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Friends, Foes, Flatmates: On the Relationship between Law and Bioethics

Richard Huxtable

1. A Tale of Two Flatmates

Lei-Kung, from China, shares an apartment with his younger flatmate Bronislawa, who is Polish. Each has their own room, into which their flatmate can venture. They drafted the rules of the flat together, dividing responsibility for shared areas, like the kitchen. Lei-Kung is primarily responsible for the rota and basic maintenance, while Bronislawa regularly cleans. The apartment occupies an urban complex, whose residents toil together on common areas, such as the stairwells; Lei-Kung and Bronislawa typically work alongside their neighbours Sachan, Theo, Pascal, and Hakym and his family. Communication is complicated by the many languages they speak, and disagreements do arise. Bronislawa nevertheless throws frequent parties for the block. Once close to Theo, Bronislawa's best friend nowadays is Pascal, who tries to get on with everyone, although his relationship with Sachan is sometimes strained.

Occasionally the relationship between Lei-Kung and Bronislawa is also tested. Lei-Kung likes to keep busy doing things; Bronislawa does too, although she is also something of a dreamer. Lei-Kung sometimes exclaims that Bronislawa is “標 (biào)” – a word not easily translated for Bronislawa, but which essentially means that she restricts his movement by hanging off his arm while he walks. Bronislawa, meanwhile, judges Lei-Kung to be “kombinowac” – also difficult to translate, this suggests that Bronislawa dislikes Lei-Kung's contrived solutions to problems arising in the flat.

Each does, however, speak some of the other's language, and Lei-Kung and Bronislawa usually get along amicably, appreciating their flatmate's contributions to communal life. Perhaps their relationship will develop: from flatmates, who are occasionally foes but often friends, to, one day, spouses.

This tale of two flatmates may seem an unlikely starting place, but metaphors abound in the literature that explores the relationship between bioethics and law: they “share much of the same turf”;¹ they may be related by blood, either as “close but estranged cousins”,² or as twin siblings;³ perhaps they are related by marriage;⁴ or, maybe, as Miola suggests, they are “flatmates rather than bedfellows”.⁵ In our tale, Bronislawa, whose name means Divine Protector, represents bioethics, while Lei-Kung, which means God of Retribution, represents law. These are our protagonists, but we will also encounter Sachan (sociable), who represents the social sciences, Theo (godly), who personifies theology, Pascal, who

¹ M.C. Sullivan and D.F. Reynolds, ‘Where law and bioethics meet ... and where they don't!!’, *University of Detroit Mercy Law Review*, 75 (1998), 607-620, 620.

² C. Foster, *Choosing Life, Choosing Death: The Tyranny of Autonomy in Medical Ethics and Law* (Oxford: Hart, 2009), p. xi.

³ W. van der Burg, ‘Law and ethics: The twin disciplines’, *Erasmus Working Paper Series on Jurisprudence and Socio-Legal Studies No. 10-02* (2010). Available at: <[http://ssrn.com/abstract \(no. = 1631720\)](http://ssrn.com/abstract(no.=1631720))>, 2.

⁴ S.M. Wolf, ‘Law & bioethics: From values to violence’, *Journal of Law, Medicine & Ethics*, 32 (2004), 293-306, 293.

⁵ J. Miola, ‘The interaction of medical law and medical ethics’, *Clinical Ethics*, 1(1) (2006), 22-25, 25.

stands for philosophy, and Hakym (doctor) and his family (i.e. the various health sciences and allied professions).

My aim here is to contemplate the relationship between bioethics and law and, in particular, to consider what law can – and cannot – contribute to bioethics. This will involve some empirical reflection, although conceptual and normative questions will also feature, including how we should understand each domain and thus how we should view the relationship. I suggest that law's (positive) contributions can be captured by five P's, which relate to law's purpose, processes, products, practices and phrasing. Despite these areas of contribution and convergence, there is also divergence and distraction, summarised in five A's, which concern articulation, angst, action, aspiration and audience. Of course, in order to see both the good and the ill in the relationship between law and bioethics, we need first to define each of these domains.

2. Bioethics as a Discipline of Disciplines

To locate “bioethics”, let us remove the “bio” prefix and first consider “ethics”, or moral philosophy.⁶ This discipline encompasses four (somewhat overlapping) sub-disciplines: *normative ethics*, which constructs and criticises normative theories of what we should do or who we should be; *applied ethics*, which relates such theories to specific fields; *meta-ethics*, which reflects on the concepts at stake; and *descriptive ethics*, which analyses actual moral beliefs and practices.⁷

Unsurprisingly, bioethics, which developed from medical ethics in the 1960s,⁸ accommodates all of this work, albeit with a focus on the biosciences.⁹ Reich defines bioethics as “the systematic study of the moral dimensions – including moral vision, decisions, conduct, and policies – of the life sciences and health care, employing a variety of ethical methodologies in an interdisciplinary setting”.¹⁰ As the final clause suggests, bioethics – like the party-hosting Bronislawa – provides a meeting place. Indeed, bioethics is distinctively inter-, multi- or even trans-disciplinary, inviting in a variety of disciplines (amongst them philosophy, anthropology, sociology, psychology and

⁶ I will use ethics and morals interchangeably.

⁷ van der Burg, ‘Law and ethics’, 5; cf. A. Dawson and S. Wilkinson, ‘Philosophical clinical ethics’, *Clinical Ethics*, 4 (2009), 36–37, 36; Nuffield Council on Bioethics, *Critical Care Decisions in Fetal and Neonatal Medicine: Ethical Issues* (London: Nuffield Council on Bioethics, 2006), para. 2.2.

⁸ Histories of medical ethics include: A.R. Jonsen, *The Birth of Bioethics* (Oxford University Press, 1998); M. Freeman, ‘Law and bioethics: Constructing the inter-Discipline’, in M. Freeman (ed), *Law and Bioethics: Current Legal Issues 2008, Volume 11* (Oxford University Press, 2008), pp. 1-11. The precise origins of bioethics are, however, contested: M.A. Rothstein, ‘The role of law in the development of American bioethics’, *J Int Bioethique*, 20(4) (2009), 73-111.

⁹ See T.J. Silber, ‘Bioethics: An interdisciplinary enterprise’, *Journal of Religion and Health*, 21(1) (1982), 21-28, 21. He sees bioethics as a special case of universal ethics, rather than a special professional ethics, a point deliberately reflected in the naming of the Centre for Ethics in Medicine, in which I work: G.M. Stirrat, personal communication.

¹⁰ W.T. Reich, *Encyclopedia of Bioethics*. Vol. I (New York: Macmillan, 1995), xxi.

theology¹¹), each of which has its own language but which must – at least in bioethics’ gatherings – communicate with its neighbours.¹²

Although its contributing disciplines (like medicine) are also heterogeneous,¹³ bioethics appears a particularly broad church. So is bioethics itself a discipline? Foucault suggested that “The disciplines characterize, classify, specialize; they distribute along a scale, around a norm, hierarchize individuals in relation to one another and, if necessary, disqualify and invalidate”.¹⁴ One of bioethics’ pioneers, Dan Callahan, noted in 1973 that disciplines involve the acquisition of professional expertise, through specific training and apprenticeships, in which particular methodologies, approaches and commitments are learnt.¹⁵ But, he added, disciplines can also exhibit arrogance, insulation, neurosis and narrow(minded)ness. Four decades on, some say that bioethics still lacks the necessary unity to be a discipline.¹⁶ Yet, bioethics does have many of the features - good and bad – to which Foucault and Callahan referred, including education programmes, learned journals, and professional appointments and organisations.¹⁷ Despite all this, it is intriguing (or is it telling?) that many of bioethics’ practitioners decline to label themselves “bioethicists”.¹⁸

Discipline or not, we might nevertheless ponder what is distinctive about this bioethics beast. Here we re-encounter Bronislawka, and specifically her ties to Theo and Pascal. While once bioethics seemed particularly associated with theology,¹⁹ nowadays it is philosophy which asserts its dominance. According to Brownsword, “as a critical discipline, bioethics tries to sort out the moral wheat from the non-moral chaff”.²⁰ In short, bioethics is ethics, which is moral philosophy, albeit visiting the realm of the biosciences.

Recalling Callahan’s concerns, some of the other contributing disciplines – notably the social sciences – have been critical of bioethics’ apparent emphasis on normative, applied and meta-ethics, at the expense of descriptive ethics.²¹ As this volume attests, the tide is turning, and perhaps necessarily so, since bioethics must engage with the real

¹¹ Although explicitly selective, Silber’s list (notably?) omits law: Silber, ‘Bioethics’, 24-25.

¹² D. Callahan, ‘Bioethics as a discipline’, *The Hastings Center Studies*, 1(1) (1973), 66-73, 70-71; Silber, ‘Bioethics’, 27.

¹³ Silber, ‘Bioethics’, 24.

¹⁴ M. Foucault, *Discipline and Punish: The Birth of the Prison*, trans. Alan Sheridan (New York: Vintage, 1977), p. 223.

¹⁵ Callahan, ‘Bioethics as a discipline’, 66.

¹⁶ N. Priaulx, ‘The troubled identity of the bioethicist’, *Health Care Analysis*, 21(1) (2013), 6-19.

¹⁷ Notably, Brownsword describes bioethics as a discipline: R. Brownsword, ‘Bioethics: Bridging from morality to law?’ in M. Freeman (ed), *Law and Bioethics: Current Legal Issues 2008, Volume 11* (Oxford University Press, 2008), pp. 12-30, 15.

¹⁸ Bioethics’ inter-disciplinarity can cause problems e.g. in the UK Research Excellence Framework, which assesses the quality of academic work, on which basis Universities are awarded funding. Lacking their own panel, “bioethicists” return to their original disciplinary homes, hopeful that their work is not too tainted by inter-disciplinarity.

¹⁹ E.g. Freeman, ‘Law and bioethics’, 10.

²⁰ Brownsword, ‘Bioethics’, 15.

²¹ E.g. A.M. Hedgecoe, ‘Critical bioethics: Beyond the social science critique of applied ethics’, *Bioethics* 18(2) (2004), 120-143.

world.²² Moral philosophy helps identify “the elements of a moral position” but, Brownsword continues,

“bioethics is much more proximately concerned with developing working guidance for those who wish to do the right thing but who are unclear what they should actually do in particular cases – such, for example, seems to be the inspiration for much of the interest in clinical ethics committees”.²³

Bioethics, then, has not only a theoretical but also a practical remit.²⁴ Miola indicates that bioethics does its diverse work in three sectors.²⁵ At the *formal* level there are authoritative, directive professional bodies, such as the UK General Medical Council (GMC), which regulates doctors. The *semi-formal* sector is less authoritative but nonetheless influential, comprising organisations like the UK’s Royal Colleges and the British Medical Association (BMA). Here we might also include clinical ethics committees and national bioethics committees (like those in the USA, Belgium and Singapore). Miola’s *unofficial* sector, meanwhile, comprises the discourses flowing from the academy, as well as from pressure groups. Miola feels that the lower levels of the hierarchy should influence the upper tiers, although we might wonder why and, indeed, whether the lowest tier should be further differentiated.²⁶ It might also be notable that Miola, a legal academic, posits an organisation like the GMC – which has the force of law – at the pinnacle. How, then, might its decrees differ from those issued by law? Indeed, where and how does law fit into this whole picture?

Like bioethics, law is notoriously difficult to define.²⁷ Lon Fuller, however, helpfully defines the concept of law as “the enterprise of subjecting human conduct to the governance of rules”.²⁸ This is useful because it appears not to beg any questions about the (conceptual) relationship between law and ethics. Jurists have, of course, long queried whether law is, *in principle*, a moral enterprise. The legal idealists (or natural lawyers), with whom Fuller sided, perceive a necessary connection between law and ethics; legal positivists, exemplified by Hart, take the opposite view.²⁹

Alongside the conceptual relationship between law and ethics, there is also the empirical relationship to consider, and thus those made (or positive) laws issued in particular jurisdictions. Is law, *in practice*, a moral enterprise? Some legal officials think so: “It would not be correct to say that every moral obligation involves a legal duty; but every

²² Cf. G.M. Stirrat, ‘How to approach ethical issues: A guide’, *The Obstetrician & Gynaecologist*, 5 (2003), 214-217, 214.

²³ Brownsword, ‘Bioethics’, 16-17.

²⁴ Cf. Sullivan and Reynolds, ‘Law and bioethics’, 609.

²⁵ Miola, ‘The interaction’, 23. Although he considers medical ethics, his point seems equally applicable to (the wider) bioethics.

²⁶ Although each possesses a useful moral compass, pressure groups and academic scholars seem distinct. Presumably, for example, scholarship involves a particular expertise, although some resist the idea: see R. Huxtable, *Law, Ethics and Compromise at the Limits of Life: To Treat or Not to Treat?* (London: Routledge, 2012), pp. 172-176.

²⁷ Sullivan and Reynolds, ‘Law and bioethics’, 607.

²⁸ L.L. Fuller, *The Morality of Law*, revised ed (New Haven: Yale University Press, 1969), p. 96.

²⁹ E.g. H.L.A. Hart, ‘Review: Fuller, *The Morality of Law*’, *Harvard Law Review*, 78 (1965), 1281-1296.

legal duty is founded on a moral obligation”.³⁰ Yet, given our specific interest in law’s relationship with *bioethics*, we should ask: is law, in *bio-practice*, a moral enterprise? Some would suggest that the (made) laws governing bio-practices are indeed indebted to bioethics.³¹ “Bioethics helped to conceptualize problems, elucidate essential values, and influence the development of legal doctrines and processes”, suggests Rothstein.³² As such, meta-ethical bioethics can clarify common legal concepts, like the “reasonable man (sic)”, “intention” and “public morals”.³³ Bioethically relevant data might also be adduced,³⁴ while bioethics’ normative and applied work can provide prescriptions about, say, respect for autonomy,³⁵ and the value of human life.³⁶ These different contributions will appear in different legal locations. Common law systems, for example, refer to written rules and to judges’ rulings. So, in English law, not only will we hear bioethics’ voice(s) in the commissions and reports that precede Acts of Parliament,³⁷ but we will also encounter judicial references to the bioethical work occurring in the formal,³⁸ semi-formal,³⁹ and unofficial sectors of the discipline.⁴⁰ In other common law systems, like the US, “bioethicists” have even acted as expert witnesses in court proceedings.⁴¹ Such jurisdictions differ from civil law systems, in which the general principles enshrined in a written code provide the primary source of law. Even in these systems, the rules can tackle bioethical matters: for example, in 2005, French law clarified the rules governing end-of-life care.⁴² As such, bioethics may be a discipline but it evidently encompasses a variety of endeavours, ranging from theorising in the abstract to collecting empirical data. In all of

³⁰ *Instan* (1893) 1 QB 450, 453, *per* Coleridge LCJ.

³¹ Particularly, perhaps, in medicine: Freeman, ‘Law and bioethics’, 5. Indeed, the dilemmas that birthed bioethics also spurred the development of medical (or health care) law: see e.g. Rothstein, ‘Role of law’, 1-3. These similar trajectories and themes (e.g. medical lawyers, like “bioethicists”, are occasionally asked what sort of lawyer they *really* are) merit further investigation.

³² Rothstein, ‘Role of law’, 3; see also Callahan, ‘Bioethics as a discipline’, 68.

³³ van der Burg, ‘Law and ethics’, 2, 9, 23.

³⁴ E.g. *Pretty v UK* (2002) 35 EHRR 1, para. 27.

³⁵ Although maybe law got there first: see G.J. Annas, ‘Ethics committees: From ethical comfort to ethical cover’, *Hastings Center Report*, 21 (1991), 18-21.

³⁶ E.g. “The Philosophers’ Brief”, supporting the right to physician-assisted suicide, which was submitted by Dworkin and colleagues to the US Supreme Court in *Vacco v Quill*, 521 US 793 (1997).

³⁷ E.g. The Retained Organ Commission (vice-chaired by Alastair V. Campbell) and the Nuffield Council on Bioethics contributed to the passing of the Human Tissue Act 2004, while Mary Warnock’s commission led to the Human Fertilisation and Embryology Act 1990. For a US perspective, see Rothstein, ‘Role of law’, 4.

³⁸ E.g. GMC guidance on confidentiality was cited in *W v Egdell* [1990] 2 WLR 471.

³⁹ E.g. Guidance from the BMA and a Royal College were respectively cited in *Airedale NHS Trust v Bland* [1993] 2 WLR 316 and *An NHS Trust v H* [2013] 1 FLR 1471.

⁴⁰ E.g. Ronald Dworkin’s (bioethical and biolegal) work is cited in *Airedale NHS Trust v Bland* [1993] 2 WLR 316 and *Chester v Afshar* [2004] UKHL 41.

⁴¹ Sullivan and Reynolds, ‘Law and bioethics’, 619.

⁴² Law no. 2005-370.

its endeavours, however, bioethics' seeks to engage with practice i.e. it seeks to work with, and speak to, the "real world". Law also performs a variety of tasks, but it too is concerned with actual practice: it seeks to issue rules which guide people in this real world. This common orientation begins to suggest that the two are related. On some accounts, (bio)ethics and law share a conceptual relationship, but even those who dispute this relationship would accept that bioethics can and does contribute to law in practice. But does bioethics itself gain or lose from its relationship with law? Let us start with the apparent positive contributions.

3. Contribution and Convergence

Law's first constructive contribution to bioethics resides in its fundamental *purpose*: to guide human behaviour. Law, as the older partner (or flatmate), might have much to teach bioethics here, and bioethics should be receptive, as it too strives not merely to theorise about, but also to influence human activity. As Van der Burg says: "Both law and morality are hermeneutic, normative, and argumentative systems or practices, their purpose being to guide human action... Moreover, both are social in character: they purport to regulate behaviour in order to make our society and our lives better".⁴³ Lei-Kung and Bronislawka worked together to ensure successful communal living. On Van der Burg's account, the purported differences between law and bioethics should not be inflated. Different jurists have emphasised different features of the legal enterprise, including its assumed sovereignty and its capacity to impose sanctions.⁴⁴ Yet, some sectors of bioethics – not least Miola's formal sector – need not be so different: the non-compliant doctor, for example, might be struck from the medical register. In its normative guise, meanwhile, bioethics might be deemed distinctive for its issuance of authoritative prescriptions, which are to be considered universalisable and for the good of all.⁴⁵ But law similarly seeks to be authoritative, prescriptive, general in its application (at least within jurisdictional boundaries, unless explicit exceptions are carved out), and a force for ensuring the good of society at large.⁴⁶ In short, as each pursues the goal of guiding human co-existence, law and bioethics might not be so distinct.

Insofar as they share a goal, bioethics and law can also appeal to similar standards for judging the success or failure of the endeavour. Here law makes a second helpful contribution, as law is characteristically concerned with *process* (Lei-Kung, you will recall, took charge of devising the rota). As such, the standards of assessment – or the methodologies employed – in each discipline might share similarities and, again, as the senior partner, law might have a great deal of experience on which bioethics can fruitfully draw.

Jurists have long pondered what it is that makes (made) law *law*, or, put differently, what makes for *good law*, if not (necessarily) in a moral sense, then in the sense of achieving

⁴³ van der Burg, 'Law and ethics', 18; see also A.R. Maclean, 'Magic, myths, and fairy tales: Consent and the relationship between law and ethics', in M. Freeman (ed), *Law and Bioethics: Current Legal Issues 2008, Volume 11* (Oxford University Press, 2008), pp. 111-135, p. 111.

⁴⁴ See e.g. J.G. Riddall, *Jurisprudence*, 2nd edn (Oxford University Press, 1999). See also van der Burg, 'Law and ethics', 18.

⁴⁵ T.L. Beauchamp, *Philosophical Ethics: An Introduction to Moral Philosophy* (New York: McGraw Hill, 1991).

⁴⁶ van der Burg, 'Law and ethics', 19

law's goal. Fuller was joined in this quest by theorists interested in the "rule of law" and "legal rationality".⁴⁷ Fuller's "internal morality of law" accordingly included such norms as clarity, consistency and coherence between the law-as-stated and the law-as-applied, without which law could not hope to guide its subjects.⁴⁸ Similar questions arise about what we might call the "internal morality of bioethics". Those interested in the standards associated with (good) bioethics – a bioethics that achieves its goal – have identified markedly similar norms, again including consistency, clarity and coherence.⁴⁹

Certainly, in both disciplines, critical questions are asked about the ultimate ends of the particular endeavour. Some jurists have insisted that law entails a particular set of moral commitments,⁵⁰ while some bioethicists urge adherence to a given normative theory.⁵¹ But many of the aforementioned norms (clarity, consistency and the like) are merely formal, instrumental or procedural – and it is here that law seems particularly well-equipped to educate bioethics. Law is experienced in issuing judgments on particular situations, by reference to guiding principles and to the situation itself. Law tackles the case and the doctrine, the latter becoming the principle in bioethics' language. In both disciplines bottom-up and top-down approaches feature. There are, of course, differences within each discipline: a civil law system might favour a top-down (doctrine-led) approach, rather than the more mixed approach we might encounter in a common law system; in bioethics, meanwhile, casuists might work from the bottom-up, while those beholden to particular principles might prefer to work down to the case in question. But, whichever extreme is preferred (and there will be middle-ground positions⁵²), law will have important insights to offer.

To illustrate these observations, consider the common ground between common lawyers and bioethical casuists: each takes an approach that is "inductive and particularist, and, it would appear to be, dismissive of principles".⁵³ Yet, this is not the whole story, as Annas, commenting on the US, hints when he says that "law's primary contribution to bioethics is procedural. Lawyers are expert at procedure. The common law itself is based on deciding individual cases and using these cases as the basis of creating law. Bioethics has adopted this technique".⁵⁴ Annas here appears to be describing the way in which particular rulings "create law" by generating rules and, indeed, wider legal

⁴⁷ See further Huxtable, *Law, Ethics*, pp. 14-22.

⁴⁸ Fuller, *Morality*.

⁴⁹ E.g. T. Regan, *The Case for Animal Rights*, 2nd edn (Berkeley: University of California Press, 2004); Dawson and Wilkinson, 'Philosophical ethics'. There are related inquiries into the "internal morality of medicine": R.M. Veatch and F.G. Miller, eds, 'The internal morality of medicine', *Journal of Medicine and Philosophy*, 26(6) (2001).

⁵⁰ R. Brownsword, 'Towards a rational law of contract' in T. Wilhelmsson (ed.), *Perspectives of Critical Contract Law* (Aldershot: Dartmouth, 1991), 241-272.

⁵¹ See J. Arras, 'Theory and bioethics', *The Stanford Encyclopedia of Philosophy* (2013), E.N. Zalta, ed. Available at:

<<http://plato.stanford.edu/archives/sum2013/entries/theory-bioethics/>>; see also van der Burg, 'Law and ethics', 13ff.

⁵² See further the discussion of reflective equilibrium, below.

⁵³ Freeman, 'Law and bioethics', 7.

⁵⁴ Annas, 'Ethics committees', quoted by Jonsen, *Birth*, 343.

doctrines.⁵⁵ As such, the principle-generating bioethicist could also find helpful precedents in the story of the common law.

Precedent is, of course, crucial in the common law. Yet, although the approach is potentially conservative in its adherence to decided cases (and thus the past),⁵⁶ changing times can mean changes in the law.⁵⁷ Officials working in a common law system will therefore tack between the case arising and the overarching doctrine or principle. This two-way process appears increasingly popular in bioethics too, not least with those who adopt Rawls' "reflective equilibrium".⁵⁸ The method involves working back-and-forth among our considered judgments about particular cases, the principles or rules that we believe govern them, and theoretical considerations, making adjustments along the way, with the aim of achieving coherence between them. Used by Rawls in his analysis of justice, bioethics' embrace of reflective equilibrium is evident in, for example, its deployment in Beauchamp and Childress' principlist approach.⁵⁹ Furthermore, and of particular relevance here, reflective equilibrium has been promoted as a methodological approach to conducting empirical bioethics research, by which theory and data might be combined.⁶⁰ As the common law has long used such a method, albeit not by name, here too we might expect law to make a valuable contribution to bioethics, not least to the aforementioned debates about methodology in bioethics. Indeed, the ideas might usefully transfer in both directions. Empirical research in law (such as socio-legal studies) is (like bioethics) backed by training programmes, journals and organisations, but remains relatively new and it lacks an agreed meaning or scope; perhaps, then, the insights offered in empirical bioethics research might in turn contribute to the evolution of empirical legal research.⁶¹

Returning to law's contribution to bioethics, and specifically to law's proceduralist bent, we should note that procedure also features elsewhere in bioethics' business, so there will be other ways in which law might fruitfully contribute. Those in the unofficial sector who advocate a proceduralist bioethics – promoting, for example, "accountability for

⁵⁵ Of course, legal doctrines might also develop from other legal sources, such as Acts of Parliament: see e.g. van der Burg, 'Law and ethics', 12.

⁵⁶ See e.g. Freeman, 'Law and bioethics', 7.

⁵⁷ E.g. "Social customs change, and the law ought to, and does in fact, have regard to such changes when they are of major importance", *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112, 171, per Lord Fraser.

⁵⁸ J. Rawls, *A Theory of Justice* (Oxford University Press, 1972); see van der Burg, 'Law and ethics', 16.

⁵⁹ T. Beauchamp and J. Childress, *Principles of Biomedical Ethics*, 7th edn. (Oxford University Press, 2013).

⁶⁰ E.g. M. De Vries and E. Van Leeuwen, 'Reflective equilibrium and empirical data: Third person moral experiences in empirical medical ethics', *Bioethics*, 24(9) (2010), 490-498.

⁶¹ H. Genn, M. Partington and S. Wheeler, *Law in the Real World: Improving our Understanding of How Law Works* (Nuffield Foundation, 2006), para 16; D. Watkins and M. Burton, eds., *Research Methods in Law* (Oxon.: Routledge, 2013). I know of socio-legal scholars who already incorporate the methodological insights offered by empirical bioethics, and such cross-fertilisation seems promising.

reasonableness”,⁶² or “principled compromise”⁶³ – could benefit from law’s experiences,⁶⁴ as might some of those working in bioethics’ semi-formal sector, such as on clinical ethics committees.⁶⁵ In short, as a forum in which process is king, law might helpfully guide its younger cohabitee.

But law can also contribute in substance, not merely in form. Put simply, law’s *products* provide work for every sector of bioethics, from the academy to the committee. Law’s edicts will often say something on which bioethics will also have an opinion (or, more likely, opinions plural). So, for example, many – maybe all – medico-legal rulings will include or invite ethical evaluation (no matter what some judges say).⁶⁶ The unofficial, academic sector will accordingly take to the journals to reflect on legal developments at home and away, while occupants of the other sectors might have cause to revise the guidance they issue.⁶⁷ This interplay between bioethics and law seems strikingly apparent when the end(ing) of life is in view.⁶⁸ The US case of Karen Ann Quinlan,⁶⁹ in the 1970s, appears a pivotal moment in the development of both disciplines.⁷⁰ Here, for the first time, a court contemplated terminating the life-supporting treatment being provided to an incapacitated patient. Citing a proposal from an academic lawyer,⁷¹ the judges even explicitly created (semi-formal) work for bioethics, by advocating the creation of clinical ethics committees. Whether it is adjudicating on matters of life or death, law evidently provides many of the raw materials for constructing bioethics.⁷²

Yet, to change metaphors, law does more than serve up the morsels for moral mastication: law also checks that bioethics’ recipes are palatable. Law thus provides a testing ground for the *practice* of bioethics. Law is inherently empirical in orientation: its

⁶² N. Daniels and J.E. Sabin, ‘Limits to health care: Fair procedures, democratic deliberation and the legitimacy problem for insurers’, *Philosophy and Public Affairs*, 26(4) (1997), 303-350.

⁶³ Huxtable, *Law, Ethics*.

⁶⁴ Although some argue that bioethics should not become too proceduralist and law-like: D. Sperling, ‘Law and bioethics: A rights-based relationship and its troubling implications’, in M. Freeman (ed), *Law and Bioethics: Current Legal Issues 2008, Volume 11* (Oxford: Oxford University Press, 2008), pp. 52-78, p. 62.

⁶⁵ S. McLean, ‘Clinical ethics committees: A due process wasteland?’ *Clinical Ethics*, 3 (2008), 99-104.

⁶⁶ *Re A (Children) (Conjoined Twins: Medical Treatment)* [2000] 4 All ER 961, 969, per Ward LJ.

⁶⁷ E.g. the first instance decision (reversed on appeal) in *R (on the application of Burke) v General Medical Council* [2005] 2 WLR 431.

⁶⁸ Sullivan and Reynolds, ‘Law and bioethics’, 619; see also J. Coggon, ‘Assisted dying and the context of debate: “Medical law” versus “end-of-life law”’, *Medical Law Review*, 18 (2010), 541-563.

⁶⁹ *In re Quinlan* (1976) NJ 355 A 2d 647.

⁷⁰ See R. Huxtable, *Euthanasia, Ethics and the Law: From Conflict to Compromise* (London: Routledge-Cavendish, 2007), pp. 115ff.

⁷¹ K. Teel, ‘The physician’s dilemma: A doctor’s view: What the law should be’, *Baylor Law Review*, 27 (1975), 6-9.

⁷² Indeed, in the case of clinical ethics committees, it arguably provided a building for bioethics to occupy.

edicts must have purchase in the real world. Many bioethical issues have indeed been tested in legal claims: “law is experienced with analysing and solving social problems”.⁷³ Law sometimes *does* bioethics and, in doing so, it is normatively open:⁷⁴ it is “ready to take on ethics if that is what gets served up to it for the making of decisions”.⁷⁵ Law can, therefore, test out bioethics’ concepts (for example, beneficence becomes “best interests” in the lawyer’s lexicon), as well as its (action-directed) normative theories, like deontology and rule-utilitarianism. Law is, after all, replete with rules and devoted to duties, so the bioethicist may see in law different ways in which a particular normative commitment could (not) or should (not) be worked through.

Whether law gets things right (in some sense) should not detract from the fact that law has to put its morals where its mouth is: law cannot merely theorise, it must also *decide*.⁷⁶ For some, this makes law the senior partner to bioethics.⁷⁷ As McLean says, “irrespective of the ethical views of decision-makers – legal or medical – there are rules under which they must operate [which] are superior (in practical terms) to the outcome predicted by adherents to one ethical school of thought or another”.⁷⁸ The law is (quite rightly) under unrelenting scrutiny for the ways in which it strives “day by day to solve the real problems of real people”.⁷⁹ Bioethics might provide such scrutiny but, in its unofficial sector at least, it is rarely subjected to the same inspection.⁸⁰ Law therefore has the benefit, and undoubted burden, of doing ethics work in the real world and, in doing so, it has surely learnt lessons that bioethics should heed. Law’s empirical orientation therefore warrants repetition. Law will sometimes appear to get things ethically “wrong”, according to some theory or other. But perhaps law can teach the ethical theorists something too, about the sorts of practical resolutions to which particular moral problems are most – or least – amenable.

And, finally, law’s lessons need not be incomprehensible to bioethics: law’s *phrasing* can be heard. Lei-Kung and Bronislaw were able to communicate and so too are law and bioethics – indeed, they share a common language, of rules, principles, and rights.⁸¹ The commonality is perhaps unsurprising, given the prevalence of academic lawyers in the

⁷³ Freeman, ‘Law and bioethics’, 6.

⁷⁴ van der Burg, ‘Law and ethics’, 2.

⁷⁵ D. Callahan, ‘Escaping from legalism: Is it possible?’, *Hastings Center Report*, 26(6) (1996), 34-35, 34.

⁷⁶ See Rothstein, ‘Role of law’, 3; Sperling, ‘Law and bioethics’, 54.

⁷⁷ Cf. Foster, *Choosing Life*, p. xi.

⁷⁸ S.A.M. McLean, ‘Law, ethics and health care’, in R. Ashcroft, A. Dawson, H. Draper and J. McMillan (eds), *Principles of Health Care Ethics*, 2nd edn (Chichester: John Wiley and Sons, 2007), pp. 193-198, 196.

⁷⁹ P. Birks, ‘Rights, wrongs, and remedies’, *Oxford Journal of Legal Studies*, 20(1) (2000), 1-37, 2-3.

⁸⁰ Note, however, the furore sparked by A. Giubilini and F. Minerva, ‘After-birth abortion: why should the baby live?’ *Journal of Medical Ethics*, 39 (2013), 261-263.

⁸¹ Freeman, ‘Law and bioethics’, 6; Sperling, ‘Law and bioethics’, 55; Miola, ‘The interaction’, 24.

unofficial sector of bioethics.⁸² Given all this, bioethics can – and arguably should – hear law’s voice.⁸³

4. Divergence and Distraction

Whilst law therefore can and does offer much to bioethics, the news is not all good. Law also differs from bioethics in ways that mean each can distract, and detract from, the other. First, returning to the previous point, problems of *articulation* do arise. Law’s styles and conventions – at least within a strict legal arena – certainly differ from those adopted in bioethics’ sectors: lawyers address one another in formal, indirect and cautious (as opposed to clear) terms, and they will conventionally defer to authority.⁸⁴ Although bioethics invites a degree of deference,⁸⁵ its practitioners seemingly prefer the pursuit of clarity and defensibility and, whilst their opinions remain revisable in principle, their exchanges can be very direct indeed.⁸⁶

Here too there are problems not only of style but also of substance. Lei-Kung and Bronislawka each faced the difficulty of translating particular words for their flatmate. In law and bioethics, we find that even common words have uncommon, technical meanings:⁸⁷ for example, pluralistic legal accounts of respect for autonomy do not necessarily correspond with the equally pluralistic accounts writ in bioethics’ corpus.⁸⁸ Whenever a discipline re-frames an issue in its terms, it risks stripping the presenting problem of “the complex facticity with which it actually presented”.⁸⁹ Law might be particularly susceptible to this reductionist charge: a complex, fractious issue like assisted dying is swept into a brute legal category and emerges unrecognisable to bioethics (and even the protagonists) as the original dilemma.⁹⁰ The resulting problems of translation return us to law’s purpose: as Schneider puts it, “we should remember that the law’s calling is to regulate social life, however awkwardly, and its language reflects that purpose”.⁹¹ We saw earlier that bioethics can share this purpose, but Schneider

⁸² Rothstein, ‘Role of law’, 1-2; Sperling, ‘Law and bioethics’, 55.

⁸³ R. Huxtable and S. Ost, ‘Voices Carry? The Voice of Bioethics in the Courtroom and Voice of Law in Bioethics’, in R. Huxtable and R. ter Meulen, *The Voices and Rooms of European Bioethics* (London: Routledge, forthcoming).

⁸⁴ van der Burg, ‘Law and ethics’, 2, 19; Sullivan and Reynolds, ‘Law and bioethics’, 611.

⁸⁵ Not only in the formal sector, but also in the unofficial, academic sector (for example, students should show due regard – if not unquestioning respect – for standard texts).

⁸⁶ E.g. between Harris and Finnis in J. Keown, ed., *Euthanasia Examined: Ethical, Clinical and Legal Perspectives* (Cambridge University Press, 1997).

⁸⁷ van der Burg, ‘Law and ethics’, 3, 25. A discipline might require some technical tools, although it is notable that in each there have been calls to purge unnecessary jargon: e.g. P. Butt, ‘Legalese versus plain language’, *Amicus Curiae*, 35 (2001), 28-32; Callahan, ‘Bioethics as a discipline’, 70; C. Cowley, ‘The dangers of medical ethics’, *Journal of Medical Ethics*, 31 (2005), 739-742.

⁸⁸ E.g. Foster, *Choosing Life*.

⁸⁹ Callahan, ‘Bioethics as a discipline’, 69.

⁹⁰ E.g. the English rulings culminating in *R (on the application of Pretty) v DPP* [2002] 1 FLR 268.

⁹¹ C.E. Schneider, ‘Bioethics in the language of the law’, *Hastings Center Report*, 24(4) (1994), 16-22, 22.

hints here that bioethics might also be doing and saying more than this; if so, then there may be limits to “the extent to which the language of the law may safely be imported into bioethical discourse and to which bioethical ideas may be effectively translated into law”.⁹²

Secondly, and related to law’s prose and purpose, law is *adversarial*, particularly where judicial proceedings are concerned. Like legal cases, bioethical dilemmas “revolve around a nexus of competing or conflicting claims”.⁹³ Law seeks a winner: “so much of what is taught in law school is about winning: winning the case, winning the arguments, or winning the point”.⁹⁴ Yet, bioethics’ problems “are not black and white, but are often composed of multiple shades of grey”,⁹⁵ in which there might be two competing rights, as opposed to a right and a wrong.⁹⁶

Certainly, law’s decisions are not always monochromatic: it sometimes manages to split the difference between disputing parties or principles.⁹⁷ Yet, law still decides – it acts – and this points to a third area of divergence. Law is, as Fuller suggested, action-orientated: law might therefore seek to kill the conflict,⁹⁸ while philosophical bioethics could opt for over-kill, further complicating matters.⁹⁹ Schneider hinted that bioethics encompasses more than the rules and action that fixate law; when we pan out, we can indeed see more of bioethics’ diverse landscape, on which the emotions, character, and the virtues also feature. Whether law can adequately talk to or about such matters is, of course, an enduring question.¹⁰⁰

Law’s adequacy is further questioned when we consider its *aspirations*. You will recall that Bronislawski disliked Lei-Kung’s contrivances, while Lei-Kung felt that Bronislawski, the dreamer, got in his way. Law’s rules perform many functions, amongst them setting standards and drawing lines between the permissible and impermissible. The fourth problem for bioethics is that law might draw the line in the wrong place, since it insists on only minimal standards, regarding what *must* be done, while (bio)ethics aspires to what

⁹² Ibid; see also Freeman, ‘Law and bioethics’, 6; Sperling, ‘Law and bioethics’, 65; Foster, *Choosing Life*, p. xi.

⁹³ Sullivan and Reynolds, ‘Law and bioethics’, 610.

⁹⁴ Sullivan and Reynolds, ‘Law and bioethics’, 620. Law’s warrior mentality has even led one judge to depict consent not in the bioethical terms of autonomy, but as conferring a “flak jacket” that protects the health professional: *Re W (A Minor) (Medical Treatment: Court’s Jurisdiction)* [1992] 3 WLR 758.

⁹⁵ S. Meller and S. Barclay, ‘Mediation: An approach to intractable disputes between parents and paediatricians’, *Archives of Disease in Childhood*, 96 (2011), 619-621, 619. Given such differences, bioethicists might need to proceed cautiously whenever they are called to be expert witnesses in a legal battle: see Sullivan and Reynolds, ‘Law and bioethics’, 619.

⁹⁶ Cf. Sperling, ‘Law and bioethics’, 65.

⁹⁷ See Huxtable, *Law, Ethics*.

⁹⁸ See e.g. van der Burg, ‘Law and ethics’, 20.

⁹⁹ Callahan, ‘Bioethics as a discipline’, 67.

¹⁰⁰ E.g. M. Slote, ‘Law in virtue ethics’, *Law and Philosophy*, 14(1) (1995), 91-113; L.B. Solum, ‘Virtue jurisprudence: A virtue-centered theory of judging’, *Metaphilosophy*, 34(1/2) (2003), 178-213.

should be done.¹⁰¹ The bioethics journals contain many examples but the English courts' long-standing reluctance to require (fully) "informed" consent suffices.¹⁰² Even the judges appear uneasy about the moral ramifications of some of their rulings, no matter how apparently sound they are in law.¹⁰³

Perhaps, then, law needs a bioethical bolt-on. "Good ethics committees begin where the law ends",¹⁰⁴ suggests Annas, providing just one example of how the disciplines might rightly remain separate, with bioethics (literally) providing added value to the law.¹⁰⁵ But, as we have seen, law does advance or adopt particular moral positions. So what sort of (bio)ethics should we expect to see *in law*? Bioethics' broadly composed congregation subjects law to a cacophony of critique: consider, for example, the diverse bioethical positions taken on laws governing assisted dying, embryo research and organ transplantation. Law will, inevitably, talk past some of these complainants.¹⁰⁶ So, recalling a famous exchange between Hart and Devlin,¹⁰⁷ should law express a positive morality, which commands popular support, or should it reflect a more critical morality, such as we might associate with bioethics?¹⁰⁸ We saw earlier how law seems to borrow from each sphere, occasionally citing public opinion, elsewhere referring to the different sectors of bioethics.¹⁰⁹ Unfortunately, such selections are just that: selective and inconsistent, with law seemingly lacking any robust or transparent methodology for making its moral choices.

Maybe a messy morass of morals is appropriate, if law is only concerned with setting the minimal standards for communal living (which, as we saw, it might achieve by capturing a compromise between values, plural).¹¹⁰ But not every bioethicist will agree, perhaps understandably so, once we appreciate that law and bioethics can have very different *audiences*. Law seems often to be targeted at the transgressor, not the utopian. These transgressors will reside in a given jurisdiction, under the dominion of particular laws. The jurisdiction may be wide,¹¹¹ but an essential point is that law is thereby relative to a particular place and, indeed, time. Time can even be a problem for law: it might sometimes get there first, but law will often lag behind developments in science and

¹⁰¹ E.g. Sullivan and Reynolds, 'Law and bioethics', 620; Rothstein, 'Role of law', 6-7; Freeman, 'Law and bioethics', 9; Sperling, 'Law and bioethics', 65; Maclean, 'Magic, myths', 111.

¹⁰² See Maclean, 'Magic, myths'.

¹⁰³ E.g. *Airedale NHS Trust v Bland* [1993] 2 WLR 316, 387, *per* Lord Browne-Wilkinson.

¹⁰⁴ Annas, 'Ethics committees', 21.

¹⁰⁵ Montgomery fears the growing "de-moralisation" of English medico-legal rulings: J. Montgomery, 'Law and the demoralisation of medicine', *Legal Studies*, 26(2) (2006), 185-210, 190.

¹⁰⁶ Cf. Sperling, 'Law and bioethics'.

¹⁰⁷ P. Devlin, 'The Enforcement of Morals', *Proceedings of the British Academy*, XLV (1959), 129-151; H.L.A. Hart, *Law, Liberty and Morality* (Oxford University Press, 1963).

¹⁰⁸ van der Burg, 'Law and ethics', 11.

¹⁰⁹ See further Miola, 'The interaction', 23; J. Miola, *Medical Ethics and Medical Law: A Symbiotic Relationship* (Oxford: Hart, 2007).

¹¹⁰ Huxtable, *Law, Ethics*.

¹¹¹ Even cross-jurisdictional e.g. in international law, federal law in the USA and the laws of the European Union and European Convention on Human Rights.

even in morals.¹¹² Bioethics can be relativistic, and even myopic,¹¹³ but it will also, on occasion, aspire to universality; law, meanwhile, remains tethered to a territory, issuing its edicts to its subjects, under the watchful, questioning and sometimes uncomprehending gaze of bioethics.

5. (Happy) Endings?

In conclusion, I have suggested that there are numerous contributions that law can make, and has made, to bioethics, which I have described as five P's, which encompass law's purpose, processes, products, practices and phrasing. There is, therefore, much that law has to offer bioethics, particularly insofar as law is inherently empirically-oriented and therefore offers a real world testing ground for particular types of solutions to particular moral problems. Like Bronislawka and Lei-Kung, law and bioethics do manage to communicate with one another more than some might believe.¹¹⁴ This is unsurprising given their close co-existence. Indeed, just as it can be difficult to define law in a way that does not beg moral questions, so too it can be hard to define bioethics without some reference to law. If the differences between law and bioethics are only gradual and contextual, as Van der Burg indicates, then there may be much that each can learn from the other.¹¹⁵

Equally, however, I have argued that the relationship is marred by five A's, which concern law's articulation, angst, action-orientation, (lack of) aspiration and audience. Some of the problems between these flatmates might be attributed to a lack of understanding of what each is and does: bioethics might over-emphasise law's authoritarian or argumentative sides, while law might fail to see that bioethics involves both consensus and controversy.¹¹⁶ Different authors offer different prescriptions for the various ills that afflict the couple, ranging from separation to the acquisition of new roles.¹¹⁷ For my part, I suspect that better appreciation of what each brings to their shared areas of interest provides a good place to start. Neither, it seems, can entirely replace the other;¹¹⁸ like our flatmates, each can benefit the other and, indeed, the wider communities they inhabit and serve, not least by spotting something that the other might miss. Whether or not bioethics itself is "a full discipline", the opportunity remains – in Callahan's words – for "creativity and constant re-definition".¹¹⁹ We should, therefore, continue to configure the relationship between law and bioethics, moving it on from its "haphazard" beginnings.¹²⁰ Sometimes friends, sometime foes, they may yet become spouses.

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¹¹² Rothstein, 'Role of law', 6; Sullivan and Reynolds, 'Law and bioethics', 611.

¹¹³ E.g. A.V. Campbell, "My country tis of thee": The myopia of American bioethics', *Medicine, Health Care and Philosophy*, 3(2) (2000), 195-198.

¹¹⁴ Foster, *Choosing Life*, p. xi.

¹¹⁵ van der Burg, 'Law and ethics', 21ff.

¹¹⁶ van der Burg, 'Law and ethics', 3; Miola, 'The interaction', 25.

¹¹⁷ E.g. Sperling, 'Law and bioethics', 76; Brownsword, 'Bioethics'; Wolf, 'Law & bioethics'.

¹¹⁸ Sperling, 'Law and bioethics', 64.

¹¹⁹ Callahan, 'Bioethics as a discipline', 68.

¹²⁰ Miola, 'The interaction', 25.

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