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SECOND THOUGHTS

The Idea of Legitimate Authority in the Practice of Medicine

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Abstract

Legitimate authority is the normative power to govern, where a normative power is the ability to change the normative situation of others. Correlatively, when one has the normative power to govern others, these others face a normative liability to be governed. So understood, physicians do not have legitimate authority over their patients, and patients do not have legitimate authority over their physicians. An authority is legitimate only when it is a free group agent constituted by its free members. On this conception, associations of physicians sometimes have legitimate authority over individual physicians, and physicians sometimes count as members subject to the legitimate authority of these associations. This might be so even when they have not consented to membership.

Introduction

Disagreement over the proper practice of medicine is an enduring feature of contemporary health care: patients might disagree with their physicians about the suitability of resuscitation in end-of-life care; individual physicians might reject the guidance of medical associations over the off-label use of atypical antipsychotics; or employers might challenge a legal requirement to provide their employees insurance coverage for contraception. Sometimes the question of who should decide in the face of such dissension is posed as a question of who has legitimate authority over whom. As we shall see, this only sometimes is the most perspicuous way to understand the challenge of resolving disagreements in medicine.

Health care ethics largely is a subfield of political philosophy, and the idea and conditions of legitimate authority are a central concern of political philosophers. So we should expect discussions of legitimate authority in medicine to be as vigorous and varied as discussions of the concept in political philosophy itself. Here, then, is one brief account. If you don't accept it, substitute your own, but all views of legitimate authority in medicine presuppose, explicitly or not, views about legitimate authority simply.

What is Legitimate Authority? The Power-Liability Account

Legitimate authority, as I shall use the notion, is the normative power to govern, where a normative power is the ability, in some context, to change the normative situation of others—their rights and duties, permissions, and restrictions. Repurposing the well-known analytic jurisprudence of Wesley Hohfeld to moral concepts, when one has the normative power to govern others, these others face a correlative normative liability to be governed, in that they are subject to changes in their normative situation [1]. Just as one who is legally liable is not immune from being subject to certain costs or penalties at the discretion of another who has the power to invoke these legal liabilities, so one who is normatively liable is not immune from being subject to changes in what one morally owes or is owed at the discretion of another who has the power to invoke these normative liabilities. Normative powers are varied: they could be powers to create or dissolve moral rights and duties; they could be powers to enact legal or institutional rights and duties and to enforce them; and they could be powers to change the social facts that shape the possibilities and meanings of one's actions, such as what counts as a marriage or who counts as a physician.

Some writers hold that the normative power of legitimate authority necessarily is the power to morally obligate and that anything short of this collapses into a mere liberty to affect others [2]. The difference between the legitimacy-entails-duty view and the legitimacy-as-mere-liberty view of legitimate authority is this: if legitimate authority merely is the liberty (or, synonymously, the permission or option or prerogative) to govern others, we do not yet know whether these others have a moral duty to obey. But if legitimate authority is a claim-right to govern, then those subject to that authority do have a correlative moral duty to obey. I have argued that there is a stable view in between the legitimacy-entails-duty view and the legitimacy-as-mere-liberty view, which I have called the power-liability view [3]. Think of it as the Goldilocks account of legitimacy: legitimacy as a claim-right that entails moral duty is too hard; legitimacy as mere liberty is too soft; legitimacy as a normative power that entails normative liability is just right. On the power-liability account, one who is subject to the legitimate authority of another is liable to certain changes in institutional rules and liable to certain burdens that the application and enforcement of such rules might impose; one is precluded from resisting in certain ways; and one may not have justified grounds for complaint. But it still might be the case that one does not have a moral obligation to obey those rules.

The Legitimate Authority of Physicians over Patients and of Patients over Physicians

Do physicians have legitimate authority over their patients, or do patients have legitimate authority over their physicians? It is not helpful to think of the physician-patient relationship as an authority relationship in either direction. Each has normative control over certain decisions and resources, and therefore each has certain rights and duties, but to have a right against another is not yet to have authority over another. On

the power-liability account, a legitimate authority does not merely have certain rights and duties; that authority has the power to change certain rights and duties of others.

Physicians of course are *epistemic* authorities, in that they possess superior knowledge and judgment about diagnosis, prognosis, and the medical consequences of treatment. Epistemic authorities give us content-independent reasons to *believe* that some proposition is true and, insofar as the correct action to take depends on our beliefs, an indirect reason to act. If a physician is an expert authority, a patient who is unable to assess the truth of the content of a scientific proposition nonetheless has reason to believe that the proposition is true merely because the physician says it is true. Our question is whether physicians are *normative* authorities, in that the directive of a physician imposes upon the patient a moral duty to comply or some other moral liability. If you ignore the expert instructions of the weather forecaster on the radio to carry an umbrella, you are likely to get wet, but you suffer no *normative* liability: you haven't violated a duty owed to the meteorologist, you cannot be stripped of some entitlement you would otherwise have, and you cannot be forced to carry an umbrella under pain of punishment by the radio station. Similarly, if you ignore the expert instructions of your physician to take your medications, you are unlikely to be cured, but you haven't violated a duty owed to your physician, you do not lose your entitlement not to be paternalized by her, and you cannot be forced to take your medicine under pain of punishment by the hospital. Although they are expert authorities with respect to you, neither your weather forecaster nor your physician has normative authority over you. Though their judgment be superior to yours, their instructions do not alter your normative rights and duties, permissions, and restrictions. Physicians care for their patients, but physicians do not govern their patients.

Nor do patients have normative authority over their physicians. Yes, physicians have a range of common and fiduciary duties towards their patients: to aid and not to harm; to conscientiously inform about diagnosis, prognosis, and choices and not to treat without genuine consent; to keep confidences and not to exploit. But not every claim-right against another is an exercise of authority over another in any illuminating sense. Insofar as we are self-governing, we have authority over ourselves, and when we consent to be treated, we create both a permission to treat where there wasn't yet such permission and a defeasible obligation to treat where there wasn't yet such an obligation. So we are exercising normative power, but it is the kind of power involved in ordinary consenting and promising. It is not the normative power to govern. Patients do not have normative power to command any treatment they fancy, creating in the physician a correlative liability to comply or to be sanctioned, let alone a duty to comply. The physician also is self-governing and is entitled to maintain the integrity of her calling, as she (or perhaps her colleagues, as we will see soon) understands it. She need not provide futile care and must not provide harmful care or disproportionately risky care [4]. Most important, whether she should provide beneficial but disproportionately expensive care depends in

part on who properly controls the resources to pay for it, for the patient has no content-independent authority to command the resources of the public or of third parties. Patients do not govern their physicians.

Who Has Legitimate Authority? The Free Group Agency Conditions

Does the medical profession have normative authority over individual physicians? For example, the American Medical Association's *Code of Medical Ethics* prohibits physicians from participating in legally authorized executions [5]. Is a physician who disagrees with this collective moral judgment nonetheless properly governed by the ruling, and so either has a moral duty to comply or at least has no justified complaint if professionally sanctioned? The American Academy of Family Physicians has recommended against routine prostate-specific antigen (PSA) screening for prostate cancer [6]. Is a physician who disagrees with this collective clinical judgment nonetheless properly governed by the recommendation and so has a duty, or at least a moral reason, to discontinue routine PSA screening? Whether the profession has this sort of normative power over physicians, I think, is the most interesting question about authority in medicine. To answer it, we need more than an account of what legitimate authority is, which I have argued is the normative power to govern entailing the normative liability of the governed. We need an account of the necessary conditions for having legitimate authority. I shall offer one. If you don't agree, substitute your own, but, once again, the question cannot be answered well without offering criteria.

If competent adults are entitled to be self-governing, how can this be reconciled with being governed by others? My answer is that authorities are legitimate only when they preserve the external and internal freedom of those they govern, and that in turn is the case only when the authority is a free group agent constituted by free members. Consider an argument for a free group agency conception of legitimate authority:

- *A legitimately governs B only if B remains a free moral agent over time.*
- *B remains a free moral agent over time only if A's governance of B realizes and protects B's external and internal freedom over time.*
- *A's governance of B realizes and protects B's freedom over time only if A is a free group agent that counts a free B as a member.*
- *Therefore, A legitimately governs B only if A is a free group agent that counts a free B as a member.*

By group agent, I mean nothing metaphysically spooky, like the existence of some ghostly intelligent being. An agent is an entity that has the capacity to consider reasons for action, the capacity to choose an action responsive to those reasons, and the capacity to act in response to this choice. Since these three capacities are not necessarily mental states residing in one wet brain, it is possible that a collection of natural agents can coordinate in such a way that these three capacities are competently performed only by combining individual efforts, and, when this is so, a group agent capable of action exists.

Group agents are constituted in three distinct ways: through the shared and mutually adjusting aims and plans of several individual agents (as in a string quartet) [7]; through the establishment of one representative to act on behalf of one or more individual agents (for example, a labor union) [8]; and through procedures that gather judgments and distribute tasks in such a way that the three capacities of considering, choosing in response to considerations, and acting in response to choice are competently executed (think of a corporation) [9].

These three routes explain how a group agent might be constituted but not how a particular person is conscripted as a member of that group and so why that particular person is legitimately governed by it. I say "conscripted" to not prejudge whether the only way to count as a member is through consent. Consent indeed is one way, but there are two others. One also can be conscripted as a member of a group agent by way of fair play: if others have joined together to create mutual advantages, and you voluntarily seek out these advantages when you could have costlessly refused them, your voluntary action enlists you as a member, even though you have not consented to be a member [10]. For example, if your neighbors have joined together to dig and maintain a new well, if you voluntarily draw water from the well, you ought to do your fair share of maintenance. A third way to be conscripted as a member of a group agent is by practical necessity: insofar as you are governed by reason, if you will an end, you must will the necessary means to that end [11]. If membership in a group agent is a necessary means to an end, and, knowing that, you still will the end, then your commitment to instrumental rationality conscripts you into this necessary membership. If shipwreck survivors in a lifeboat must cooperate to survive, and your intention is to survive, then, if you are rational, your intention is to cooperate.

Do Physicians Have Legitimate Authority over Each Other?

Is the medical profession a group agent that legitimately governs the physicians that constitute it? If it were, then the profession would have normative powers whose exercise would change the normative situation of its member physicians. The directives of the profession would give physicians content-independent reasons either to comply or to accept the liability of noncompliance, and this would be so even when individual physicians disagree with the clinical or moral guidance of the profession. So the stakes are high. Fortunately for dissenting physicians, the "medical profession" as such does not constitute a group agent, for it does not have the three capacities of considering, choosing, and acting. "The profession" is not capable of action. Unfortunately for dissenting physicians, various and overlapping organized subsets of the medical profession might very well constitute group agents: practice groups, hospitals, medical schools, specialty boards, and associations. These are collectivities that are capable, through some mixture of shared aims, representation, and procedures, of achieving the unity of will necessary for group agency, for they typically have formal and informal mechanisms of deliberation, decision, and execution. If I am right about how individuals

are conscripted as members of group agents, physicians do not necessarily have to consent and accept medical associations and organizations as legitimate authorities that govern them for these group agents to be legitimate authorities that govern them. Only about a quarter of physicians in the United States are dues-paying members of the American Medical Association [12], but it does not follow that the opinions of the AMA Council on Ethical and Judicial Affairs govern only dues-paying members. It may be sufficient that physicians voluntarily accept the benefits of the organizations of the practice of medicine or that the professional ends to which they are committed would be impossible to attain without these organizations.

Consider an example of conscription by free play. Suppose that physicians in a rural hospital serving an inadequately insured population cooperate to provide medical care for the community. They charge high fees to those with good insurance and provide free care to those who cannot afford to pay. The medical director of the hospital sees to it that free-care patients are evenly distributed among the house staff and the attending physicians. A new specialist joins the hospital in order to benefit from the prevailing high fees but refuses to provide free care, claiming, correctly, that he never agreed to do so. Still, we might conclude that he is governed by the cooperative venture that fairly spreads the burden of providing free care, even though he didn't voluntarily join the venture.

Next, consider an example of conscription by practical necessity. Suppose a transplant surgeon is committed to the effective allocation of scarce organs, that the only way to achieve the effective allocation of scarce organs is if all transplant surgeons participate in one nationwide matching program, that a matching program works only if it is supervised by a governing board, and that an adequate but not perfect matching program supervised by a governing board is in place. Then a rational surgeon is committed to be governed by the matching program's board, even though she could have devised a more effective matching program.

If—and it is a big if—the decision-making mechanisms of these group agents combine the reasons for action of its members in ways that preserve their freedom as self-governing agents, then these members have no justified complaint when their individual views or preferences do not prevail. Recall, however, that on the power-liability view, to be governed by a legitimate authority does not necessarily entail that one has a moral duty to obey. It might be that dissenting physicians merely are morally liable, and so cannot justifiably complain, when the rules of these professional organizations are enforced to their detriment.

References

1. Hohfeld WN. *Fundamental Legal Conceptions as Applied to Judicial Reasoning*. New Haven, CT: Yale University Press; 1919.
2. Raz J. *The Morality of Freedom*. Oxford, UK: Clarendon Press; 1986.
3. Applbaum AI. Legitimacy without the duty to obey. *Philos Public Aff*. 2010;38(3):215-239.
4. Applbaum AI, Tilbut JC, Collins MT, Wendler D. A family's request for complementary medicine after patient brain death. *JAMA*. 2008;299(18):2188-2193.
5. American Medical Association. Opinion 9.7.3 Capital punishment. *Code of Medical Ethics*.
6. American Academy of Family Physicians. Clinical preventive service recommendation: prostate cancer. http://www.aafp.org/patient-care/clinical-recommendations/all/prostate-cancer.html. Accessed November 30, 2016.
7. Bratman ME. *Faces of Intention*. Cambridge, UK: Cambridge University Press; 1999.
8. Hobbes T. *Leviathan*. Cambridge, UK: Cambridge University Press; 1991.
9. Pettit P. Responsibility incorporated. *Ethics*. 2007;117(2):17-201.
10. Rawls J. *A Theory of Justice*. Cambridge, MA: Harvard University Press; 1971.
11. Kant I. *Groundwork of the Metaphysics of Morals*. Cambridge, UK: Cambridge University Press; 2012.
12. Pitman D. AMA claims second year of membership gains. *Medpage Today*. May 10, 2013. http://www.medpagetoday.com/PublicHealthPolicy/GeneralProfessionalIssues/39043. Accessed December 9, 2016.

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