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Expert Testimony by a Bioethicist

Perspectives and Practice

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Bioethics is a relatively new discipline. The first center dedicated to bioethics, called The Hastings Center, was founded by a philosopher and a physician in 1969. Its publication, *The Hastings Center Report*, quickly became the source of scholarly analysis for health issues. The Kennedy Institute of Ethics at Georgetown University, founded 3 years later by a physician and a theologian, was more closely devoted to ethical problems in medicine, particularly those involving research and end-of-life care. The field, as Al Jonsen noted in his history of modern bioethics, had its origins in philosophy and theology.[1]

Law was soon to make its presence felt. The 1976 case of Karen Ann Quinlan, which involved a young woman who, as a result of ingesting a combination of drugs and alcohol, was diagnosed as being in a persistent vegetative state, generated national attention.[2] When informed by the treating physicians that they did not anticipate recovery to consciousness, her parents requested the removal of the life-sustaining respirator.[3] The treating physician, Dr. Robert J. Morse, refused to do so. He believed that medical ethics required the provision of a respirator for a patient who could not breathe on her own.

In his classic 1835 study of American culture entitled *Democracy in America*,[4] Alexis de Tocqueville noted that Americans have a strange propensity of transforming their moral dilemmas into legal problems as if judges, unlike mere mortals, can provide a definitive resolution to all of life's dilemmas. That tendency continued with *In re Quinlan* when the parents sought injunctive relief from a New Jersey court. Their attorney, a newly minted lawyer named Paul Armstrong, faced with a case of first impression, turned to the constitutional principles of religious freedom, protection against cruel and unusual punishment, and privacy as the basis for his petition to a New Jersey trial court. He also sought assistance from the family's priest, the local Catholic bishop, and several prominent bioethicists to help frame the issue.

The Quinlans' priest testified at the trial, the bishop provided an affidavit in support of the family's request, and the bioethicists, both Jesuit moral theologians,

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supplied background materials on the Catholic Church's centuries-long teaching on end-of-life care, and more particularly on the distinction between the use of ordinary and extraordinary measures to sustain life.

At the court hearing, the New Jersey attorney general and the Morris County prosecutor testified that the removal of the ventilator from a non-brain-dead patient would amount to state sanctioned murder. The physician witnesses stated that it would be unethical to withdraw a ventilator from a patient who could not breathe on her own. The trial judge accepted that testimony, and removed guardianship from Karen Ann's father and transferred it to a court appointed guardian. The New Jersey Supreme Court, in a landmark opinion, reversed that ruling.[5] It opined that although the testimony concerning the father's religious beliefs went to his character and integrity, it was not relevant to the issues before the court. It also noted that constitutional protection against "cruel and unusual punishment" is applicable only to prisoners. The court chose to focus on Karen Ann's "right of privacy." It opined that all patients, including those no longer decisionally capable, have a constitutional right to be free of unwanted medical interventions. In the case of an incompetent patient, that right, absent evidence of neglect or abuse, is best expressed by those who know and love the patient: the next of kin.

The court's assessment of the physicians' claim that the removal of a respirator from a patient dependent on medical technology to breathe would violate the standard of care as well as professional ethics was of note. In the court's words, "Determinations as to these [questions] must, in the ultimate, be responsive not only to the concepts of medicine but also to the common moral judgement of the community at large." With its analysis of the "common moral sentiments of the community" and the role of life-sustaining medical technologies, the intersection of ethics and medicine became the focal point of the New Jersey Supreme Court's approach to the case. For insight and guidance, that court, in an extensive footnote, cited multiple articles by bioethicists, philosophers, and theologians on the ethical issues involving death and dying.

Bioethics had come into the courtroom. Its arrival was not universally welcomed. A widely cited article published in 1982 by Delgado and McAllen began what became an increasingly vocal protest against the incursion of bioethical testimony in the courtroom.[6] Criticism ranged from a fear that the bioethicist would be seen as "the authority" on right and wrong, to a concern that such testimony would invade and potentially usurp the domain of the trier of fact: the judge or the jury. Some critics would concede that the expert witness might speak to descriptive or meta-ethical ethics, but ought not to be allowed to address "normative" ethics; that is, what constitutes ethical and unethical behavior. Others thought that the "teaching" role of the philosopher would be compromised by assuming an advocacy position. Even worse, as John Fletcher of the University of Virginia argued, a bioethicist might in the adversarial process find his or her views challenged.[7] Virginia Sharp and Edmund Pellegrino maintain that the most a bioethicist ought to do in the public forum is to address policy positions before legislature hearings or public commissions.[8] In that way, they hoped that ethicists could avoid an adversarial stance, while adding an ethical dimension to the formulation of public policy.

The expectation that there would be fully developed legislative remedies for whatever potential ethical conflicts might arise in medicine is not only an idealized description of how legislation is crafted, it also fails to recognize what

Justice Paul Liacos of the Massachusetts Supreme Judicial Court noted in his Saikewicz opinion: "The law always lags behind the most advanced thinking in every area."[9] Judges, when confronted with disputes not readily resolvable under present legal standards, do not have the luxury of waiting for statutory guidance on how to proceed. They are called upon to resolve disputes as they arise.

Some critics such as Christopher Cowley scoff at the notion of moral expertise.[10] That sentiment was articulated by Giles Scofield in his thesis that we are "all moral experts."[11] He believes the concept of expert "is antiethical to the foundational beliefs of a pluralistic democracy" in which each individual is "the moral equal of every other."[12] That apotheosis of the "man on the Clapham omnibus," is captured in Don Henley's 1995 rock hit "The Garden of Allah" when the devil proclaims, "I am an expert witness, because I say I am."[13]

The counterpoint to radical skepticism or the reduction of bioethics to the musings of philosophers is the finding of Douglas Mishkin that in a poll of judges, "almost half the one hundred fifty responding judges reported the testimony of bioethicists had been persuasive or useful in resolving disputes."[14]

In an insightful article on that issue, Edward Imwinkelried[15] notes that Rule 702 of the Federal Rules of Evidence directs that normative testimony should be admissible when it is helpful to the court. Imwinkelried goes further in his observation that "A judge performs an essentially legislative function when she fills a gap in the law by formulating a common-law rule." That role, he notes, is distinctive from the adjudicative function of deciding a particular case on the basis of existing law. In performing the former role, Imwinkelried argues, judges "may freely go anywhere for relevant information." On that point he quotes Justice Oliver Wendell Holmes that when a court is investigating "a ground for laying down a rule of law," it may "ascertain" relevant information "as it sees fit."[16]

Contrary to the stance of attorney George Annas that it is not philosophy, theology, or the tradition of medicine, but law, that has shaped bioethical norms,[17] judges facing conflicts at the intersection of medicine and ethics seek out and utilize insights from those trained in moral analysis and clinical ethics.[18] This most readily occurs in path-breaking cases. The Massachusetts Supreme Judicial Court's opinion in the landmark Saikewicz case provides a useful illustration.[19] There the court was confronted with the question of the state's obligation to treat a severely retarded adult afflicted with fatal leukemia. Chemotherapy offered a 30 percent change of a 3–13 month prolongation of the patient's life, but at the price of pain and increased sickness. Without treatment, death would come swiftly and relatively painlessly. At issue was the moral standing of an incompetent, moribund patient to choose the latter alternative.

In resolving that question, the Supreme Judicial Court noted that the law often lags behind the most advanced thinking of "theologians and moral leaders." It sought guidance from those sources and "the framework of medical ethics." In doing so, it acknowledged that such considerations were not controlling, but in its words, "ought to be considered for the insights they give us." Among other findings, the Supreme Judicial Court noted that medical ethicists no longer believe that physicians should invariably prolong life by extraordinary means. The court declined to order the provision of chemotherapy. In cases of this nature, not to decide is to decide: by resolving an ethical dilemma in favor of one outcome over another. To do so without thoughtful, informed analysis or to depend on legal norms that lag behind developments in medicine is an injustice to the patient.

The question then arises: who is qualified to offer "expert testimony" that will prove "helpful" on topics that are generally unfamiliar to judges and jurors? The individual purporting to do so must first establish his or her qualifications as an expert in a particular field. It is fairly obvious who would be qualified to speak on a topic such as neurosurgery. Bioethics is not so readily parsed. Bioethicists come from philosophy, theology, law, social work, psychology, medicine, nursing, and other fields. Further, the rules developed over centuries of litigation on what constitutes evidence rather than mere opinion are extremely refined. They are also very complex.[20]

Loretta Kopelman, a highly regarded professor of bioethics, uses qualifications for promotion in a research university as a rule of thumb on identifying an "expert." The witness, she observes, should have significant peer reviewed publications in well-known journals in the field of bioethics, and have a tenured position in a university of significant reputation.[21] My experience on being qualified as an expert witness was quite different. In 1981, a reporter who had written a story for the *Boston Globe* on my teaching bioethics at the University of Massachusetts Medical School suggested to the attorney who represented the husband of a brain-dead 23-year-old Connecticut woman, named Melanie Bacchiochi, that I might be of help in the legal controversy over the husband's request to have the respirator removed.[22] That suggestion led to my first court appearance as an "expert" on bioethics. The attending physician, who feared a potential "homicide" charge in a state lacking a brain-death statute, had refused the family's request. The judge, reluctant "to make law," cited the common law definition of death as irreversible cessation of heart and respiration. With a respirator in place, the woman's heart was beating, and she was breathing; therefore, he declared she was not dead.

I was called to the stand to testify on the ethics of removing the respirator. Shortly after I began my testimony, the judge stopped me and asked, "Isn't the statement you are making on 'ordinary and extraordinary' treatment Catholic doctrine?" I assured him that whereas the Catholic Church does hold such a position, the principles have also been adopted by the American Medical Association. I then noted that the distinction I was making could also be found in footnote #7 of Judge Armstrong's opinion in a Massachusetts Court of Appeal case entitled *In re Dinnerstein*.[23] The judge stopped me and said: "Anyone who can cite footnotes from a ten year old opinion of an intermediate appellate court is by definition an 'expert.'" It was that, not a resumé of published articles or academic appointments that qualified one as an "expert" in that courtroom.

There followed a dialogue in which the judge told the lawyers to sit down so that he and I could explore the entire range of issues involving termination of treatment. After approximately 3 hours of discussion, the judge inquired, "If, as you have demonstrated from the literature, it is ethical to remove a ventilator from a brain-dead patient, should I accede to the plaintiff's request and order the ventilator removed?" That was the petition of the lawyer who had asked for my testimony. My response was an unambiguous "No." "To do so," I replied, "would transform a medical decision into a judicial judgement, a mistake made by the Massachusetts Supreme Judicial Court in the *Saikewicz* case." The judge then asked, "should I, as the physician requested, grant immunity to the doctor." Again, I demurred. Such a precedent would encourage physicians to seek immunity for whatever procedure they performed. Rather, I proposed, he should direct the physician—who was seated in the front row of the courtroom—to act in a

way appropriate to the patient's physical condition. If he did not know what that was, there were physicians in the state who could instruct him on the proper response to a brain-dead patient. The lawyer who had requested my testimony was nearly apoplectic. Why, he demanded, "didn't you just answer 'yes' when the judge asked should he order the respirator removed?"

In his reflections on being an expert witness, John Fletcher noted the lessons learned from that experience.[24] The major one was about role conflicts. As Fletcher stated, "The core expectation in the expert witness role [is to be] an effective advocate of one and only one right moral judgement." Another lesson was that the expert felt responsible for outcomes of important cases. An additional issue raised by Pellegrino is the potentially corrupting role of payment for testimony. As Kipnis has noted, remuneration can be a perverse incentive to become nothing more than a "hired gun," who for a fee, is willing to say whatever the client wants.[25] Medicine has provided too many examples of such behavior to make that concern nothing more than a remote possibility.

When asked to testify in *Bacchiochi v. Johnson Memorial Hospital* or in multiple other cases of patients trapped in an underdeveloped medical-legal environment such as *Quinlan*,[3] *Brophy v. New England Sinai Hospital*,[26] or *Baby Jane Doe*,[27] I did so because, as John Fletcher put it, testimony in pathbreaking legal cases where the stakes for bioethical issues are very high is part of the professional obligations of one who can help inform public policy on applicable principles, norms, and traditions. Alternatively, when testifying in cases in which eight or ten lawyers are listening to an explanation of how an ethics expert might help shape their case—while they are billing at their standard hourly rate—I am mindful of the scriptural exhortation "Do not muzzle the ox that grinds the grain" (Deuteronomy 24:4). It is also liberating to know that the compensation received is going not to me but to the Jesuit Community.

After my first experience testifying in a court case, my response when receiving a call inquiring if I would testify in another case was: "Let me review the record, see if I can identify a significant ethical issue, inform you if I think an ethicist will help your cause, and then I will let you know if I am willing to be the ethicist." Although I am concerned about helping to shape public policy, I have no particular desire to resolve the claims of every aggrieved party. After testifying in *Barber v. Superior Court*,[28] Brophy,[30] and *In re Jobes*,[29] and working with the attorneys on appellate briefs in those cases as well as *In re Claire C. Conroy*,[30] I believed that the policy issues on withdrawal of artificial nutrition and hydration had been well developed. When subsequently called by the attorney seeking my testimony on behalf of a Rhode Island woman who was in a persistent vegetative condition and whose physician had declined to honor the family's request to withdraw the use of artificial nutrition and hydration, I declined.[31] The opinion of multiple state courts, as well as the United States Supreme Court,[32] had provided a strong consensus that competent patients have the right to decline any and all unwanted medical interventions including the use of artificial nutrition and hydration and that, subject to various state evidentiary requirements, that "right" applied as well to incompetent patients.

As soon as the once-contentious dispute over withdrawal of artificial nutrition and fluids had been resolved, there arose a new source of conflict: disagreement between families and physicians over demands for continued life-sustaining medical intervention on patients for whom physicians believed the treatment would be inappropriate or ineffective. The dispute over so- called medical "futility"[33]

generated a flood of commentary and led to a rash of legal cases including *Baby L*,[34] *Matter of Baby K*,[35] *Gilgunn v. Massachusetts General Hospital*,[36] and *Hudson v. Texas Children's Hospital*.[37] There was also a cluster of cases in which parents sued neonatologists for failure to continue resuscitation of a newborn infant believed by the physician to be stillborn or unresuscitable.[38] Those conflicts involved highly contentious issues in which it seemed that assistance from a bioethics expert would be helpful to the court.

Even more instructive than the cases in which I participated were those in which I declined to be involved. Among them were that of an attorney seeking testimony that a physician having a sexual relationship with his patient was ethically acceptable on the grounds that his sexual involvement with the patient kept her from committing suicide, that of a cardiothoracic surgeon who wanted testimony in support of the ethical propriety of phalloplasty, and requests to defend major pharmaceutical firms in the disputes on the issue of diet pills or Norplant. The most bizarre request I received was from an attorney seeking testimony on behalf of a nurse accused of homicide in the case of an anencephalic newborn. The lawyer's defense was "by any enlightened medical standard a baby born without a brain was already dead." When I informed the lawyer that by the statute in every state an anencephalic baby who was breathing on her own was not dead, he inquired, "How would you describe what my client did?" My response, "Your client killed the baby." The lawyer, who spoke with a pronounced southern drawl muttered, "My, my, if I put you on the stand I would have fried my own fish."

In addition to having been invited to address bioethical issues for more than two dozen judicial conferences, including those sponsored by the supreme courts of multiple states and five annual meetings of the Council of Chief Judges of State Court of Appeal, perhaps the strongest evidence that the testimony of a bioethics witness can be helpful to a court was an unanticipated letter received from the Connecticut Superior Court judge in the *Bacchiochi* case: "While the case resolved itself before the need for a decision, your testimony was of great assistance to the court and would have been extremely helpful in framing the issues had a full opinion been necessary in the case (personal communication)."[39]

With the exception of one instance in which a trial judge excluded my testimony on the grounds that an examination of professional ethics of the several nurses in the case regarding confidentiality would invade the province of the jury, my experience has been that courts not only allowed expert testimony on narrative ethics, but were relieved to find someone who could provide conceptual clarity and substantive guidance on the conflicts before the court.

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