

(Too) Much Ado About the Ethics of Less-than-Universal Access to Health Care?

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The invitation to participate in the Kansas Law Review Symposium was welcome, as it provided some motivation for finally setting down in writing my thoughts about some interesting recent developments. Much of my work has been centered on the intersection between law and bioethics. In the latter field, there has been a growing reconsideration of the role of bioethics and bioethicists in the debate over universal coverage. An examination of this development can help inform broader discussions about access to health care in the United States.

I. BIOETHICS AND ACCESS ISSUES

Issues relating to access to health care have always been an important part of the field of bioethics. If you pick up any bioethics textbook,¹ it is likely to have one or more chapters devoted to the topic of justice and its relationship to distribution of health care resources. Much of the current attention to that topic can be traced to the book which many consider to have created the field of bioethics: *Principles of Biomedical Ethics*.²

That book attempted to create a theory of bioethics built around four principles. The last of those principles was that of “*justice* (a group of norms for distributing benefits, risks, and costs fairly).”³ In the chapter

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1. See, e.g., BONNIE STEINBOCK ET AL., *ETHICAL ISSUES IN MODERN MEDICINE* 145–243 (6th ed. 2003) (devoting one of the five parts to justice issues); *BIOETHICS* 317–426 (John Harris ed., 2001) (devoting one of the five parts to allocation of scarce resources and quality of life); *CONTEMPORARY ISSUES IN BIOETHICS* 355–425 (Tom L. Beauchamp & LeRoy Walters eds., 5th ed. 1999) (devoting one of the ten chapters to “Justice in the Distribution of Health Care”).

2. TOM L. BEAUCHAMP & JAMES F. CHILDRESS, *PRINCIPLES OF BIOMEDICAL ETHICS* (5th ed. 2001).

3. *Id.* at 12. The other three principles were “(1) *respect for autonomy* (a norm of respecting the decision-making capacities of autonomous persons), (2) *nonmaleficence* (a norm of avoiding the causation of harm), [and] (3) *beneficence* (a group of norms for providing benefits and balancing benefits against risks and costs).” *Id.*

devoted to that principle, the book's authors comment that "a broad social consensus appears to be emerging that all citizens should be able to secure equitable access to health care, including insurance coverage without temporal gaps and unjust exclusionary clauses."⁴ They go on further to conclude that "[p]olicies of just access to and financing of health care . . . dwarf in social importance every other issue considered in this book."⁵

What are the moral arguments in favor of a right to access health care? They fall broadly into two categories: those relating to how health care is similar to certain other goods, and conversely, those relating to how health care plays a special role in peoples' lives.⁶ With regard to the first category, health care might be considered analogous to other services that governments traditionally provide, such as police, fire departments, and collecting trash.⁷ The reasons justifying the government's provision of those services might similarly justify providing health care. With regard to the second category, the argument is that having poor health significantly diminishes a person's ability to otherwise function appropriately and take advantage of the opportunities that society provides. It would, accordingly, be unjust not to provide that person with the health care that would restore their ability to "use their capacities."⁸

In spite of these pronouncements in favor of the need for justice with regard to access to health care, there have been other indications that access issues are not always accorded such great importance. For example, it certainly remains the case that these issues are rarely given special prominence in bioethics curricula. Yes, some textbooks have one or a few chapters devoted to justice and access to health care, but they are never the biggest sections in these books. Often, that honor would go to topics relating to end-of-life decision-making, perhaps befitting its prominent role in the law and bioethics arena. And while some

4. *Id.* at 241.

5. *Id.* at 272.

6. *Id.* at 242.

7. There are nonetheless good arguments for distinguishing health care services from many of the other services that governments typically provide. In particular, the latter services often have the character of being "social goods." *Id.* at 242.

8. *Id.* at 243. Just as with the other category of arguments, this category is also subject to counter-arguments. For example, it might be argued that while having poor health does indeed reduce a person's opportunities, there are other disadvantages that are even more significant factors in reducing opportunities (such as low income, living in a neighborhood with poor schools, etc.), yet our society has not chosen to remedy those disadvantages.

distinguished bioethicists have devoted their careers to access issues,⁹ they constitute a relatively small percentage of the field.

It was against this background that the leading professional organization representing bioethicists, the American Society for Bioethics and Humanities (ASBH), in 2000 debated making certain changes in its bylaws.¹⁰ Two years earlier, some ASBH members asked the board of directors to protest actions a medical center took against a prominent bioethicist when she testified under subpoena in a lawsuit against that employer. The board discovered that, even under the rubric of supporting academic freedom, they were not permitted to take such a position as it was prohibited by the ASBH bylaws. As a result of that circumstance, a committee was created to look into the appropriateness of “taking stands” of various types.

The committee’s proposals were debated at an annual ASBH meeting. “And a lively—nay, rancorous—debate it was. Tempers flared, passions ran high, and it became abundantly clear that we all needed more time to think about whether [it] should, as a Society, take stands of various kinds.”¹¹ In my personal recollection of that event, one of the main topics discussed related specifically to taking a stand in favor of universal access to health care. The advocates of that position were indeed spirited. To give a sense of the level of emotion, one proponent, a Holocaust survivor, drew an analogy between the ASBH’s failure to take a position and those who stood by and did nothing to stop the Nazi atrocities. The members of the organization ultimately voted in favor of allowing the ASBH to take stands on matters relating to academic freedom and professionalism, but against allowing opinions relating to “substantive and moral policy issues.”¹²

The issues raised in that debate have not been limited to merely whether a professional organization should be taking stands. The events that took place at the ASBH are part of a growing debate within bioethics about what fields of study bioethicists should be involved with. Whether it is at national meetings, online discussion groups, or small informal gatherings, that somewhat self-referential topic has an excellent chance of popping up.

9. Perhaps most prominent is Harvard professor Norman Daniels, author of *JUST HEALTH CARE* (1985) and other works on how health care should be fairly distributed.

10. Daniel I. Wiklered, *The ASBH 'Taking Stands' Debate*, *ASBH EXCHANGE* (Am. Soc’y for Bioethics and Human., Glenview, Ill.), Summer 2001, at 1.

11. *Id.*

12. Bylaws of the American Society for Bioethics and Humanities, Article III, §§ 4.1–4.2 (“The Society shall not issue positions on substantive moral and policy issues, [but] may adopt positions on matters related to academic freedom and professionalism.”).

A good example of the terms of this debate is provided by a recent letter to the editor printed in a prestigious bioethics journal, the *Hastings Center Report*. The letter, from two South African bioethics scholars, took issue with the views expressed in a previous article criticizing the “conservative agenda” in bioethics, and contrasted it to the greater attention to justice issues given by bioethics’ more liberal wing.¹³ The South Africans commented that American bioethics as a whole, regardless of political persuasion, had a narrow agenda.¹⁴ It focuses, so they say, on issues relating to reproduction—abortion, assisted reproduction, embryos—to the exclusion of even more important issues.¹⁵ They observe that the U.S. bioethics agenda “is ethically insensitive to the claims of hundreds of millions of poor who lack meaningful rights or access to even minimal health care.”¹⁶

Norman Daniels, a Harvard professor and leading scholar on health care distribution issues, has written in a similar vein. In an article entitled *Equity and Population Health: Toward a Broader Bioethics Agenda*, he noted:

Bioethics’s traditional focus on clinical relationships and exotic technologies has led the field away from population health, health disparities, and issues of justice. The result: a myopic view that . . . can overlook factors that affect health more broadly than do exotic technologies. A broader bioethics agenda would take up unresolved questions about the distribution of health and the development of fair policies that affect health distribution.¹⁷

II. WHAT IS THE PROPER ROLE FOR AMERICAN ACADEMIC BIOETHICS?

The comments by these scholars, and the views of the broader community they echo, at the least raise a number of important issues. Given that this is a symposium among academics, and that it focuses on issues stemming from the lack of universal access to health care in the United States, I would like to address a relevant subset of these issues. In particular, what is the proper role for academic bioethics with regard to the universal access debate in this country? Should it be spending less time dealing with relatively exotic and “elite” issues, mainly relevant to

13. Solly Benatar & Theodore Fleischer, Letter to the Editor, *Bioethics with Blinders*, HASTINGS CENTER REP., Sept.–Oct. 2006, at 4.

14. *Id.*

15. *Id.*

16. *Id.*

17. Norman Daniels, *Equity and Population Health: Toward a Broader Bioethics Agenda*, HASTINGS CENTER REP., July–Aug. 2006, at 22, 22.

the upper-middle class and rich, and more time on access issues that affect the poorest segments of our society? Is it appropriate that the profession as a whole, and individual bioethicists, change their focus?

To answer this important question it is necessary to delve into the proper role of academic inquiry, particularly as it relates to ethical issues. For that purpose, a relevant source is the debate generated by Richard Posner with his controversial *Harvard Law Review* article *The Problematics of Moral and Legal Theory*.¹⁸ As summarized in the preface to the article, “academic moralism . . . lacks either the intellectual cogency or the emotional power to change people’s beliefs or behavior; the power to do so resides in ‘moral entrepreneurs,’ which academic moralists emphatically are not.”¹⁹

Posner’s analysis was challenged by a who’s who of prominent legal scholars, whose responses accompanied his article.²⁰ They gave a variety of arguments, many of them noting, among other things, that Posner failed to provide much (if any) evidence supporting his conclusion that moral theory is ineffective in changing viewpoints, and that there are indeed many counterexamples to his proposition.²¹ As someone who works in academic law and bioethics and makes his living producing arguments that have at least some moral elements, I am certainly reluctant to endorse Posner’s main point. But a comment by Charles Fried in his response—noting that Posner’s position was “too gross and unnuanced”²²—suggests a possible middle position, one that is appropriately nuanced. There might indeed be a grain of truth (though perhaps only that) in Posner’s view of the limits of academic moral reasoning. That grain might in fact have some relevance to particular issues—one of which might be the general question, as opposed to more

18. Richard A. Posner, *The Problematics of Moral and Legal Theory*, 111 HARV. L. REV. 1637 (1998). This article was later expanded into a book: RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* (1999).

19. Posner, *The Problematics of Moral and Legal Theory*, *supra* note 18, at 1638.

20. See generally Ronald Dworkin, *Darwin’s New Bulldog*, 111 HARV. L. REV. 1718, 1718 (1998) (describing Posner’s contentions as “bad arguments”); Charles Fried, *Philosophy Matters*, 111 HARV. L. REV. 1739, 1740 (1998) (arguing that Posner’s lectures are an attack against moral and political philosophy); Anthony T. Kronman, *The Value of Moral Philosophy*, 111 HARV. L. REV. 1751, 1753 (1998) (adamantly rejecting “Posner’s despair”); John T. Noonan, Jr., *Posner’s Problematics*, 111 HARV. L. REV. 1768, 1769 (1998) (discussing how Posner’s seemingly “pragmatic criterion” is “vacuous”); Martha C. Nussbaum, *Still Worthy of Praise*, 111 HARV. L. REV. 1776, 1789 (1998) (stating that Posner’s argument is flawed). A response by Posner appears in Richard A. Posner, *Reply to Critics of the Problematics of Moral and Legal Theory*, 111 HARV. L. REV. 1796 (1998).

21. See, e.g., Fried, *supra* note 20, at 1739–45 (arguing that “the few empirical studies . . . to which Posner alludes do not carry much force” and providing counterexamples).

22. *Id.* at 1739.

specific formulations, of the lack of universal access to health care in the United States.

Specifically, what is it that academic bioethics has to add to the analysis of that question? For decades, the leading viewpoint has been that the strongest arguments favor the conclusion that the lack of universal access is morally troubling. The arguments in favor of that viewpoint appear to have changed relatively little over time. Given that circumstance, and picking up on Posner's distinction of academic moralists from academic entrepreneurs, it is far from clear that there is much more that academic moralists can do with regard to this question. Granted, we could have a greater percentage of the academic bioethics community addressing it, but what is that likely to accomplish? Certainly, the better informed members of the public, who are regularly confronted with stories about how tens of millions are uninsured each year, and the troubling circumstances that befall specific members of that group, are unlikely to find more articles by bioethicists as the crucial additional item that tips the balance in favor of convincing those who are not yet convinced that the current state of affairs is immoral.

Getting back to a major element of the recent debate within the bioethics community—the issue of whether the ASBH should take a stand opposing the lack of universal access—it is difficult to see how doing so would have anything beyond a rather trivial effect on the debate in this country. Surely, major newspapers will not publish the fact that an organization with less than two thousand members has concluded that the lack of universal access to health care in the United States is morally troubling. Even if, miracle of miracles, this event did indeed receive substantial press coverage, it is extremely unlikely that that would alter the thinking of even a small percentage of Americans. The facts relating to the millions of uninsured are so well publicized that something far beyond a position taken by an academic society is needed to change attitudes. Some people may still remain unconvinced that there is anything wrong with this state of affairs. Some Americans might indeed already think that the current situation is immoral, but they may nonetheless be unwilling to suffer significant hardship—for example, more than a trivial increase in their taxes—in order to change the status quo.

There is substantial evidence that a great many Americans want some appropriate effort at change. As I prepared this article, the *New York Times* reported on a poll it helped conduct, revealing a “striking willingness” on the part of Americans “to make tradeoffs to guarantee

health insurance for all, including paying as much as five hundred dollars more in taxes a year and forgoing future tax cuts.”²³ Sixty-four percent of respondents indicated that the government “should guarantee health insurance for all.”²⁴ “Nearly eight in ten said they thought it was more important to provide universal access to health insurance than to extend the tax cuts of recent years.”²⁵ In the face of these rather compelling statements of public opinion—which, certainly in recent years, is split almost fifty-fifty on so many issues of national importance—there remain of course numerous factors (such as the political power of the insurance industry) that might nonetheless prevent universal health insurance from becoming a reality. Whatever the outcome, it nonetheless seems clear that greater forces are at work than are likely to be shaped by bioethical pronouncements on the moral status of the existing American health care system.

III. A FUTURE ROLE FOR BIOETHICAL ANALYSIS

Having concluded that bioethics is unlikely to have much to contribute to changing attitudes regarding the “big” question—the morality of the American health access status quo—does not mean that there is no role for bioethics in the access debate. Far from it. For as this nation continues to tackle access issues, it will have to address a multitude of narrower, but crucial, ethical issues. The debate over the new Massachusetts health care plan that is the focus of this symposium provides many examples of this narrower (but not less important) role for bioethical reasoning.

Consider, for example, a recent issue of the *Hastings Center Report* which was devoted primarily to commentaries on the Massachusetts plan.²⁶ Accompanying a lead-in article by an MIT economist which described the plan²⁷ were five commentaries providing differing reactions to the plan. While one contributor appeared likely to have objected to any government plan designed to give Americans greater

23. Robin Toner & Janet Elder, *Most Support U.S. Guarantee of Health Plans*, N.Y. TIMES, Mar. 2, 2007, at A1.

24. *Id.* at A5.

25. *Id.*

26. HASTINGS CENTER REP., Sept.–Oct. 2006.

27. Jonathan Gruber, *The Massachusetts Health Care Revolution: A Local Start for Universal Access*, HASTINGS CENTER REP., Sept.–Oct. 2006, at 14. A lead-in to this article notes that the author served as an advisor to the State of Massachusetts regarding this plan. Gregory Kaebnick, *Bipartisan Health Reform?*, HASTINGS CENTER REP., Sept.–Oct. 2006, at 2.

access to health care,²⁸ the others based their evaluations on specific aspects of the plan. For example, one pair of authors concluded the plan was “half a step forward and three steps back,” having dissected the flow of money and determining that it would “generate huge new revenues for private insurers, vastly increase payments to already flush hospitals, excuse the wealthy from sharing the burden of covering the uninsured, and saddle working families with huge bills for nearly useless coverage.”²⁹

Another pair of authors highlighted the fact that Massachusetts was requiring individuals to purchase health insurance so long as an “affordable” plan was available.³⁰ They concluded that “[d]etermining the appropriate contribution expected of individuals is the central philosophical and economic question facing those implementing the Massachusetts plan.”³¹ And one commentator concluded that “Massachusetts appears to have orchestrated broader deliberations about access, accountability, and affordability than the United States has seen since the Oregon Health Plan. . . . [It] has taken a necessary first step in what could ultimately lead to far-reaching changes.”³²

This set of articles provides a fair representation of the future of bioethical commentary on the American health care access issue: application of bioethical reasoning, but using that reasoning to provide answers to relatively specific questions of fairness. Perhaps we might borrow from the terminology of economics, and distinguish the traditional macro-ethical analysis from a newer emphasis on micro-ethical analysis. What is notable about this change is not merely the scope of the problems that will need to be addressed, but also an accompanying change in the manner of the analysis. Norman Daniels, in his arguments for a new agenda for bioethics more focused on distributional issues,³³ barely mentions this crucial point, only briefly and

28. Michael Tanner, *The Wrong Road to Reform*, HASTINGS CENTER REP., Sept.–Oct. 2006, at 24. Tanner noted that “for all its flaws, American health care is of the highest quality available anywhere in the world,” and that “government control will ultimately erode those things that are best about the U.S. system while doing little to solve the system’s problems.” *Id.* at 26.

29. Steffie Woolhandler & David U. Himmelstein, *The New Massachusetts Health Reform: Half a Step Forward and Three Steps Back*, HASTINGS CENTER REP., Sept.–Oct. 2006, at 19, 21.

30. Susan Dorr Goold & Nancy M. Baum, *Define “Affordable”*, HASTINGS CENTER REP., Sept.–Oct. 2006, at 22.

31. *Id.* at 23.

32. James Sabin, *“Disappointing but Fair”: The Connector’s Challenge*, HASTINGS CENTER REP., Sept.–Oct. 2006, at 26, 27.

33. See Daniels, *supra* note 17 and accompanying text.

vaguely noting that this new bioethics agenda will require bioethicists to undertake new types of training “in a wide range of social sciences.”³⁴

This likely change in the manner of bioethical analysis is far more clearly articulated by Alex John London in commenting on Daniels’ proposal.³⁵ He observes that to succeed in performing meaningful analysis of distributional issues, bioethicists “must become proficient in some highly technical academic disciplines. In particular, the field will have to deepen its engagement with economics, not only at the level of application, but at the level of first principles.”³⁶ London goes on to highlight the current important role of cost-benefit analysis in evaluating distributional questions, and the “unexplored” implications of this technique for ethics. “In order to motivate their use in a broader policy context, bioethicists will need to understand their implications and demonstrate their relevance to issues of equity.”³⁷

IV. BACK TO LAW AND BIOETHICS

It is hard to predict to what extent either the agenda, or the mode of analysis, of bioethics will change in years to come. Nonetheless, it is likely that at least some of the changes discussed above will indeed take place. What I find especially interesting is that these changes will move the field of bioethics (and thus the sub-field of law and bioethics) toward a more detail-oriented and interdisciplinary role, one that will fit in well with the type of legal and policy analyses that were presented at this symposium. This bodes well for future fruitful collaborations between legal scholars and bioethicists in dealing with the complex issue of deciding what constitutes an appropriate amount of fairness in the allocation of health care.

34. *Id.* at 34.

35. Alex John London, *What Is Social and Global Justice to Bioethics or Bioethics to Social and Global Justice?*, HASTINGS CENTER REP., July–Aug. 2006, at 3.

36. *Id.*

37. *Id.*
