the fullest sense students must have mastered certain basic skills of literary analysis. . . .²¹

We submit that the humanities may contribute to medical and PA education and to medical ethics in another way—specifically, as a bulwark against the law's designs on dominance. Using the example of literature, quite apart from those contributions to medical ethics cited above and elsewhere, its breadth may act to counterbalance the law's narrowness and its aforementioned tendency to stunt moral reflection. The humanities are rich, nuanced, ambiguous and holistic in a way that the law simply cannot be.

The 1980 United States Rockefeller Commission on the Humanities described the humanities in its report, *The Humanities in American Life*: Through the humanities we reflect on the fundamental question: What does it mean to be human? The humanities offer clues but never a complete answer. They reveal how people have tried to make moral, spiritual, and intellectual sense of a world in which irrationality, despair, loneliness, and death are as conspicuous as birth, friendship, hope, and reason . . .

The humanities presume particular methods of expression and inquiry -- language, dialogue, reflection, imagination and metaphor. In the humanities the aims of these activities of mind are not geometric proof and

quantitative measure, but rather insight, perspective, critical understanding and discrimination . . .

The humanities are an important measure of the values and aspirations of any society. Intensity and breadth in the perception of life and power and richness in the works of the imagination betoken a people alive as moral and aesthetic beings, citizens in the fullest sense. . . . They are sensitive to beauty and aware of their cultural heritage. They can approach questions of value, no matter how complex, with intelligence and goodwill. They can use their scientific and technical achievements responsibly because they see the connections among science, technology and humanity . . .

Study of the humanities makes distinctive marks on the mind: through history, the ability to disentangle and interpret complex human events; through literature and the arts, the ability to distinguish the deeply felt, the well wrought, and the continually engrossing from the shallow, the imitative, and the monotonous; through philosophy, the sharpening of criteria for moral decision and warrantable belief.²²

One of the highest profile recent examples of the use of literature in a bioethics context took place days before the first meeting of the President's Council on Bioethics, when then council chairman Leon Kass gave his colleagues a reading assignment: Nathaniel Hawthorne's “The Birthmark,” a tale about a scientist who obsesses over the tiny mole on his wife's cheek, creates a potion to erase it, and instead kills his spouse. We believe that such use of literature is a powerful and probably underutilized tool (thus, as of 1994 only about one-third of U.S. medical schools taught literature to their students)²³ with much to add to bioethics education and clinical ethics consultation and deliberation.

Examples of the humanities' richness can be found, for example, in *On Doctoring*, a collection of stories, poems and essays (that “penetrate beyond the science of medicine and help to illuminate its human face”²⁴) that is among the humanities resources employed at the University of South Florida College of Medicine in undergraduate medical education and at Nova Southeastern University's Naples-based PA program. Therein, for example, Iona Potapov's plight in Anton Chekhov's “Misery” illustrates powerfully the idea that the healing encounter and respect for persons starts with and sometimes consists of the simple act of listening.²⁵ The law, constrained by evidentiary concerns, looks for answers to relevant questions; its listening is structured and selective.

Mikhail Bulgakov's physician protagonist in “The Steel Windpipe” gives readers a glimpse of the tension between beneficence and respect for autonomy, and the limits of the latter when he exclaims, “Look, have you gone mad? What do you mean by not agreeing? You're condemning the baby to death. You must consent. Have

you no pity?"²⁶ This is the stuff of which are made a hospital attorney's nightmares.

Jorge Luis Borges' "The Immortals"²⁷ and Kurt Vonnegut's "Fortitude"²⁸ are succinct and powerful indictments of the prolongation of life *simpliciter* as a goal of medicine. We could not help wondering throughout the protracted Terri Schiavo ordeal whether the actions of the state and federal governmental officials who became involved might have been more discerning had they read such stories.

In "Coming into the End Zone," Anatole Broyard writes poignantly as a patient about the universal longing for an "ideal doctor," and in the process gives us all a lesson in the true meaning of beneficence and respect for persons:

Inside every patient, there's a poet trying to get out. My ideal doctor would "read" my poetry, my literature. He would see that my sickness has purified me, weakening my worst parts and strengthening the best . . . [A] doctor, like a writer, must have a voice of his own, something that conveys the timbre, the rhythm, the diction, and the music of his humanity . . . all cures are partly "talking cures." Every patient needs mouth-to-mouth resuscitation, for talk is the kiss of life.²⁹

Of course, the law cares not a whit about the "ideal doctor." The law concerns itself only with the "reasonable doctor."

In the same piece, Broyard writes, "To most physicians, my illness is a routine incident in their rounds, while for me it's the crisis of my life. I would feel better if I had a doctor who at least perceived this incongruity." We wonder whether if anywhere in the bioethics literature there is writing that so movingly mirrors this incongruity or so strongly summons physicians to their role as witnesses as do W. H. Auden's "Musée des Beaux Arts"³⁰ or "Stop All the Clocks."³¹ The law is not concerned with whether or not physicians perceive this incongruity, though, we suspect, lawyers probably prefer that physicians and PAs be perceived as perceiving this incongruity if such perception would decrease the likelihood of litigation.

U. A. Fanthorpe's "Children Imagining a Hospital" reminds us that being a sick human means so much more than being sick, while Raymond Carver's "Errand" reminds us that doctoring sick humans demands so much more than doctoring the sickness; sometimes it even requires the ordering of a bottle of champagne on a stat basis.^{32,33}

This collection is just one of a number that lends itself to use in medical education as well as in clinical ethics consultation.^{34,35,36}

Conclusion

Lon L. Fuller, in his work *The Morality of Law*, distinguished between what he termed the "morality of aspiration" and the "morality of duty."³⁷

The morality of aspiration . . . is the morality of the Good Life, of excellence, of the fullest realization of human powers . . . [A] man might fail to realize his fullest capabilities . . . [but] in such a case he was condemned for failure, not for being recreant to duty; for shortcoming, not for wrongdoing . . . Where the morality of aspiration starts at the top of human achievement, the morality of duty starts at the bottom . . . It is the morality of the Old Testament and the Ten Commandments. It speaks in terms of "thou shalt not," and, less frequently, of "thou shalt." It does not condemn men for failing to embrace opportunities for the fullest realization of their powers . . . [but rather] for failing to respect the basic requirements of social living . . . If we look for affinities among the human studies, the morality of duty finds its closest cousin in the law, while the morality of aspiration stands in intimate kinship with aesthetics . . . As we consider the whole range of moral issues, we may conveniently imagine a kind of scale or yardstick which begins at the bottom with the most obvious demands of social living and extends upward to the highest reaches of human aspiration. Somewhere along this scale there is an invisible pointer that marks the dividing line where the pressure of duty leaves off and the challenge of excellence begins . . .

This line of division serves as an essential bulwark between the two moralities. If the morality of duty reaches upward beyond its proper sphere the iron hand of imposed obligation may stifle experiment, inspiration, and spontaneity. If the morality of aspiration invades the province of duty, men may begin to weigh and qualify their obligations by standards of their own and we may end with the poet tossing his wife into the river in the belief—perhaps quite justified—that he will be able to write better poetry in her absence.

We submit that in the field of bioethics, both at the level of undergraduate medical education and at the level of clinical ethics deliberation, the effect of the law is to promote a morality of duty. The proper location of the "invisible pointer" on the moral scale requires a balance between law and the humanities.

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