

ESSAYS

REFLECTIONS ON TEACHING LAW & MEDICINE*

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In responding to the question, "What comes under the rubric of a law and medicine course?" I intend to draw on my experiences—now twenty-nine years long—in the world of law and medicine. Some of my reflections, I hope, will prove instructive to you.

Teaching, communicating with students, is a very personal experience. It is shaped by a teacher's personality, philosophy, socialization, and commitment as well as by the environment in which he or she works. The environment is of crucial importance, and the institution in which I work has decisively influenced my socialization as a teacher of law and medicine.

Yale Law School and I turned out to be a good fit. The school allowed me to pursue my interests without any restrictions on subject matter. I had the freedom to move from the study of criminal responsibility, to family law, human experimentation, professional responsibility in medicine and law, and, most recently, the social and legal control of reproductive technologies. To this day I consider myself fortunate for having been able to spend most of my professional life at Yale Law School. The school permitted me to create my own structure, and there was no scarcity of colleagues and students to join me in my scholarly pursuits. Had I gone elsewhere, my professional life would have turned out differently, for it is one thing to teach law-medicine courses in a law school (and in

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particular a law school like Yale) and another to teach such courses in a medical school; it is one thing to teach an interdisciplinary course alone and another to teach it with colleagues from the other discipline; it is one thing to be on a faculty on a part-time basis, with limited opportunities for contact with colleagues and students and another to be a member of a school's full-time faculty.

I was offered and I accepted a full-time appointment at Yale Law School, and my office has always been within its building. I sought such an appointment, at least for the first few years, because I felt that a meaningful interdisciplinary working relationship required physical closeness and continuing interactions with faculty and students.

During the first decade I always taught jointly with law-trained colleagues. They taught me law and I taught them psychiatry and medicine. While occasionally I taught seminars with various faculty members—Richard Donnelly, Fowler Harper, Abraham Goldstein, Harold Lasswell, to name a few—I was most intensely involved with one colleague, Joseph Goldstein. Ours was a special working relationship, which I believe was rare in the annals of interdisciplinary collaboration. I want to describe to you briefly how we worked—not that many of you will be able to duplicate our arrangements because they require the fortuitous coming together of two crazy characters. Nevertheless, I wish to describe to you our work life, because our arrangement, in less intense form, is perhaps one of the best ways to carry on interdisciplinary teaching and writing.

Joe and I spent an incredible amount of time together—six to eight hours a day, three to four days a week, spring, summer, fall, and winter. Almost every word we wrote, every page we read, we wrote and read together. We literally worked elbow-to-elbow: preparing intensively for each class, debriefing one another afterwards and dissecting what we thought had worked well or badly. A number of articles on psychiatry and law¹ and two case books—*The Family and the Law*² and *Psychoanalysis, Psychiatry and*

1. Goldstein & Katz, *Dangerousness and Mental Illness—Some Observations on the Decision to Release Persons Acquitted by Reason of Insanity*, 70 YALE L.J. 225 (1960), simultaneously published in 131 J. NERV. & MENT. DIS. 404 (1960); Goldstein & Katz, *Abolish the "Insanity Defense"—Why Not?*, 72 YALE L.J. 853 (1963), simultaneously published in 138 J. NERV. & MENT. DIS. 57 (1964).

2. J. GOLDSTEIN & J. KATZ, *THE FAMILY AND THE LAW* (1965).

*Law*³—constitute the written products of our collaboration.

In our articles, case books, and teaching, we largely raised questions. Trying to formulate the right questions and engaging ourselves and our students in a continuous dialogue, rather than giving authoritative answers, were our objectives. Joe and I fought vigorously about any answers we gave to our questions, but ultimately we were more concerned about the questions. We thought deeply about the right questions that needed to be posed. Our quest to identify the important questions, as well as our capacity (call it neurotic, if you will) for hard work, were the intellectual glue that held us together.

When the time came in our work on family law—the subject matter we liked the most—to publish our own answers, we began to disagree on many fundamental issues and eventually decided to work independently. It was hard to say goodbye. A divorce after a long and good marriage is painful.

In a final attempt to see whether we could continue to collaborate, we offered a seminar on parent-child problems, with the objective in mind of examining our differences in the company of our students. It was one of the best seminars that we had ever taught. Surrounded by twenty students, Joe and I devoted one of the two hours of every seminar to debating issues raised by the assigned materials. The debate was intense, relentless, and searching. We continued to disagree on many of the basic issues. During the second hour we brought the students into the discussion. We felt we owed that much to them. The students, it turned out, had not felt left out. They loved the seminar. They particularly loved the first hour, our debate. They experienced our relentless debate not as a show, but a marvelous pedagogic method, one of the best ever devised. If it was pedagogy, it was also for real. At the end of the semester, Joe and I knew that further collaborative work would be punctuated by too much dissent.

We went our separate, intellectual ways and there are lessons to be learned from our experiences. They highlight the contributions which two persons from different disciplines can make to raising questions but not to answering them. They also highlight another way of working and teaching collaboratively: a relentless exploration of differences of views by two teachers from disparate

3. J. KATZ, J. GOLDSTEIN, & A. DERSHOWITZ, *PSYCHOANALYSIS, PSYCHIATRY AND LAW* (1967).

disciplines.

While at present I teach more by myself, I served a long apprenticeship period when I did not do so. I mention this for two reasons. First, to teach and write effectively in interdisciplinary fields demands a thorough familiarity with the other discipline. I cannot think of a better way to acquire this familiarity than through joint teaching. Second, I do not believe that acquiring dual degrees is the best answer for effective interdisciplinary teaching (although this conclusion may be influenced by a personal bias based on my experience). I almost obtained a law degree. When Dean Eugene Rostow invited me to join the law school faculty, he offered me the opportunity, with full pay, to obtain a law degree. I declined. At the time, I did so because I was tired of being a formal student, having only recently finished my psychoanalytic training. Also, my children were beginning school and I did not want to compete with them. In retrospect, I believe that I made a good decision. It allowed me both to become a law professor and to maintain my identity as a physician.

While there are notable exceptions, I have met too many persons with joint degrees who, I believe, suffer from an identify diffusion, not knowing whether they are lawyers or physicians, and then being neither. To be sure, specific reasons—such as wishing to apply one's prior medical training in the practice of law or a preference to work by oneself—may require obtaining degrees in two disciplines. Thus, I only wish to emphasize that an equally good way of mastering the knowledge of another discipline is through intensive collaboration with a person from that discipline.

So far I have said nothing about the question, "What comes under the rubric of a law and medicine course?" Instead, I have addressed another question: "What comes under the rubric of a law and medicine teacher?" I wish to pursue for a while longer this second question. After all, it is the teacher who creates the course.

My socialization as a teacher began at Yale Law School. Prior to that time, I not only had attended one of the best medical schools, but also had been a teacher at Yale Medical School. Teaching is a task not taken very seriously at medical schools. The intellectual dimension of medical schools is research; the rest is the onerous obligation of teaching a craft to students and residents.

Moreover, during my socialization as student and teacher at medical school I had been lectured to death and, in turn, lectured my students to death. At the law school, I was introduced to the

"Socratic" method. I took to it like a fish takes to water. I became enchanted with thinking about questions, trying to formulate the right questions, with each answer leading to new questions. Of course, the task was not merely to think of questions, but of questions that, as my colleague Harold Lasswell once put it, "jarred the cakes of custom,"⁴ that illuminated hidden problems, that opened up problems in law and medicine to scholarly inquiry.

Thus, my approach to interdisciplinary teaching was not to make physicians out of law students or to teach students *the* law (although they learned much about medicine and law in the process). Instead, I wanted to convey to my students that on the playing fields of law and medicine they will be confronted with intriguing and complex questions that take time to identify. While questions often will be in need of answers because a particular situation requires decision, they will be only the best answers for the moment, not the answer for all times or for all situations. If one wishes to find answers that transcend the moment, one must first relentlessly search for the right questions.

My most recent work on doctor-patient interactions in therapeutic settings,⁵ particularly my exploration of the problem of medical uncertainty,⁶ was heavily influenced by what I had learned as a teacher in a law school. My experiences in medical school had led me to believe that answers can be provided without prior careful reflection about the problems for which answers are sought. It took time for me to appreciate that one must constantly ask whether the questions one raises have been so influenced by one's experiences and values that, without reformulating them, they will not yield relevant answers. These considerations apply not only to scholarly work but to teaching as well. Thus, the lecture method employed in medical school, where one professor, for example, authoritatively holds forth on the treatment of diseases, can mislead students; for students are taught only what the professor thinks is the right answer to the question of how to treat a particular disease and it is not necessarily *the* only answer.

Many years ago, I showed my materials on the treatment of hypertension to one of my former teachers, Herman Blumgart, the late and revered Harvard Medical School professor of internal

4. Lasswell, *The Political Science of Science: An Inquiry into the Possible Reconciliation of Mastery and Freedom*, 50 AM. POL. SCI. REV. 961, 973 (1956).

5. J. KATZ, *THE SILENT WORLD OF DOCTOR AND PATIENT* (1984).

6. *Id.* at 165-206.

medicine. I had prepared them for inclusion in my book, *Experimentation with Human Beings*,⁷ but ultimately did not use them because they turned out to be too complicated for law students to digest. In these materials I juxtaposed articles that illustrated the confusion and uncertainty about the right treatment for essential hypertension. After Herman Blumgart had studied them, he told me, "What you have done is remarkable. I had not appreciated before that this is the way to introduce students to the treatment of hypertension and other diseases; not by doing what I have always done, to tell students what I believe to be the best treatment approach." His praise was too generous, but what he said was also a very perceptive comment by a great man whom I had respected enormously during my days as a student at Harvard Medical School.

In what I have said so far, I have tried to convey to you my basic objectives as a teacher in a professional school: to raise questions,⁸ to raise consciousness, to make students appreciate that life, as well as the art and science of law and medicine, are complex, and that the life of law and medicine becomes even more complex when the two disciplines meet head on and have to accommodate themselves to one another.

What comes under the rubric of a law and medicine course? That question has many answers and I can best give you my answer by telling you what I have done.

Before briefly describing to you the courses I have offered, let me only mention in passing that I have never offered a traditional forensic seminar on law and medicine. For example, I have never taught students much, if anything, about medical proof in litigation (such as the use of medical records, photography, X-rays, and court room demonstration of medical proof), malpractice law issues (such as *res ipsa loquitur*, good Samaritan laws, and statutes of

7. J. KATZ, *EXPERIMENTATION WITH HUMAN BEINGS* (1972) (with the assistance of Alexander M. Capron and Eleanor Swift Glass).

8. In emphasizing "raising questions" as my primary objective in teaching, I do not wish to dismiss the importance of providing medical and law students with background materials about their own and other disciplines. Such materials, however, can only give students sufficient information to raise meaningful questions, to know when they have to learn more about their own or the other discipline's problems, and to avoid the pitfalls of finding answers only on the basis of "hypotheticals" (an all too common teaching device in law schools). Answers based on hypotheticals are often misleading because the information provided does not sufficiently depict the complexities either of the problem presented or of underlying legal and medical theories and professional practices.

limitation), the legal definition of death, or the ins and outs of the insanity defense and other competency determinations. Even though such teaching has its usefulness, I have had no experience with it.

Since such courses are often presented in black letter law fashion, let me interject one caveat that is particularly relevant to teaching law to medical students. Medical students are socialized to eschew uncertainty. Thus, if law is presented to medical students in black letter form, the danger is great that they will not appreciate that, legal rules notwithstanding, physicians at times must place professional responsibilities ahead of legal prescriptions. Physicians must sometimes expose themselves to legal liability when, in the exercise of their professional responsibility to patients, they must challenge legal doctrine. Similarly, physicians must, in fulfilling their responsibilities to their chosen profession and to society, participate in reforming laws so that they will comport better with good patient care.

In my own teaching I have always cast my net wide. A few excerpts from the introduction to my case book, *Experimentation with Human Beings*, will give you not only an appreciation of the scope of my inquiries in a specific area of law and medicine, but also a flavor of my overall approach to teaching:

When science takes man as its subject, tensions arise between two values basic to Western society: freedom of scientific inquiry and protection of individual inviolability. Both are facets of man's quest to order his world. Scientific research has given man some, albeit incomplete, knowledge and tools to tame his environment, while commitment to individual worth and autonomy, however wavering, has limited man's intrusions on man. Yet when human beings become the subject of experimentation, allegiance to one value invites neglect of the other. At the heart of this conflict lies an age-old question: When may a society, actively or by acquiescence, expose some of its members to harm in order to seek benefits for them, for others, or for society as a whole?

Recent experience with human experimentation in a variety of disciplines has prompted renewed concern among the professions and the public that the present regulation of the research process is unsatisfactory. Some critics call for increased governmental controls, more detailed codes of ethics, more powerful professional review committees, or more active participation of nonscientists in research decisions. Others fear that involvement of outsiders or more stringent controls will "put a ceiling price on

truth" and dry up all reservoirs of creativity and scientific progress. Yet perhaps the most pervasive viewpoint is that experimentation cannot be rationally controlled. Before accepting any of these judgments it is the task of the student of human experimentation to seek answers to three questions: (1) What limits, if any, should be placed on scientific inquiry, and what implications do these limits have for society's democratic and egalitarian aspirations? (2) Who should have the authority to formulate these limits? (3) By what means should they be imposed?

In searching for answers to these questions, this book examines and evaluates the authority which should be vested in each of the chief participants in the human experimentation process—the *investigator* who initiates and conducts the experiment, the human being who is its *subject*, and the *professions* and the *state* which appraise, support, or restrict research.

. . . .
. . . This volume includes experimental studies from several disciplines—medicine, psychology, sociology, biology, and law—and materials from many sources—trial transcripts, congressional hearings, panel discussions, appellate decisions, administrative regulations, editorial comments, legislation, private agreements, scholarly publications, and newspaper stories. These have been interwoven with commentary from philosophy, political science, economics, genetics, medicine, anthropology, psychoanalysis, biology, jurisprudence, psychology, theology, and literature. Both the relevance and the reliability of these materials, as data and as evaluations, must be subjected to critical appraisal. Scrutinizing case studies about events in the past can sometimes seem petty, sterile, or disheartening. Yet any hope for a better and more thoughtful resolution of the issues in the future depends on our willingness to engage in unstinting examination of the past, as imperfectly as it may be recalled

. . . .
. . . If this book in some measure documents man's inhumanity to man, it only serves to remind us how pervasive that phenomenon is. Human experimentation has been severely criticized on this ground. Yet in raising questions about experimentation we do not intend to indict science or stifle research, for the failure to experiment is equally an experiment which may also have unsatisfactory consequences. The real need to which this volume speaks is for greater conscious awareness and relentless scholarly analysis of the conflicting purposes of human experimentation—protecting man, advancing science, and improving the well-being of society and future generations. Only if students and decisionmakers are prepared to sort out these conflicts and to

acknowledge the reality of harm to individuals and society can they begin to formulate rules and procedures which will minimize harm without erecting insuperable impediments to the acquisition of knowledge. In addressing this task for human experimentation, significant contributions may also be made to decision-making in other areas of law, science, and politics, for the conflicts presented in this volume are inherent in all affairs conducted by and with man.⁹

Let me add a few excerpts from an earlier case book, coauthored by Joseph Goldstein and me, *The Family and the Law*:

The question underlying all of these general and specific questions is whether, how, and to what extent the state should not or should be authorized to regulate the relations of man. In answering this question the decisionmaker must resolve the important issue of why, when, and how the state ought or ought not to intervene. It should not be assumed, however, that he will respond rationally "[e]ven if the materials are sufficiently relevant and valid to fully support or undermine a given position. Like all human beings he is subject to a variety of internal and external, conscious and unconscious, pressures which may evoke a decision contrary to that sought. Awareness of this makes it all the more important that we seek to design our model of [the family law process] carefully and free from second guesses about possible pressures. For models built on the sand of anticipated compromises obscure and hinder the development of well articulated objectives which ought to be available as guides to and bases for appraising the work of decisionmakers."¹⁰

The reader who opens himself to these questions and materials will be unable to keep his thoughts from straying to reflections about himself and his families. This may cause feelings of uneasiness, particularly if the boundary between the people in the materials and those in personal fantasy become hazy. Such an experience can be likened to that of the medical student who frequently "suffers" from all of the symptoms he is studying in his text books. "As a matter of fact, it is most unsatisfactory to be immune to 'medical students' disease.' A touch of the ailment is a sign that the reader is really opening himself to his subject, trying to grasp it and feel it rather than just reading about it."¹¹

9. J. KATZ, *supra* note 7, at 1-5.

10. J. GOLDSTEIN & J. KATZ, *supra* note 2, at 4 (footnote omitted) (quoting R. DONNELLY, J. GOLDSTEIN, & R. SCHWARTZ, *CRIMINAL LAW*, iv (1962)).

11. J. GOLDSTEIN & J. KATZ, *supra* note 2, at 4 (footnote omitted) (quoting R. WHITE, *THE ABNORMAL PERSONALITY* 58 (2d ed. 1956)).

In preparing this book we have come to hope that it might have a place in the tradition for which Mr. Justice Frankfurter spoke in one of his dissents:

"To be writing [a casebook affecting many] lives after the curtain has been rung down upon them has the appearance of pathetic futility. But history also has its claims. This [book, we hope] is an incident in the long and unending effort to develop and enforce justice according to law. The progress in that struggle surely depends on searching analysis of the past, though the past cannot be recalled, as illumination for the future. Only by sturdy self-examination and self-criticism can the necessary habits for detached and wise judgment be established and fortified so as to become effective when the judicial process is again subjected to stress and strain."¹²

Law, like man, meets the need for continuity and stability by listening to precedent and rule as guides for decision. And law, like man, meets the need for flexibility and adaptability by making available for selection alternative precedents and rules (sometimes called counter-precedent and counterrule) as guides for decision. Thus law, like man, in search of autonomy and identity must integrate these needs and become aware of both the values exerting pressure and the values to be preferred in each decision.

We have designed this book, then, to encourage students and decisionmakers in law to develop the capacity to communicate with and understand the communication of many disciplines, to appraise and assess their relevance, and to speculate about their many wonderful and frightening implications for the future of the family and society. The application of scientific "advances" in theory and technique must be subject to advance thinking by lawyers concerned with the limits of state intervention. Otherwise much knowledge may be too little and too dangerous for the health and well being of the family and the law in a democracy.¹³

My more recent teaching materials on disclosure and consent in medicine and law are similar in scope.¹⁴ As yet unpublished, they are designed to explore the general problem of professional responsibility by focusing on four basic issues: (1) the capacities that individuals as persons, professionals, and patient-clients bring to decision-making; (2) the reasonable controls that professional

12. J. GOLDSTEIN & J. KATZ, *supra* note 2, at 4-5 (footnotes omitted) (quoting *Rosenberg v. United States*, 346 U.S. 273, 310 (1953) (Frankfurter, J., dissenting)).

13. J. GOLDSTEIN & J. KATZ, *supra* note 2, at 5 (footnotes omitted).

14. J. KATZ, *DISCLOSURE AND CONSENT: DECISION-MAKING IN PHYSICIAN-PATIENT AND LAWYER-CLIENT INTERACTIONS* (7th draft Jan. 1983) (not yet published).

organizations and the state can impose on the interactions between professionals and patient-clients; (3) the vicissitudes of consciousness and communication, and their impact on understanding oneself and others; and (4) the constraints which the uncertain state of the art and science of medicine and law impose on meaningful disclosure and, in turn, on consent.

The materials are not intended to teach students interviewing or counselling techniques. Instead, they focus on the capacities of individuals to engage in, and of institutions to control, decision making. These problems have not been given the comprehensive attention they deserve, even though they are *prerequisites* to any systematic study of interviewing in the service of decision making. The concepts of disclosure and consent guide the inquiry; for ultimately a better appreciation of how to fulfill these two obligations will significantly affect decision making between professionals and patient-clients.

The materials are divided into three parts. Part One begins the analytic inquiry by providing students with basic information about medicine and law, and its implications for the medical and legal decision-making processes. Theoretical and clinical materials on the therapy of breast cancer are presented to familiarize students with the complexities of medicine, the certainties and uncertainties inherent in medical knowledge, and the impact of deeply held professional beliefs on decision making, as well as the difficulties which physicians and patients encounter in their efforts to communicate with one another.

A study of disclosure and consent in lawyer-client interactions undertakes the same task for law. The problem of plea bargaining strikingly illustrates the uncertainties inherent in lawyer-client decision making as well as the similarities and differences between lawyer-client and doctor-patient interactions. Moreover, other materials on courts' conflicting responses to the allegation of incomplete disclosure provide important data about judges' attitudes toward professionals and their patient-clients.

Finally, in Part One, the contours of disclosure and consent are explored by tracing the common-law development of consent and informed consent in professional settings from the late eighteenth century to the present. The cases as well as the accompanying commentaries were selected to explore such questions as: Have the doctrines of consent and informed consent, and their construction by courts, fulfilled the promise of enhancing patient-clients'

participation in decision making? If not, why not?

Part Two address the influence of professionalism and self-determination in shaping disclosure and consent. Two of the three basic conflicting tensions that shape the disclosure and consent process are examined: (1) professional authority versus equality between professionals and patient-clients and (2) attribution of capacities for self-determination (autonomy) to patient-clients versus grave doubts about the extent of such capacities.

Background materials for answering these questions are provided by a case study of Mary Northern, an elderly Tennessee woman who struggled valiantly to remain in control of her fate. Her refusal to consent to the amputation of her gangrenous legs brought her in contact with many persons (social workers, policemen, judges, psychiatrists, guardians ad litem, and surgeons) who wanted to manage her life for her. Their respective views provide a wealth of data for the theoretical issues to be explored in subsequent sections.

The issue of the nature and scope of authority and equality confronts the first tension: professional authority versus greater equality between professionals and patient-clients. Commentaries on the nature of professions highlight the value preferences that professionals bring to their interactions with patient-clients as well as the expectations that both participants have of one another. Oaths and professional codes depict the views that professionals have of themselves and their practices. Cases and commentaries on licensure, malpractice, and "unauthorized" professional activities permit exploration of the regulatory and supervisory roles that the state can play. Pleas for self-medication by patients and self-representation by clients, without the assistance of professionals, allow analysis of the limits to be placed on citizens who wish to rely on their own lay, rather than on professional, authority. Throughout, one basic question guides the inquiry: To what extent can, and should, professionals interact with patient-clients on the basis of equality?

The nature and scope of self-determination is addressed next. This section begins with commentaries from the political and psychological sciences as well as cases from American constitutional law in order to identify competing views on self-determination and to examine underlying assumptions about the capacities of professionals and patient-clients for autonomous choice. In the final section the relevance of the views reached on the nature and scope of

personal autonomy is evaluated in situations in which patient-clients refuse treatments deemed necessary for safeguarding their physical integrity or survival. These latter issues put the principles of self-determination and paternalism to their severest test.

Part Three explores the impact of uncertainty on disclosure and consent processes. Here, uncertainty is broadly conceived. Under this rubric are the uncertainties engendered by (1) the limitation in the current state of professional knowledge and its incomplete mastery, (2) the limits of human capacities to understand themselves and others, and (3) the limits of human capacities and human willingness to be truthful with themselves and others.

The uncertainties that stalk both the science and practice of law and medicine are examined first. Materials on the contemporary debate over the use and abuse of "elective" surgery provide the necessary medical background data. Selected cases from the law of estates, divorce and personal injury do the same for law. These materials seek to explore the consequences of professional uncertainty and how they can be better controlled. Next, the limits of understanding oneself and others are investigated. This section turns to the individual participants in the disclosure and consent process. After studying a variety of clinical encounters between professionals and their patient-clients, the impact of convictions, biases, conflicts, experiences, and phantasies that all participants bring to the disclosure and consent process are explored in considerable detail.

Finally, the limits of fidelity to truthfulness are probed. Here the requirement for "truthfulness" is compared with physicians' pleas to be permitted to obscure truth for the sake of compliance (particularly with frightened patient-clients) and for the sake of hope (particularly with dying patients). Then materials are introduced to examine the impact of the requirement for truthfulness on the placebo effect. Since the effectiveness of placebos depends so much on the unquestioned faith of professionals in their interventions and of patients in their doctors and therapies, disclosure of uncertainty may undermine therapeutic effectiveness. These explorations seek to define the limits of truthfulness and, in turn, "informed consent," should "medical necessity" require it.

In the course of our work I caution my students that if our explorations document man's unwillingness and inability to engage fully in a dialogue based on disclosure and consent, such conclusions should only sensitize them to the limits of human capacities

to participate in responsible decision making. Such conclusions, however, should not (as they often have) serve as excuses for dismissing attempts to improve communications between professionals and their patient-clients. It is physicians' and lawyers' professional obligation to develop a better appreciation of the nature of human beings—their motivations, capacities, and limitations—and a greater willingness to confront the conflicting tensions inherent in any dialogue with their patient-clients. Finally, I suggest to my students that in addressing these tasks in their professional work, they may also learn a great deal about decision making in other interactions between human beings. The problems we struggle to understand better in the study of these materials are inherent in all affairs conducted by and with human beings.

Before concluding, let me say a few words about a new course on professional responsibility in the practice of medicine that Robert Levine and I shall teach at Yale Medical School in the spring of 1988. It is a required course for first year medical students during their second semester. Excerpts from the Task Force Report to the Medical School's Curriculum Committee illustrate the scope of the course:

Our objectives can be succinctly stated: To teach medical students how to think systematically about the problems of professional responsibility which they will encounter in the practice of medicine. The course will focus on basic concepts. Four major groups impact upon the practice of medicine: *physicians* (including other health care professionals, *e.g.*, nurses, social workers, physician- associates), *patients* (including, *e.g.*, members of family, intimate friends), the *profession* (primarily, but not only, the medical profession and its component organizations, *e.g.*, specialty groups, Boards, hospital associations, but other professionals as well, *e.g.*, osteopaths, unlicensed healers, lawyers), and the *state* (*e.g.*, courts, legislatures, Congress, administrative agencies). The basic question we intend to explore is this: What duties and obligations should be assigned to each of these groups at various stages of the medical decision-making process?

While the primary focus of the course will be on problems that physicians encounter in their interactions with patients—particularly problems of decision making—we believe that such an inquiry demands moving beyond the individual physician-patient relationship and exploring the impact of other societal institutions on the two parties.

The following observations are illustrative of our specific

plans for the course's scope:

(1) The course could begin with a case study of the contemporary treatments of breast cancer. The controversy over different treatment modalities highlights the pervasive problem of medical uncertainty and its implications for decision making. In the light of medical uncertainty, many questions require scrutiny: Can decisions be made unilaterally by physicians—decisions that are so decisively influenced by the specialities physicians practice—or must patients be consulted? If the latter, do patients have the capacity to participate in decision making? What role should professional organizations play in promulgating rules for the decision-making dialogue between doctors and patients? What weight should be given to the “consensus reports,” recently promulgated for the treatment of breast cancer and other diseases? If doctors do not comply with consensus reports, or other official professional promulgations, what sanctions, if any, should be imposed on physicians by their professional peers?

(2) We shall then move to the legal doctrine of informed consent and explore the relevance of such jurisprudential principles as autonomy and self-determination to the physician-patient relationship. Here the focus begins to shift from the private ordering of conduct between physicians and patients to socially imposed regulations. That discussion will extend to the regulation of medicine by the state—medical practice acts etc.—and the dilemma of professional insistence on freedom from lay control, on the one hand, and asking for state regulation of the practice of medicine in order to keep unlicensed and unqualified healers from exploiting the public, on the other. New questions arise: Should licensure be abolished? Who should be allowed to practice? Addressing these questions might lead to an exploration of FDA regulations, now firmly grounded in “efficacy” and “safety”, or dispensing with these requirements and substituting, instead, full disclosure warnings (*vide* laetrile).

(3) An examination of contemporary surgical practices will raise complex questions of physician competence: For example, how many operations must a surgeon perform in order to maintain his competence? If a surgeon's or a hospital's surgical mortality rates exceed a certain percentage, can negligence be presumed? Who should monitor competence and surgical morbidity—the professions or the state? How is negligence to be defined? These questions can lead to an exploration of the law of malpractice and its role in defining standards of care.

(4) A more intensive study of medical uncertainty then could stimulate an exploration of the problems associated with the development of new (experimental?) therapies. Who should decide

when a treatment modality has become acceptable medical practice? And, until that decision has been made, should the regulation of innovative therapies be different from the regulation of "accepted" practices?

(5) While, in the above, the focus has already shifted from the microcosm of the physician-patient relationship to the macrocosm of the physician and patient in their interactions with other societal institutions, that larger focus will require further extension. For example, the impact on the physician-patient relationship of the contemporary shift from fee for service to third-party payments, and of DRGs, PSROs, and for-profit hospitals will have to be scrutinized. Here, problems of free access to health care (the so-called "right to treatment"), availability of scarce and expensive treatment modalities, allocation of resources for health care vs. other societal priorities deserve exploration. In examining the impact of societal forces on physicians and patients we intend to keep our focus on the effect of these external pressures on physicians' traditional commitment to caring for their individual patients.¹⁵

I hope that I have conveyed to you my answer to the questions posed at the beginning: What falls under the rubric of a law and medicine course, and who falls under the rubric of a law and medicine teacher? What I attempted to accomplish during my life as a teacher of law and medicine can be stated simply: to raise questions. In pursuing that objective, I perhaps was influenced by a German poet, Rainer Maria Rilke, whom I loved to read as an adolescent. In *Letters to a Young Poet*, he wrote:

Sie sind so jung, so vor allem Anfang, und ich möchte Sie, so gut ich es kann, bitten, lieber Herr, Geduld zu haben gegen alles Ungelöste in Ihrem Herzen und zu versuchen, die Fragen selbst liebzuhaben wie verschlossene Stuben und wie Bücher, die in einer sehr fremden Sprache geschrieben sind. Forschen Sie jetzt nicht nach den Antworten, die Ihnen nicht gegeben werden können, weil Sie sie nicht leben könnten. Und es handelt sich darum, alles zu leben. Leben Sie jetzt die Fragen. Vielleicht leben Sie dann allmählich, ohne es zu merken, eines fernen Tages in die Antwort hinein.¹⁶

15. Task Force for Developing a Course for Medical Students on Professional Responsibility, Final Report (July 30, 1986). The members of the Task Force consisted of Professors Raymond S. Duff, Angela R. Holder, Lorraine V. Klerman, Robert J. Levine, Melvin Lewis, Theodore R. Marmor, Arthur J. Viseltear, and J. Katz (Chair).

16. Letter by Rainer Maria Rilke at Bremen (Jul. 16, 1903), reprinted in R. RILKE,

You are so young, so before all beginning, and I want to beg you, as much as I can, dear sir [and let me add, dear madam], to be patient towards all that is unsolved in your heart and to try to love *the questions themselves* like locked rooms and like books that are written in a very foreign tongue. Do not now seek the answers, that cannot be given you because you would not be able to live them. And the point is, to live everything. *Live* the questions now. Perhaps you will then gradually, without noticing it, live along some distant day into the answer.¹⁷

I have lived and still live the questions. I also beg you to live the questions in your teaching of future generations of professionals. I have raised two generations of students on these questions. Many of them are now renowned teachers. The best of them continue to raise questions.

BRIEFE AN EINEN JUNGEN DICHTER 23 (1951).

17. R. RILKE, LETTERS TO A YOUNG POET 33-34 (H. Norton trans. 1954) (emphasis added).

