How Should Ethics Consultants Weigh the Law (and other Authoritative Directives)?

Peter Koch

In the continuing debate about the role of the Clinical Ethics Consultant in performing clinical ethics consultations, it is often assumed that consultants should operate within "ethical and legal standards."[1] Recent scholarship has focused primarily on clarifying the consultant's role with respect to the ethical standards that serve as parameters of consulting.[2] In the following, however, I wish to address the question of how the ethics consultant should weigh legal standards and, more broadly, how consultants might weigh authoritative directives, whether legal, institutional, or professional, against other normative considerations. I argue that consultants should reject the view that authoritative directives carry exclusionary reason for actions and, further, ethicists should interpret directives as lacking any moral weight qua authoritative directive. I then identify both implications and limitations of this view with respect to the evolving role of the ethics consultant in an institutional setting.

Clinical Ethics Consultation Services (CECS) have become increasingly prevalent in hospitals and medical institutions since the inception of the service around thirty years ago.[3] Despite the widespread and growing use of CECS, many questions remain regarding the appropriate CECS model, the role of the consultant, and the nature of ethical expertise. As it stands, the answers to these questions tend to be treated either non-uniformly or inconsistently both between institutions and between individual consultants within a single institution.[4] Among the multi-faceted conversation spawned by the growth of clinical ethics consulting, an important question has remained largely unaddressed, and so unsettled: How should an ethics consultant weigh the law when performing a consultation? And, more broadly: How should an ethics consultant weigh authoritative directives, whether institutional or professional, when consulting?

The prevailing assumption throughout the literature is that clinical ethicist must operate, in some capacity, within the standards provided by the law or relevant institutions. The most prominent framework for ethics consultation is produced by the American Society for Bioethics and Humanities (ASBH), a de facto leader in the field the ethics consultation. ASBH has regularly compiled taskforces to address the pressing issues of ethics consulting, which in turn have produced the "Core Competencies" of consulting, a code of ethics and professional responsibilities, and descriptions of the nature and goals of ethics consultation.[5] ASBH specifically states that consultants ought to practice within "legal standards" and that the law ought to be given its appropriate weight in ethical considerations. It is unclear, however, how these phrases translate to the practice of deliberation during a consult.

Questions about the weight of the law in ethical considerations arise not only at the theoretical level but also in practice. For example, a recent debate in literature centered over a consultants' weighing of laws when navigating a particular clinical case.[6] The authors were concerned, in part, with the consultant's "giving appropriate attention to legal roles and utilizing legal processes."[7] However, it remained unclear as to what constitutes appropriate attention to the law. Further, it is likely the experience of any clinical ethics

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consultant that, in some (if not many) cases, abiding by a legal framework would have resulted in a recommendation that was ethically insupportable. In fact, it is often the case that it is precisely because of a legal framework that an ethical dilemma arises and a consultation is called — for example when a legally designated health care representative of a patient is clearly acting contrary to the interests of the patient. In these cases, the demands of the law have created the dilemma. The opposite is likely true as well. In some cases, the force of the law has helped resolve an ethical conflict that may seem irresolvable — for example, when an unethical request by a parent on behalf of a minor falls in the category of legally prohibited. In these cases, ethics consultants often find the law to be a convenient supportive structure.

Law, of course, is not the only example of an authoritative directive that consultants face. Consultants are obligated to inform themselves of institutional and professional guidelines and policies for the very purpose of incorporating them into their deliberations. For example, in one widely referenced guide for performing an ethics consultation, Fletcher and Spencer suggest that ethics consultants "identify any relevant institutional policies pertaining to the case" as part of the assessment.[8] This suggestion is not merely to identify what these policies are, but to implement these policies in deliberations. It remains unclear in both theory and practice exactly how these institutional policies ought to be weighed among myriad other considerations; it is widely accepted, however, that policies and other authoritative directives such as laws ought to be weighed when providing a recommendation. It is this question — how an ethics consultant ought to incorporate authoritative commands, like laws, in the broader balance of reasons in moral deliberation — that I wish to consider here.

The Role of the Ethicist and Consultation Models

Before addressing the question of how ethics consultants ought to incorporate authoritative commands overall, we should first sketch the role of the ethicist in an institution and the manner in which the ethicist performs a consultation. (I say "sketch" because there remains a good deal of ambiguity about what it is the ethicist actually does, and ought to do.) This is important because the role of the ethicist tells us what kind of content the ethicist needs to perform the services associated with that role; this is true of all specialists in a hospital, as a pulmonologist, for example, incorporates very different data from that of a social worker when performing their services.

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While there is, as mentioned above, continued debate about the specifics of the role of an ethics consultant, the ASBH describes it as follows:

> Consultants seek to identify and support the appropriate decision maker(s) and to promote ethically sound decision making by facilitating communication among key stakeholders, fostering understanding, clarifying and analyzing ethical issues, and including justifications when recommendations are provided.[9]

The ethics' consultant's role, then, is to promote sound ethical deliberation by balancing ethically relevant features of a case and then provide justified recommendations. Typically, some notion of impartiality is mentioned when describing the role of the ethicist; here, the impartiality seems to be implied by the ethicists' role as promoting and supporting the ethically sound decisions of stakeholders, without introducing or promoting their own specific moral values into the conversation. Further, the kinds of reasons that

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the ethicist incorporates into such conversations are generally restricted to the ethical domain. In the same way that a pulmonologist might restrict their deliberations to that which is medically relevant to lung function and bodily health, the ethicist restricts their considerations to the ethically relevant features of a case.

An understanding of the consultant's role is further complemented by an understanding of the various models of how to perform an ethics consultation. The model that receives the bulk of attention (both positive and negative) is the "ethics facilitation model," in which the ethicist facilitates conversations with stakeholders towards and ethically sound, justified recommendation. This model reflects a hybrid between two other common (though flawed) models of practice: the pure consensus model and the authoritative model. As the name suggests, the pure consensus model takes the role of the ethicist to be one of a mere facilitator with the goal of reaching an agreement among interested parties — regardless of the content of the agreed upon solution. On the other end of the spectrum is the authoritative model, in which the consultant announces the "correct decision" to the interested parties with little or no regard for their values and insights. The facilitation model offers a compromise: the ethicist incorporates the values and insights of the interested parties through communication, listening, and mediation, all towards the end of arriving at "firmly grounded conclusions." Ethicists guide conversations without imposing their own values on the stakeholders, while at the same time recognizing the range of ethically acceptable recommendations that could result as a product of deliberations.

The purpose of the consultant, then, is to facilitate discussions about ethically-complex issues with relevant stake-holders, assisting the stakeholders in clarifying and communicating their (ethically-relevant) values, towards the goal of identifying a justified recommendation. Importantly, the consultant's role is in the realm of the ethical; consultants do not make medical or legal recommendations. In fact, the ASBH goes out of its way to warn against consultants slipping into the realm of legal considerations when performing their duties, calling the ethical-legal conflation a common "pitfall":

> Don't confuse legal considerations with HCE consultation. Do recognize the appropriate roles and contributions of legal considerations in HCE consultation. While legal considerations (including risk management and legal precedent) and ethical concerns related to a particular case may overlap considerably, they are not synonymous. This is not surprising, because their ultimate purposes differ, and the key stakeholders may be different. For example, in risk management, one goal is institutional protection, and the key stakeholder is typically the institution itself. For HCE consultation, the ultimate goal is arriving at healthcare decisions that are ethically optimal and defensible, and the key stakeholder (particularly in a case consultation) is typically a person, such as a patient or a staff member. Similarly, while legal considerations (such as case law or relevant state/federal legislation) may be very germane and inform ethical thinking about a case in important ways, what legal counsel might advise may differ from what the HCEC might recommend. Accordingly, the HCEC must resist the temptation to simply follow the guidance of legal counsel or risk managers, and instead arrive independently at positions and recommendations based on ethical principles and considerations.[10]

We see here acknowledgements of vague relations between the legal considerations and ethical considerations: legal structures "may be very germane and inform ethical thinking in important ways";" they "may overlap considerably;" and consultants ought to recognize the "appropriate roles and contributions of legal considerations." But, if the role of the ethicist is as described — that is, appropriately limited to the ethical deliberations of a case — then we should ask: how exactly do legal considerations fit into these ethical deliberations? These descriptions, as they stand, do very little to direct an ethics consultant in how to weigh legal considerations as an ethics-facilitator.

The Moral Component of the Law

If the role of the ethics consultant is as described, then we should identify the moral components of the law qua law in order to see how the law might fit into the consultant's deliberations. In other words, we should ask: what moral demands, if any, does the law (or other authoritative directives) create on a subject, simply in virtue of it being a law?

This question is distinct from asking about the moral demands of the content of a law or directive. The content of the law refers to the particular information that the law contains: the requirement to wear a helmet while riding a motorcycle, prohibitions against assault, etc. When we assess the moral demands of the content of the law, we are deliberating about whether the requirement is itself good or bad, independently of whether it is a law. To illustrate the importance of the distinction between the moral demands of the law and its content, imagine that a law is passed requiring that

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hospital staff report any undocumented patients to the appropriate authorities. The ethics consultant is called to assist in a case regarding the patient. One concern is if and when to report the patient, since reporting the patient may interfere with patient care. Imagine that the ethics consultant gives great moral weight to the law qua law, independently of the content of the law. When the consultant deliberates about what elements of the case are relevant to discussion, they would consider the mere fact that this law exists as a good reason to provide the patients information to authorities — because there is an intrinsic moral reason to follow any law. Perhaps the consultant thinks that the moral obligation to follow the law could be outweighed by other considerations, but they would consider that the law itself creates a moral reason to report the patient, just in virtue of it being a law. The consultant would think that it is appropriate to both weigh the fact that the directive is a law, and that the law says to report patients: two separate considerations.

A different consultant, however, may think that there is no moral duty to follow the law qua law, and so only the content of the law is weighed. This ethics consultant only introduces these "legal considerations" insofar as reporting undocumented patients has moral content, and only insofar as the various stakeholders might include this consideration in their balance of reasons. This distinction is important because, if laws have moral weight qua laws, then the introduction of a law can tip the scales of a recommendation towards following a specific law, since the law and its content are considered independently. However, if laws do not have moral weight in themselves, then the content of the law will be weighed alone, and only when the content itself is morally relevant.

In both scenarios there remains room for the ethicist to support a recommendation that is contrary to the demands of the law. And almost any ethicist will agree that, of course, there should be room for recommending a course of action that is contrary to the law. But this in itself demonstrates the vagueness of phrases like "within legal standards" or "appropriate roles and contributions" of the law. On the one hand, the content of the law does not always track what is moral, nor do legal and institutional frameworks capture the full ethical story. Yet many consultants — and certainly institutions and governments — implicitly or explicitly assert that laws and directives ought to be obeyed. And so we should sort through, as precisely as we can, what the moral demands of the law are.

The Moral Obligation to Obey the Law

The question of whether there is a moral obligation to obey the law, and related questions on the relation between the law and morality, has a rich history as a source of philosophical contention, which continues today.[11] In the following I will propose that there are good reasons for clinical ethics consultants to reject the view that authoritative directives provide overriding, exclusionary reasons for action, and, further, that authoritative directives should be taken to introduce any prima facie duty to obey the law qua law in ethics consultations. I suggest that, rather than present the weight of law as law within consultations, ethics consultants should only weigh deliberations about the content of a particular law along with the incentives and penalties for obedience of disobedience to a particular law or directive. To support this thesis, I first outline an argument for why authoritative commands like laws are incompatible with the moral reasoning demanded of clinical ethicists and, in some cases, relevant stakeholders in ethics consultations. I then turn to a common consent-based argument for why we might have a duty to obey the law qua law grounding the prima facie moral obligation to obey the law, and argue that this justification fails both generally and also within the specific context of ethics consultations. Together, these considerations offer strong support for the view that ethics consultants should not give moral weight to the law qua law, and so should be best understood as philosophical anarchists within institutions.

The Incompatibility of Authoritative Directives and Moral Reasoning

The first position that consultants should reject is that legitimate authoritative directives offer exclusionary reasons for action, and so subjects ought to obey authoritative directives without weighing the content of the directive for themselves.[12] In his now classic "In Defense of Anarchism," Robert Paul Wolff defends this view and offers a framework through which to evaluate the relationship between an authority and the autonomous, moral individual.[13] Wolff argues that the demands of authority are incompatible with the requirements of a moral life

Following Wolff's argument, to claim authority is to claim the right to rule and the right to be obeyed. If an individual or group claims authority, then they do not merely offer suggestions or recommendations to those over whom they have authority. Rather, they claim that their commands ought to be followed; there is an obligation on the part of the subject to follow those commands. A failure to follow those commands is a violation of the rights of the authority and the duties of the subject.

When we speak of authority in this way, as a right to rule and to be obeyed, we speak of a *de jure* authority — an authority that has a justified right against their

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subjects, and to whom their subjects owe their obedience. *De facto* authority, on the other hand, is the person or persons who function as an authority, although they are not necessarily a justified authority. A *de facto* authority is the person or group who issues commands to a relevant group and whose commands are generally obeyed; their actions and the responses to their actions are descriptively those of an authority.

The relation between a de jure authority and a subject is importantly distinct from other common relations between individuals within society; it is worth distinguishing authority from these other relations to further illustrate the demands of a legitimate authority. First, the demands of authority are distinct from demands based solely upon power. Power is the ability to compel to action through coercion, force, or threat, and so power-based directives do not entail that any rights are at stake between the individual wielding power and the individual under power. A robber, for example, may exercise power over their victim because they can compel their victim through force (the use of a gun) to give them money. Second, an authoritative command is distinct from a persuasive command, or a command that stems from a theoretical authority.[14] Persuasive commands offer beneficial reasons for abiding by the command, where the benefit derives from the content of the command. There are no rights at stake between the issuer of the command and the recipient of the command. If, for example, your physician tells you, "Exercise twice a week for thirty minutes so that this condition improves," you have been issued a persuasive command. If you fail to do so, you have not violated any rights of your physician. Third, an authoritative command is distinct from a request. A request requires deliberation about the content of the request, but also offers an additional reason for obedience beyond the merits of the content of the request.[15] A request from a friend, for example, gives you reason to do the request because the requestor gives you a reason to act and, if the content of the request is good, then the content may provide additional reasons for action. It is nice of you to fulfill a request, and you may have a content-independent reason to fulfill a request (e.g. friendship), but the requestor does not have a right to your fulfilling the request.

These distinctions can be clearly illustrated when we think of a parent and a child at a dinner table. The child does not want to eat the vegetables. Assume for the sake of argument, that this parent is a de jure authority over the child. The parent commands the child to eat the vegetables, but with variations that reflect the different kinds of commands: one stemming from legitimate authority, the second from power, the third from persuasion, and the fourth as a request. In the first variation, the parent says simply "Eat your vegetables because I said so." There is no further reason needed because the command stems from de jure authority — the parent has the right to rule and the right to be obeyed. In the command stemming from power, the parent might say "Eat your vegetables or else you aren't allowed to play with your friends tomorrow." Here the command is backed by threat. In the persuasive command variation, the parent might say "Eat your vegetables so that you grow up to be healthy and strong." Here the command is backed by beneficial reasons to the child. Finally, a request might be, "Please eat your vegetables — for me." The content of the directive is beneficial to the child if followed, but there is also an appeal to the person who makes the request, which adds in additional reason for the child to obey. Each kind of command is backed by different

Once an individual begins weighing whether to obey a directive based on the merits of the law or the penalties of violating the law rather than the authority behind the law, then that person has strayed from accepting the authority as a de jure authority. If a person follows laws because the laws offer good ideas, then that person accepts the law as persuasive commands. If a person follows the law out of fear of penalty, then that person has been compelled through power to follow the law. Or if a person views a law as a request, then they are not treating the authority as an authority. As seen, these are importantly different reasons for follow a law or directive.

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kinds of reasons — if additional reasons are needed at all, which is not the case for de jure authoritative commands.

When we explore how ethics consultants should respond to authoritative commands, we are concerned about those commands that stem from de jure authorities. Here it is worth stressing the kind of reasons that a de jure authority provides in support of a directive — namely, none beyond their justified right to rule and to be obeyed. From the perspective of the authority, the subject needs no further reason for action than to know that the authority is the authority. And, if Wolff's understanding of authority is correct, any person or group claiming authority over another group must claim this legitimate authority: they are not merely claiming to be more powerful than you, or to have good advice for you, nor are they simply requesting that you obey a law. Rather, they claim to have the right to rule and the right be obeyed. They must claim that, when a directive, such as a law, is promulgated, the subject of the directive need not consider and weigh the content of the directive. It is sufficient to know that the directive comes from a de jure authority; no additional persuasion or power is needed. We see this, for example, when the government posts highway signs that read "Buckle up. It's the Law." Subjects need no further reason to buckle up than to know that it's the law, and that the law stems from a legitimate authority.

If we assume that there is such a thing as a de jure authority — one that truly and legitimately bears the right to rule and the right to be obeyed — then this has implication on ethical considerations in the hospital setting. The ethics consultant who adopts this kind of attitude towards authoritative directives would hold that consultants ought to obey the law and need not — or, even more strongly, ought not — weigh the ethical content of the law. Of course, a subject must deliberate about the content of a law in order to obey it, but the subject is not in a position to weigh whether they ought to obey the law. In order to know that the law ought to be obeyed, it is enough to know that the directive has been issued by a legitimate authority.

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Authority and Moral Reasoning

Wolff adopts the view that autonomy, understood as self-law, is the capacity to act both freely and with responsibility — a view which reflects a major, if not the predominant view of autonomy in bioethics literature. As the above analysis suggest, the rights and duties that stem from the relation between a de jure authority create demands on the subject that are often, if not always, incompatible with the exercise of autonomy. The primary source of incompatibility, philosophers like Wolff argue, is that one cannot strive for both an autonomous moral life while taking seriously the demands made by a de jure authority. A person who strives to be moral must reflect upon external directives, regardless of the source, deliberate upon the rightness or wrongness of the directive, and then choose whether to abide by the directive. This conflict has led philosophers to reject either the notion of the de jure authority all together or, as a less drastic conclusion, the notion that a de jure authority has ever existed in practice. This process of acting both freely and taking responsibility for one's action excludes, in almost every case, an acceptance of an authority as a legitimate, de jure authority.

A strong view of authority like Wolff's can also be framed as incompatible with the exercise of rationality. If exercising rationality involves balancing reasons and acting in accordance with these reasons, and authority demands that we obey a directive at the exclusion of our own reasons, then the two are incompatible. In "Challenging Authority," and channeling the same model of concern as Wolff, Heidi Hurd succinctly summarizes the incompatibility as follows:

> If it is a canon of practical rationality that we act on the balance of reasons available to us, and if a government has authority if it can command us to act in ways that may not comport with the balance of reasons as we see it, then civic obedience violates a central principle of rationality.[16]

This conflict applies to *any* moral, rational agent who is under a legitimate external authority. If the moral obligation to obey a law derives from the rights and duties inherent in a subject's relation to a legitimate authority, yet a moral agent cannot accept a legitimate authority as such, then we cannot ground our moral obligation to obey the law in the acceptance of a legitimate authority as such. The rejection of author-

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ity as authority in favor of the one's own balancing of moral reasons for action is a form of philosophical anarchism.

If moral agents ought not accept laws and directives with the obedience demanded by a legitimate authority, then the principle of rejecting authority in favor of independent moral reasons seems to apply *particularly* to an ethics consultant because of the ethicist's role as a facilitator of moral reasoning for stakeholders. Thus, the ethicist should focus their deliberations on the balance of moral reasons as put forth by the stakeholders in an ethics consultation, and in doing so exclude from their deliberations the demands of authoritative directives *qua* authoritative directive. In short, the morally salient features and related ethical frameworks should drive the justifications for an ethicist's recommendation, rather than drawing upon legal, institutional, or professional directives as justifications in themselves.

The rejection of the kind of authority described above is compatible with the deliberative process of the ethicist as described by ASBH: Ethicists should "instead arrive independently at positions and recommendations based on ethical principles and considerations" — a claim which, when understood in terms of the incompatibility of authoritative directives and moral reasoning, is a tenet of anarchism. And this conclusion extends not only to laws, but to other authoritative directives that an ethics consultant may encounter, such as institutional or professional directives. Either these institutions claim the kind of authority that is incompatible with moral reasoning, or they are merely producing persuasive commands, requests, or coercive power-driven directives. Most institutions do not formulate institutional policy as mere requests or persuasive commands; if they do, then the policies are not binding in the first place, and so ethics consultants need only weigh the content of the policies as suggestions and nothing more. And very few institutions and professional organizations would demand obedience solely through coercive measures. Hence the incompatibility of authority with moral reasoning extends to institutions and professional organizations as well, and ethics consultants ought not accept the overriding, exclusionary authority of professional or institutional policies.

Perhaps, however, when ethics consultants are advised to stay within the legal standards, this advice can be interpreted as taking authoritative directives to have moral weight, but just not the overriding, exclusionary weight of the authoritative directive described above. This would provide a more tempered view of authoritative directives, in which the subject may balance their own reasons for obeying the content of the law, but the command will also carry a content-independent obligation to obey. This is the sort of authority sometimes described as an influential authority, which is marked by 1) the reasons for obedience are independent of the merits of the content of the directive; and 2) the reasons cannot be exclusionary, meaning that the subject can balance their own reasons in addition to the content-independent reasons for obedience.[17] The idea would be that the prima facie obligation to obey is quite strong, but not in principle overriding. Since the moral obligation to obey the law qua law is weighty, but not necessarily always overriding, then the subject will almost always obey the directive. Some have argued that this could explain why it may appear that authoritative directives require a suspension of judgment. The weight of the law qua law is so great that in almost every case the subject will obey with the directive after balancing the content-dependent and content-independent reasons for action.

Even if we offer this more charitable interpretation of authoritative directives, there remains the question of the grounding for the moral obligation to obey the law, even if a prima facie moral obligation. Traditionally, there have been three main candidates for the source of this moral obligation: fair-play, utilitarian principles, and consent.[18] There are good reasons to reject all three kinds of arguments and so reject the metaphysical claim that there is a moral obligation to obey the law, a conclusion which has been argued for extensively by MBEE Smith, among others.[19] I will leave the details of these arguments to those have my mind successfully cast doubt on each of these justification, and focus instead on the grounding that I imagine most would point to as a reason for the ethics consultant to follow the law: consent-based justifications.[20] Consent-based justifications offer the explanation that individuals provide consent to obey the laws of the legitimate government or institution under which they are a subject through certain actions that they have performed. Those who ground the prima facie obligation to obey the law in consent, of course, concede that people do not typically offer their explicit consent to obey the law; few people express verbal or written consent to follow all laws. Rather, these theorists argue that consent to obey laws is found in certain acts, or signals, which can be taken as implying and so establishing consent. For example, Locke famously argued that subjects have provided their implied, tacit consent to be governed by virtue of their enjoying the benefits of a legitimate government through participation in political processes and through benefitting from the goods and services provided by a government.[21] Implied consent, then, creates a prima facie moral obligation for obedience.

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When applied to HCECs, consent-based models (and the other models) raise an additional issue. It is unclear if the signals for consent should be obtained from the consultant, from the patient, or from a combination of stakeholders. If from the consultant, then it is not clear how the consultant's consent makes any difference in deliberations, as it seems strange that the moral duty to obey the law transfers to the patient, about whom the law presumably applies; the ethicist's consent to obey the law does not imply the patient's consent to obey the law. We should instead focus on consent-signals from the patient.

Shifting to the patient is also problematic. Even if some acts create an obligation to obey authoritative directives, however minor or major the weight of such an obligation may be, it surely falls outside of the role and expertise of the ethics consultant to determine whether or not the stakeholders in a given consultation have performed such actions and so now have these obligations. Take, for example, voting, which is often invoked as a signal of consent to obey laws, thus creating an obligation to obey laws. It is not plausible, however, that such considerations should play a part in an ethics consultant's deliberations; it would be strange if ethics consultants should give extra weight to laws if the stakeholders within a consultation are voting members. Another example of a consent-signal is serving in a political office or in the military. This too seems like an odd consideration for an ethics consultant, to weigh the law differently if, for example, a patient's family member holds a political office or has provided another signal of consent. And we can imagine other cases in which a consultant sees no signal of consent: for example, a patient who is being treated after an emergency landing of their flight in a foreign country. In this case, it is implausible that the patient has implied their consent to the laws of that country or to the authoritative directives of that particular hospital. These considerations indicate that it is outside of the purvey of clinical ethics consultants to gauge a particular individual's signals of consent to authoritative directives, even if it were the case that such signals could ground moral obligations to obey authoritative directives.

Implications and Limitations

There are good reasons to reject that clinical ethicists have a moral obligation to obey authoritative directives or presume that patients have such an obligation. However, there is still room for the ethicist to have moral obligation to obey certain directives, but only in virtue of obligations derived from explicit promises or oaths, and not in virtue of the authority backing such directives. If an ethicist explicitly promises to abide by the directives of an authoritative institution (for example through an oath), then the ethicist is bound by the moral obligations of that promise in virtue of it being a promise. As we have seen, however, this a different claim from having a moral obligation to follow the law qua law, and to argue for the moral entailments of promise-making is outside of the scope of this paper. This leaves room for CECs to promise to uphold either the particular values of the CEC profession or the particular values of an institution to which they are of service, and such an obligation would be grounded in the promise rather than in the authority behind the directives. This conclusion, however, suggests a call for either a professional oath within the field of ethics consulting (to which consultants would be morally bound) or a movement by particular institutions to ensure that their first-party — that is, hired by the institution — consultants agree to the moral framework promoted by the institution. However, given the preceding discussion, this may be a controversial new feature of the clinical ethics consulting service.

How CECs Should Weigh Directives

Given the above discussion, I suggest that there are two major considerations that ethics consultants should reflect upon when incorporating authoritative directives like laws into a consultation. First, ethics consultants may consider the ethically relevant features of the content of a given law — presuming that there is a law or directive that relates to the consultation case in the first place. But, in considering the features of the content of the law, the consultant should not place additional moral weight on the content simply because it is the law. Rather, the fact that it is a law provides an opportunity to raise or clarify ethically relevant features of the case. For example, take a case in which a patient has an advance directive indicating to physicians that they would not wish to live if they must depend heavily on the assistance of others. Imagine that the advance directive is legally operable as the conditions for using the directive have been met. The consultant may use this directive as a means of discussing the patients' values with respect to independence or the fear or being a burden on others.

One way to understand the weight of such directives is as the product of an epistemic peer. Epistemic peers are those entities (like a government or friend) who have access to relevant information and have a track-record of thoughtful moral deliberation. CECs could consider directives as one of many that stem from epistemic peers, where other peers consist of fellow consultants, patients, patient family member, physicians, etc. Importantly, however, directives are the

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source of just one of many suggestions, none of which independently carry a moral obligation for obedience. Just as a CECS has no moral obligation to obey the directives of a physician or social worker etc. — other epistemic peers — so too does the CECS have no moral obligation to obey the directives of another authority.

However, the *content* of the directive carries the moral weight, rather than the legal requirement to follow advance directives. In this manner of deliberation, the consultant treats authoritative directives as requests, persuasive commands, or as the advice of epistemic peers, depending on the nature of the directive and the context in which is introduced. An advance directive may be seen as a request from the patient, for example, while referring to the legal hierarchy of health care representatives may be seen as a persuasive command, since it is often the case that the legal hierarchy does in fact offer sound guidance in who should make decisions for an incapacitated patient.

Secondly, consultants should consider the ethically relevant consequences of failing to abide by a law, as pertaining to the various stakeholders. These consequences often have ethical import, since penalties, fines, or other measures may be imposed on individual members of the medical team, the patient's family, or the institution as a whole, likely carry ethical relevance to the stakeholders. In treating directives in this way, the consultant relates to authoritative directives as power-backed commands. For example, the consequences of violating the directive to report undocumented patients to authorities ought to be considered and weighed along with the many other ethical considerations that would arise in such a case. These two manners of drawing upon the law in ethics consultations, then, provide some guidance for how ethics consultant should weigh authority. It is worth noting that such considerations are best explained as a product of a consequentialist framework.

Given these two considerations outline above, however, I anticipate that there will arise an important objection to this treatment of the law and authority by consultants: it is easy for the consultant to advise others to break the law, since consultants only provide recommendations. In other words, it's easy enough to recommend breaking a law if doing so is ethically justified, but it's very much another thing to be the person to break the law and risk the consequences.

This objection is, I think, an objection to the broader features of the role of the ethics consultant — after all, we provide recommendations for action, and our recommendations are non-binding. Yet, the recommendations that we provide, if the two strategies described above are deployed, will account for the risks that others might take in choosing to disobey a directive. Secondly, ethics consultants maximize their participation within a consult by documenting their recommendation in the patient's electronic medical record. This creates a record of their deliberations and justifications. If a consultant recommends disregarding a particular law, then the consultant ought to acknowledge that they have done so in the patient's chart, providing the reasoning for why they have done so. This will, at the very least, allow the consultant to share some of the burdens of acting contrary to authoritative directives.

Conclusion

I have argued that there remains an important gap in the literature regarding the role of the ethics consultant: namely, how the consultant ought to weigh authoritative directives. I suggest that ethics consultants should introduce only the content of laws and directives into ethics consultations, without invoking a prima facie moral obligation to follow the law qua law, or any authoritative directive qua directive. Ethics consultants should, however, use the law and directives in two ways when performing a consultation. The first, as a means of introducing ethically relevant features of a case to a discussion, such as one might weigh the advice of an epistemic peer; and the second, insofar as obedience or disobedience creates risks or rewards for stakeholders in a consultation. While these are tentative guidelines moving forward, there remains a good deal of discussion to be had regarding how the ethics consultant should weigh the demands of authority – that is, if they should give moral weight to authorities at all.

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Notes

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