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The Journal of Dental Humanities is dedicated to presenting thought provoking material connecting dentistry to the humanities, and the social sciences. The journal places a priority on publishing quality material that supports the objective of dental professionals who seek to provide a patient-centered approach to health care. The mission purpose of the Journal of Dental Humanities aligns with the position that a functional democracy requires ethical, highly skilled professionals who are engaged, active members within their community and the larger society.

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ROBERT P. IOVINO, D.D.S., M.A.

For the past forty-three year,s my wife Noreen and I have resided year-round in Southampton, N.Y. Recently we enjoyed a brief three-day escape from the frenzied summer activity typically encountered during summertime in the Hamptons. Thankfully, traveling north off eastern Long Island is easy. A pleasant three-hour automobile journey, that includes a one-and-a-half-hour cross Long Island sound ferry passage, deposited us in the relatively calm southeast corner of the "Constitution State" of Connecticut.

Arriving in New London we traveled on Interstate 95 to Old Lyme, Conn., and enjoyed an alfresco lunch at café Flo's while sitting at a table overlooking the sedate winding banks of the Lieutenant River. The bucolic view from the café's veranda provides one of the two main reasons an art colony flourished here. Florence Griswold herself provided the other key reason. At the end of the nineteenth century Florence, the daughter of a prominent, once wealthy, family faced financial challenges. She established a board house in her home seeking income from paying guests. Soon many traveling artists who were attracted to the region's natural beauty began to stay at Flo's. They set up their easels and painted along the banks of the small winding river. The artists, notable for including Childe Hassam, also painted on the wooden panels lining the dining room walls in Flo's boarding house, where they gathered, partied and broke bread together. Today, visitors can envision these events as they view the painted wall panels the artists left behind as they tour this part of the Florence Griswold Museum.

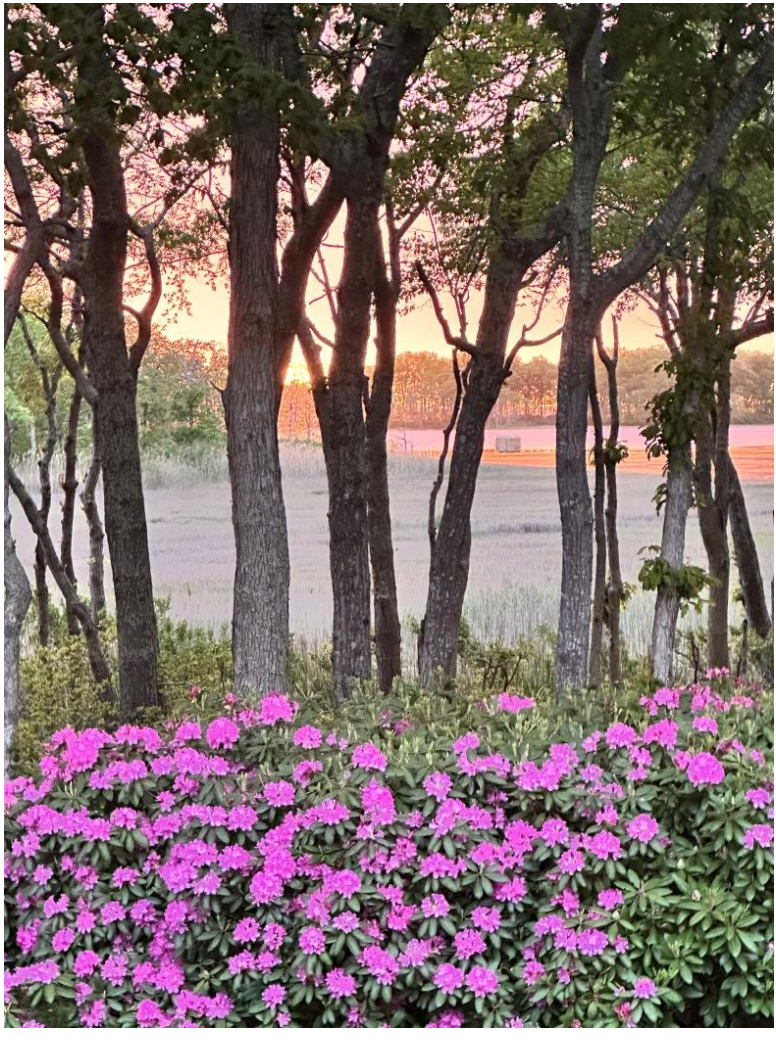
Thanks to the encouraging and generous support Florence extended to these artists an art colony flourished; Florence financially did not, owing to the easy credit she extended to her boarders. Facing the necessity to sell her home the artists, in appreciation, offered her support. Fortunately, a local benefactor stepped up and purchased the property, and invited Florence to remain in residence for the rest of her life. In the end everyone benefited, just as those who travel to Old Lyme do today, when they visite Connecticut's nationally recognized art colony that Florence helped create.

Next onto Essex, a river-port town, home of the Connecticut River Museum, the Black Seal and the Griswold Inn and a wonderful array of numerous small retail shops that beckon travelers to visit, shop, eat and spend. Reportedly, this busy merchant community flourishes thanks to the good grace of a local restauranteur who owns several retail properties and rents them out at affordable rates (Unlike the high rents often charged by landlords for their storefronts in Southampton Village.) It is a rare example win-win-win, the locals, tourists, and undoubtedly the benevolent restauranteur all benefit. The fact that Noreen and I enjoy returning a few times each year to shop and dine provides "proof-of-the-pudding." Imagine, if landlords in all towns were so enlightened.

On to Clinton, Conn., the home of an eclectic multi-dealer antique shop owned and operated by two pleasant brothers who visibly enjoyed running it. Whether-or-not you discover anything of interest to purchase you are guaranteed to leave happy. The prices are fair, and discounts are cheerfully given. Recently when completing a purchase one brother commented to me on their awareness of how much their customers enjoyed visiting. He mentioned how their customers reported that they missed shopping there when the store was closed during the pandemic. The brothers clearly envision their role as merchants to be one primarily designed to make their customers happy, while secondarily simultaneously making a reasonable profit. "Don't worry, we know how it feels to be on the other side of the counter," the brother related to me as he made sure my transaction was another pleasant one. The customer-friendly narrative and role that

informed and motivated the brothers is a clear example of truly enlightened business ethic.

Now, you are probably asking, what is the moral of this rather unusual editorial? It is simply: Caring for and about the wellbeing of others is good, in different ways both reckless generosity and greed are bad, making a reasonable profit is honorable, and empathizing with the needs and wishes of those individuals who depend and rely on your services is even better. So reassured, following a pleasant two-night stay in Stonington, Noreen and I returned via the ferry to eastern Long Island. We were refreshed and ready to do good while simultaneously doing well at work.



HABERMAS, RIGHTS AND HEALTHCARE A DISCOURSE-THEORETICAL PERSPECTIVE

ROBERT P. IOVINO, D.D.S., M.A.

The popular perception of the moral, or special obligation/duty, to provide access to healthcare has been long acknowledged. Agreement on the necessity to expand and codify into law the universal right to healthcare is quite another matter. An internationally recognized right to health and healthcare was formalized by the United Nations General Assembly in 1948 within its Universal Declaration of Human Rights[1]. Surprisingly, more than seventy-five years later, the United States remains alone among western industrialized nations in its failure to codify access to healthcare into the law as a basic universal right. Bodenheimer notes, "Thus far the U. S. government has not acted on the popular belief that health care should be a right of all the people."[2] As a result, residents of the United States have had to

[1] International law is replete with support for the human right to health and healthcare. Yamin notes in his paper "The Right to health under international law and its relevance to the United States," in the *American Journal of Public Health,* Vol. 105, July 2005, p.1156. "The first notion of a right to health under international law is found in the 1948 Universal Declaration of Human Rights…unanimously proclaimed by the UN General Assembly." Rijlaarsdam notes, subsequently the United Nations Committee for Economic, Social and Cultural Rights has linked the right to healthcare with other human rights, holding member states responsible for "ensuring" the right to health as a basic human right. See Rijlaarsdam, "Reassessment of the right to health care," in *Periodicum Biologorum,* Vol. 105, No. 1, 2003, pp.5-7.

rely on a consortium of government, public, private and charitable departments and agencies that strive but continually fail to provide many with adequate access to healthcare. Accordingly, the institution of the formal federal obligation to provide universal healthcare is thought by many to be both desired and required. However, in the United States the heretofore irresolvable tension perceived to be existing between the private and public spheres, especially as it regards matters dictating the equitable distribution of goods and property, has prevented the recognition of such a right.

Currently, Canada, the European Union (See Article 35 – Health Care, in the EU Charter of Fundamental Rights) and other industrialized western democracies have sought redress to the perceived shortcomings and injustice of capitalism by formalizing the right to health care within the parameters of the developing social-welfare state. Meanwhile, within the United States the desire to expand healthcare coverage has resulted in the institution of social welfare programs, such as Medicare and Medicaid, to the better address the health care needs of the elderly, disabled, and economically disadvantaged. The Affordable Care Act, passed in 2010, while

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The UN Committee's general comment in Article 12 of the International Covenant on Economic and Social Rights clearly states, "Health is a fundamental human right indispensable for the exercise of the other human rights. Every human being is entitled to the enjoyment of the highest attainable standard of health conducive to living a life in dignity…Moreover, the right to health includes certain components which are legally enforceable….The right to health contains both freedoms and entitlements. The freedoms include the right to control one's health and body…the entitlements include the right to a system of health protection which provides equality of opportunity for people to enjoy the highest attainable level of health…(however) good health cannot be ensured by the State, nor can the States provide protection against every possible cause of ill health… Consequently, the right to health must be understood as a right to the enjoyment of a variety of facilities, goods, services, and conditions necessary for the realization of the highest attainable standard of health." See UN Committee on Economic, Social and Cultural Rights. *General Comment 14: The Right to the Highest Attainable Standard of Health.* Geneva, Switzerland: United Nations: 2000. UN Document E/C.12/2000/4.

[2] Bodenheimer, Thomas. "The Political Divide in Health Care: A Liberal Perspective," *Health Affairs,* Nov/Dec 2005, p.1426.

successfully extending access to healthcare to millions of additional residents, still falls short of providing universal healthcare coverage.[3]

Regretfully, in the United States, there remains the perception that the institution of the universal right to health care would represent another victory for the social-welfare paradigm in its ongoing zero-sum competition with "classical" liberalism.[4] Habermas presents a Proceduralist understanding of law which offers a path between these competing paradigms; I believe it is a path offering a democratic way to our formal legal recognition of a universal right to health care.

[3] The. Affordable Care Act, formally known as the Patient Protection and Affordable Care Act, was signed into law by President Obama on March 20. 2010. While it has been estimated that by 2016 the percent of the population that remained uninsured had been reduced in half, approximately 20 to 24 million individuals remained uncovered.

[4] Alexander Lefebvre in his book *Liberalism as a Way of Life* (Princetown Univ. Press, 2024) adopts an interesting viewpoint, considering liberalism as the "sea we swim in." (p.14) Lefebvre cautions against utilizing the word "classical" when referring to liberalism, explaining that early proponents of liberalism, such as J.S. Mill, would not have identified with the term as understood today. Lefebvre notes *classical liberalism* currently denotes a version of liberalism "that privileges individual rights, free markets, small government, and moral individualism." (p.39) Instead, Lefebvre views liberalism as a product born out of the desire to correct the pitfalls of democracy (p.45); and Lefebvre considers the adoption of the term *classical liberalism* to be a "revisionist" tactic, and "historically inaccurate." (p.39) Lefebvre cites Helena Rosenblatt, who in her *The Lost. History of Liberalism* writes "Liberals always saw themselves as fighting for the common good and continued to see this common good in moral terms." (pp.39-40) Despite Lefebvre's objection, within this paper the term "classical liberalism" is utilized as it is most conventionally (Arguably, inaccurately.) understood today.

The Thesis:

Habermas's discourse-theoretic method can be used both to substantiate the justification for and enable the political/legal mechanism necessary to give concrete form to, the constitutional right to healthcare. Methodologically, the right to healthcare is justified relative to the goal of satisfying perceived needs; it is derived and contingent on Habermas's fifth basic category of rights to material social-economic benefits. The right to health care is a social-welfare benefit which provides a necessary component for enabling the procedural method of a constitutional democracy. So derived, such a right is best understood as one that is actively enjoyed, not simply possessed; and, properly understood, this procedurally derived right to healthcare may be better able to quell the traditional tensions found between private and public autonomy operative between all the principle actors involved: the state, all citizens and residents as recipients, and health care providers.

The Outline:

In constructing the right to healthcare, we will utilize Habermas's Discourse Theory of Law and Democracy, which he presents most substantially in his 1992 work *Between Facts and Norms.* We first will elaborate how Habermas has utilized his discourse method to give full theoretical form[5] to a legally and logically derived five categories of basic rights within the necessary framework of a constitutional democracy. I hope to demonstrate, how Habermas's theoretical construction of the five categories of basic rights, and procedural method of law, provides a path for the justification of the collective sharing of material health care benefits. Such a path is to be found between the competing liberal and social-welfare paradigms. Properly understood, Habermas's method better enables the utilization of positive law as a procedural tool in providing a means to the materialization of a right to health care.

[5]See a latter, incomplete, form in, Habermas, J., "Constitutional Democracy: A Paradoxical Union of Contradictory Principles?", in *Political Theory,* Vol. 29, No. 6. December 2001, pp. 766-781.

It is important to understand that in *Between Facts and Norms,* Habermas professes to demonstrate the internal relation, or the co-originality, between actionable individual human rights and popular sovereignty.[6] His system of rights is understood to be conditional and dependent on the legal medium, but given its dual nature, the basic categories of rights derived within this system also enjoy a moral foundation and a claim to universialality; accordingly, any basic rights derived within Habermas's system possess a privileged status not enjoyed by rights conveyed by simple legal positivism.

Habermas presents, last among his lexically organized five basic categories of rights, the implied existence of, "basic rights to the provision of living conditions that are socially, technologically, and ecologically safeguarded, insofar as the current circumstances make necessary if citizens are to have equal opportunities to utilize the (four preceding groups of) civil rights."[7] Implied here is the all but stated necessity for a citizen to access opportunities for health and health care. Habermas specifies, "In a word, there is no legitimate law without these rights,"[8] but acknowledges, "The basic rights inscribed in the legal code itself remain *unsaturated*, so to speak. They must be *interpreted* and *given concrete shape* by a political legislature in response to changing circumstances."[9] In a brief private conversation with Dr. Habermas at Stony Brook, he explained all that is necessary to establish the basic right to healthcare is to expand his "abstract concept."[10]

[6] Within this paper we will accept Habermas's 'co-originality' thesis as given.
[7] Habermas, J. *Between Facts and Norms,* 1992. Edition used, MIT Press, 1998, p.123.
[8] Ibid., p.125.
[9] Ibid.
[10] Dr. Habermas served as a Special Visiting Professor while teaching at Stony Brook during the Fall semester in 2009.

At a theoretical level social-welfare rights are necessary to keep the actors within the democratic process functioning optimally. If the participants are functioning well, it is not unreasonable to expect the same level of overall performance for the democratic process. Any substantive elaboration of a right to health care must involve an analysis of the basic needs required by individuals, and of the technical, political and legal organization of health-care systems necessary to provide for the satisfaction of such health-related needs. The legal/legislative means for elucidating and implementing actions directed at providing for health care rights, while necessarily being held accountable to moral norms, must involve a legitimate, ongoing process of will-formation in a fair and open discourse, within which tensions concerning differences of value judgments are submitted to a process of will-formation operative on ethical-political and pragmatic levels.

Specific health care needs are contextually relative. At its most basic level health care is delivered at the provider/patient level; and, at this intimate level, individual rights can often come into value driven conflict. Accordingly at an empirical level the key issues regarding the elaboration of a legal right of access to healthcare are those of *legitimacy* and law. The moral, legal and political imperatives of access to care, here synonymous with distribution of health care benefits, without well-defined secondary rights or laws coupling legal obligations and defining who has to do what for whom, will fail.

However, in providing for healthcare needs, the instrumentalization of law for the purpose of political regulation must be avoided.[11] Indeed, as we will see within Habermas's proceduralist paradigm of law**, a**ctive participation in rational discourse is required to avoid a paternalistic approach to health care access, as well as to insure the equitable consideration of the rights of the all involved - providers as well as recipients. We will investigate the tension encountered between the liberal and social-welfare paradigms of law, especially as it concerns the nature of professional property; additionally we will elucidate Habermas's concern regarding dangers

[11] See Habermas, *Between Facts and Norms,* p.438.

of state paternalism and the possible uncontrolled expansion, development, and distribution of social-welfare benefits. The genealogy of these latter concerns finds their origin within feminist legal theory.

In summary, I hope to demonstrate how Habermas's theoretical procedural-legal system offers a promising path to justifying a universal basic right to healthcare; and that the pathway to such a right resides in a discursive legal/political process located between the liberal and social-welfare paradigms of law.

The Discourse-Theoretic Perspective

Any legitimate delineation of a right to health care or its materialization should be understood as a complex feat of social coordination. Habermas considers the primary function of speech is its use to coordinate individual actions into a functional social reality. Habermas maintains that any sincere speech-act makes a validity claim to truth, rightness, and truthfulness within the corresponding areas of theoretical, moral, and aesthetic discourse. When in a speech act the validity claim is rejected by a hearer, "the agents are propelled by disagreement from an action situation into a discourse situation."[12] Finlayson notes that Habermas's "claim that validity, rather than truth, is the underlying concept of the theory of meaning…means…that the concept of truth has the same connection with reasons *and* the same pragmatic function of eliciting consensus."[13]

Habermas's discourse theory of morality provides a normative, deontological, but pragmatic theory offering a procedural method in which to derive valid norms (behavioral rules) to coordinate and direct proper action. Habermas defines moral discourse as a practice of justification conducted in a manner so as to select norms that "are capable of commanding universal agreement – for example, norms expressing human rights."[14] Thereby, as Finlayson notes, "Moral

[12] Finlayson, J. *Habermas*: *A Very Short Introduction*, Oxford University Press, 2005, p. 41.
[13] Ibid., p. 45.
[14] Ibid., p. 43.

norms are deontic rules that express obligations and have the grammatical form of imperatives…Habermas argues that such commands are the legacy of a Judeo-Christian way of life…that still have a point… (and) have been preserved."[15]

Participants seeking validity via discourse have recourse to varied options. Depending on the matter in need of regulation moral and ethical aspects may dominate. At other times pragmatic issues may take priority, such as in validity claims regarding the understanding of the nature of professional property, which require a balancing of interests and fair negotiation. As we proceed it will become obvious that the process of the justification of the right to health and health care, and its substantive realization, should be viewed as a complex issue requiring active discourse at all levels of justification.

In summary, Habermas divides practical reason into moral, ethical, and pragmatic discourse. Finlayson notes, "Pragmatic discourses concern the rational choice of means to a given end. They say nothing about the choice of ends. Pragmatic discourse…is especially germane to the political and legal domains, since politics and law are essentially concerned about what is feasible."[16] Alternatively, ethical discourse concerns value determinations which influence preferences in determination of the selection of the choice of ends. Ethical discourse is influenced by context and the traditions of its participants. Finlayson notes, that when Habermas established the distinction between ethics and morality, Habermas essentially

> cuts values out of the (moral) justification process, thereby circumventing a source of intractable conflict…, moral discourse has a certain social-ontological priority over ethical discourse…it is a specification of validity, analogous to truth, without which communicative agents in modern societies could not live as they do.[17]

[15] Finlayson, J. *Habermas*: *A Very Short Introduction*, p. 81.
[16] Ibid., p. 92.
[17] Ibid., p. 99.

The social-ontological priority of necessary basic social-economic rights awaits development within Habermas's theoretical elaboration of the five categories of basic rights. Such rights are dependent on a system of law, and we direct our attention next to this matter.

A System of Law

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William Rehg notes, "Modern law is meant to solve social coordination problems that arise…where societal pluralization has fragmented shared identities and eroded…resources for consensus and…functional demands of material reproduction call for an increasing number of areas in which individuals are left free to pursue their own ends according to the dictates of purposive rationality."[18] Rehg notes, "The solution is to confine the need for agreement to general norms."[19] The dual character of law satisfies the need for facticity (legal rights and statutes that stabilize behavioral expectations and thus the social environment) and validity (rational acceptability on the basis of satisfying validity claims in a discursive process).

Habermas is now prepared to reconstruct "the normative understanding of the modern rule of law…, (and identifies) in analyzing modern law as a system of rights…, (that) the rule of law, or constitutional state, is internally related to deliberative democracy."[20] Habermas recognized that sociological ill effects of civil privatism, grounded in self-interest, combined with systems logic could result in displacing "citizens into the peripheral role of mere organizational members"[21] passively incorporated into, and paternalistically benefiting from the self-regulating mechanizations of the economy and its' administration. Such closed systems obey the imperatives of money and power, and as Habermas notes, "Explode the model of a legal community that determines itself through the common practice of

[18] Rehg, "Translator's Introduction," p. xix. In Habermas, *Between Facts and Norms,* (1998).
[19] Ibid.
[20] Ibid.
[21] Habermas, *Between Facts and Norms,* p. 78.

associated citizens."[22] Habermas sought "To forestall such levelings" and in his *Between Facts and Norms* offers to "reconstruct the normative content of citizenship by analyzing the system of rights and the principles of the constitutional state from a discourse-theoretic point of view."[23]

Habermas sought, first, to rectify the philosophical ambiguity encountered in the discussion of justice. Habermas clarifies the distinction between law and morality, Habermas notes,

> Unlike postconventional morality, law does not just represent a type of cultural knowledge but constitutes at the same time an important core of institutional orders. Law is two things at once: a system of knowledge and a system of action…legal norms have an immediate effect on action in a way that moral judgments do not.[24]

Morality and universal moral norms lack sufficient scope and penetration to successfully co-ordinate actions within a complex modern pluralistic society. Law satisfies the need for legitimate order required to support reciprocal interrelations in our social reality. Habermas notes, "The language of law, unlike moral communication restricted to the lifeworld, can function as a transformer in the society-wide communication circulating between system and lifeworld." Such an understanding is consistent with Parson's view that modern law can be viewed as "a transmission belt by which solidarity—the demanding structures of mutual recognition we know from face-to-face interaction—is transmitted in abstract but binding form to the anonymous and systematically mediated relations of a complex society."[25]

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[22] Habermas, *Between Facts and Norms,* p. 79.
[23] Ibid., p. 79.
[24] Ibid., pp. 79-80.
[25] Ibid., pp. 76-77.

Flynn notes, modern law possess following features, "Law is positive, coercive, reflexive, and individually actionable."[26] Significantly, and indirectly addressing Holland's concerns (see reference no. 50) regarding the elaboration of any right to health care, Flynn notes,

> The *reflexivity* of law allows it to produce a system of accountabilities by creating institutions and defining jurisdictional powers. This is vitally important because the positive duties associated with morality often exceed the powers of individuals acting alone, and can only be managed and met by institutions.[27]

The Five Basic Categories of Rights

All five basic categories of rights must be collectively understood as necessary and constitutive of the process of self-legislation. The parameters of citizenship must be defined, and a system of legal statutes elaborated so "as to ensure that every future member of the association counts as a bearer of individual rights."[28] Habermas maintains such a system is possible "only if first three categories of rights are concomitantly introduced"[29] and form "the necessary basis for an association of citizens that has definite social boundaries and whose members mutually recognize one another as bearers of actionable individual rights."[30] Habermas presents the first three categories of rights as follows,

1. Basic rights that result from the politically autonomous elaboration of the *right to the greatest possible measure of equal individual liberties*.

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[26] Flynn, J. "Habermas on Human Rights: Law, Morality, and Intercultural Dialogue", in *Social Theory and Practice,* Vol. 29, No. 3 (July 2003), p. 435.
[27] Ibid., p. 435.
[28] Habermas, J., "Constitutional Democracy: A Paradoxical Union of Contradictory Principles?", in *Political Theory,* Vol. 29, No. 6. December 2001, p. 776.
[29] Ibid., pp. 776-777.
[30] Ibid.

> These rights require the following as necessary corollaries:
>
> 2. Basic rights that result from the politically autonomous elaboration of the *status of a member* in a voluntary association of consociates under law.
> 3. Basic rights that result immediately from the *actionability* of rights and from the politically autonomous elaboration of individual *legal protection*.[31]

A fourth category of basic rights is required if the qualified participants are to mutually recognize their authorship. Habermas notes, "Without the first three categories of basic rights, something like law cannot exist; but without a political elaboration of these categories, the law could not acquire any concrete contents."[32] The fourth basic right is:

> 4. Basic rights to equal opportunities to participate in processes of opinion-and will-formation in which citizens exercise their *political autonomy* and through which they generate legitimate law.[33]

This elegant but somewhat didactic account incorporates what Habermas terms the "two-stage scenario of the conceptual genesis of basic rights"[34] The principle of popular sovereignty underlies this two-stage process. Habermas considers the first stage to incorporate "the conceptual explication of the language of individual rights in which the shared practice of a self-determining association of free and equal

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[31]Habermas, *Between Facts and Norms,* p. 122.
[32] Habermas, J., "Constitutional Democracy: A Paradoxical Union of Contradictory Principles?", p. 777.
[33]Habermas, *Between Facts and Norms,* p. 122.
[34] Habermas, J., "Constitutional Democracy: A Paradoxical Union of Contradictory Principles?", p. 778.

citizens can express itself."[35] The second stage consists in the "realization of this principle through the exercise…of this practice."[36] Habermas conceives this ongoing practice of civic self-determinism as an empirical process where citizen, when confronted "with the intolerable consequences of the use of physical violence…recognize the necessity of elementary rights."[37]

Interestingly, Habermas's insistence that "the constitutional assembly can reach decisions only when it sees the risks that make a specific need for security into a matter it must address" shares significant similarities with the genealogy of the secular theory of human rights advanced by the constitutional lawyer Alan Dershowitz, who maintains that "our collective experiences with injustice constitute a fruitful foundation on which to build a theory of rights."[38] Dershowitz does not present a discourse-legal theory, indeed he states "we will never achieve consensus over what constitutes the best, or even good society"[39] However, Dershowitz does present an accessible counter-argument favoring "a conception of rights that consists of restrictions on the power of government to deprive anyone of those basic liberties that experience has shown are essential to prevent the recurrence of acknowledged wrongs."[40]

Dershowitz's pragmatic system of rights based on correcting perceived wrongs demands an ongoing and vigilant advocacy, where "we must constantly defend our choice of rights by reference to the

[35] Habermas, J., "Constitutional Democracy: A Paradoxical Union of Contradictory Principles?", p. 778.
[36] Ibid.
[37] Ibid.
[38] Dershowitz, A. *Rights from Wrongs: A Secular Theory of the Origins of Rights,* Basic Books, 2004, p. 7.
[39] Ibid., p. 6.
[40] Ibid., p. 16.

changing forces of history and experience."[41] He maintains that rights cannot be discovered but rather must be "invented" by human beings, based on experience. However, unlike Habermas, Dershowitz maintains rights cannot "be logically deduced from any external reality or constructed from arguments" as the premise underlying any such deductions or constructions "are the product of differing experiences and perceptions."[42] Dershowitz, while crediting human beings as the proper authors of rights**,** inexplicitly fails to connect his method with the very human process of legitimate discourse; he prefers instead to make the more amorphous stipulation that rights "must be advocated in the marketplace of competing ideals."[43] In conclusion**,** Dershowitz dismisses any possibility of ever attaining perfect justice, instead, he finds the history of common law as a fallible process of "adapting legal doctrine to avoid or minimize injustice."[44] Dershowitz, like Habermas, advocates that this fallible process adopt a non-metaphysical approach that avoids the "empty tautology of legal positivism."

Finally, we arrive at Habermas's fifth category of basic rights. Not to be found within Habermas's 2001 paper titled *Constitutional Democracy* this fifth basic right is seen in his 1992 Between *Facts and Norms,* and its import here merits restatement,

> 5. Basic rights to the provisions of living conditions that are socially, technologically, and ecologically safeguarded, insofar as the current circumstances make necessary if citizens are to have equal opportunities to utilize the civil rights listed in (1) through (4).[45]

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[41] Dershowitz, A. *Rights from Wrongs: A Secular Theory of the Origins of Rights,* p. 85.
[42] Ibid.
[43] Ibid., p. 86.
[44] Ibid., p. 90.
[45] Habermas, *Between Facts and Norms,* p. 123.

It is important to note that only the first four categories of basic/civil rights are absolutely justified. Habermas admits that the fifth "category of social and economic rights…can be justified only in relative terms."[46] This should immediately provide an important clue as to the proper level of justification of any substantive elaboration of material benefits found within this morally justified basic right. For example, while the right to social-economic benefits may be morally justified, any further elaboration of a contingent right to health care can only be justified in relative, be it in an ethical or pragmatic way. Additionally, Habermas's glaring omission of his fifth category of basic rights in his 2001 paper is interesting; it permits the speculation of Habermas possible philosophical prejudice in prioritizing the first four absolutely justified categories of rights, as well as the danger he foresaw in an instrumentalization of law and the overwhelming illiberal state financed non-discursive provision of social-welfare benefits.

It is now to Habermas's procedural concept of law, the area in which the necessary, but still theoretical, social-welfare rights are defined and materialized, that we now direct our attention

The Proceduralist Concept of Law & its application in Healthcare

The liberal paradigm of law is a three-hundred-year tradition finding its origins in the scientific-social revolution which identified the need to address the perceived wrongs suffered by humanity under forms of religious and state domination. Similarly, the social–welfare paradigm of law was initiated in response to the perceived 'social blindness' of liberalism and its capitalist social model. The materialization of law as it relates to healthcare has already occurred within each paradigm; it is seen within the liberal paradigm as a necessary response to social injustice, enacted, for example, through the initiation of the Medicare and Medicaid social legislation programs. This materialization of law within the social-welfare

[46] Habermas, *Between Facts and Norms*, p. 123.

paradigm was also demonstrated when Canada instituted its' national health care system. These paradigm shifts are in accord with Habermas's statement, "That the private autonomy connected with the status of legal persons in general must be realized in different ways as the social context changes."[47]

Both liberal and social-welfare paradigms, and their representative health plans have perceived shortcomings concerning the issue of civic and individual autonomy. Accordingly, Habermas has constructed an alternative paradigm seeking amelioration in the path between the two. Habermas's construction of a 'legal procedural paradigm' is premised on the existence of a constitutional system of law, the system of law believed most compatible within the operational necessities of a complex plural society, and it privileges neither the liberal nor social-welfare paradigms.

Our current debate regarding the legal recognition of a right to a system of healthcare is best viewed as a political dispute where experts may contest the correct understanding of law, but in which all citizens must have a legitimate voice and be afforded an opportunity to be actively involved in the process. The priority given to constitutional law places the legislator with the burden or "task of *converting* the content of basic rights into a differentiated and more concrete law that is immediately binding for participants in a private-legal relationship."[48] The universal right of access to healthcare may eventually be constitutionally enacted, but the performance of the tasks necessary for the material delivery of the right will require a legislative process delineating professional responsibilities. Additionally, the task of delivering the material benefits of healthcare is often a restricted right or privilege premised on attainment of an epistemic competency

[47] Habermas, *Between Facts and Norms,* p. 391.
[48] Ibid., pp. 396-397.

and, most often, the possession of a restrictive professional license.[49] This poses the question of whether a primarily right-based approach to health care is misguided. Stephen Holland, in his work *Public Health Ethics,* states, "The only way to interpret 'the right to health care' is to determine '*who* has to do *what* for *whom.*' But this implies that obligations, and not rights, are fundamental."[50] Professional organizational codes of ethics and conduct widely incorporate a list of obligations incurred by health care providers which are intended to protect the best interests of the recipients of their professional services. However, without the coercive mandates of law such obligations may be cynically viewed as simply being a window-dressing protecting a professional organization's best interests. Law alone, indeed, has the scope and penetration needed to successfully co-ordinate professional action. Habermas's procedural paradigm of law incorporating his system of rights, possessing the dual characteristics of law and morality, appears capable of addressing, and ameliorating, the tension identified here between rights and obligations.

As needs are identified and values ordered a system of specific actionable rights concerning access to health care will be developed. While normatively grounded in preserving autonomy rather than just distribution, such rights to health care nevertheless will grant collective rights of access to all constitutionally protected members. Habermas is concerned that the concept of 'inclusion' seen within the linear progression of citizenship "emerges from a description that remains insensitive to increases and losses in autonomy"[51] He notes, "In an ever more functionally differentiated society, an ever greater number of persons acquire ever more inclusive rights of access to, and participation in, an increasing number of subsystems, which include

[49] It should also be understood that professional boards, largely comprised of members of the respective health professions exert significant influence on the composition of legislatively enacted state professional practice acts. The validity of the professional organization's claim to act in such a capacity is founded on the idea of epistemic relativism; it is a principle which should be subjected to critical re-evaluation.

[50] Holland, S. *Public Health Ethic,* Polity Press, 2007, p. xiv.

[51] Habermas, *Between Facts and Norms,* p 78.

(health care)…hospitals."[52] In a healthy democracy citizens must remain cognizant of the need to actively exercise their rights of political participation. Habermas cautions,

> Only the rights of political participation ground the citizen's reflexive, self- referential standing. Negative liberties and social entitlements, on the contrary, can be paternalistically bestowed. In principle, the constitutional state and the welfare state can be implemented without democracy.[53]

Given our desire to seek both normative grounds and functional mechanism operative in establishing the right to health care, a careful reading of Habermas's lengthy exposition of the following complex point is most helpful. Habermas notes,

> Historically speaking, liberal rights crystallized around the social position of the private-property owner. From a functionalist viewpoint, one can conceive them as institutionalizing a market economy, whereas from a normative viewpoint they guarantee basic private liberties. Social rights signify, from a functionalist viewpoint, the instillation of welfare bureaucracies, whereas from a normative viewpoint they grant compensatory claims to a just share of social wealth. It is true that both individual liberties and welfare guarantees can also be viewed as the legal basis for a social autonomy that first makes it possible to put political rights into effect. But these are empirical, and not conceptually necessary, relationships. In different circumstances negative liberties and social entitlements may well be equally indicative of the privatistic retreat from the citizen's role… (where) citizenship is reduced to a client's relationship to administrations that provide security, services, and benefits paternalistically.[54]

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[52] Habermas, *Between Facts and Norms*, pp. 77-78.
[53] Ibid., p.78.
[54] Ibid.

Having postulated the valid but derived/secondary right to health care any discourse-theoretic attempt in providing for its implementation must come to terms with its justification and recognize the necessity of an implicit legal paradigm shift from the prior alternatives found within the liberal and welfare state. The proper materialization of the right to health care must confront the inherent tension between the classical liberal and civic republican approach to individual rights and collective goods.

Habermas notes both the liberal and social-welfare paradigms, "share the *productivist image* of a capitalist industrial society."[55] The pursuit of private interests either satisfies or stifles the expectations for social justice. Habermas notes, "Both views are fixated on the normative implications of how a legally protected negative status functions in a given social context."[56] Both views are fixated on the question of whether individual liberties guarantee private autonomy or whether the conditions necessary for the development of private autonomy depends on the institution of welfare entitlements; Habermas [57]succinctly notes, "Both views lose sight of the internal relation between private and political autonomy, and thus lose sight of the democratic meaning of a community's self-organization. The still-unresolved dispute between these two parties is focused on specifying the material preconditions for the equal status of legal persons as addressees of the legal order. "[58] Habermas redirects attention from this "zero-sum game between the competing initiatives of private and governmental actors" and offers his discourse-theoretic system of communication, and law and politics as the key to a Proceduralist understanding of law, He understands its necessity given his belief that, "In justifying the system of rights…under postmetaphysical conditions, the only legitimate law is one that emerges from the discursive opinion and will-formation of equally enfranchised citizens."[59] All participants involved in actualizing the right to health care must see themselves as the autonomous authors of the law to

[55] Habermas, *Between Facts and Norms*, p. 407.
[56] Ibid., p. 408.
[57] Ibid.
[58] Ibid.
[59] Ibid.

which they are subject, and from which they may share the benefits and the burdens.

Justice, while an important factor is not fundamental, the just distribution of the right to health care is better simply viewed as the result of the egalitarian effect of legitimate law equally applied in the best interest of all. Habermas notes the just distribution of social benefits follows the procedural paradigm of law, where, "The normative key is autonomy, not well-being."[60] Both the liberal and social-welfare paradigms of law "misunderstand the legal "constitution" of freedom as "distribution" and assimilate it to the model of the equal distribution of acquired or allocated goods."[61] However, as Iris Marion Young points out, rights are better not thought of as being possessed but rather understood as relationships, not things, which define rules defining "social relationships that enable or constrain action"[62] Young stipulates that justice refers not only to distribution but to enabling the institutional conditions necessary for individual to participate in the democratic process. Injustice primarily refers to the debilitating effects of oppression and domination. Over-reliance on the superabundant resources of the social-welfare state poses the dual danger of state paternalism and domination.

Finally, the constitutional acknowledgement of a procedural right to healthcare makes demands for new ways of legally constructing "formally equal but materially different legal relationships."[63] At a pragmatic level validity claims regarding individual rights cannot help but come into conflict. Habermas's stipulation of the enforcement of equal individual liberties for all points to needed restriction of classical liberties of some individuals at times as required in the best interest of the overwhelming majority. Habermas notes rights granting substantive legal equality "may produce *actual* restrictions for one or another party in comparison to

[60] Habermas, *Between Facts and Norms*, p. 418.
[61] Ibid., p. 419.
[62] Ibid.
[63] Ibid., p. 398.

the status quo ante"[64] Habermas sees the pragmatic justification for such measures believing "Such restrictions are not limitations on the principle of legal freedom[65], but arise as a result of abolishing privileges that are incompatible with the equal distribution of individual liberties required by this principle."[66]

Similarities regarding the limitations of private autonomy are seen in the writing of Arneson. Adapting his idea we can state that health care professionals may be said to exercise, "private ownership rights over a small resource holding"[67] Arneson in discussing moral rights notes, "Where many people exercise rights over small bits of property that in the aggregate significantly begin to restrict the lives of others… the 'intrinsic moral right' (to autonomy) gives way and a best results standard becomes operative."[68] Apparently the validity claim for inviolable private nature of professional epistemic and medical property possess no trump over the validity claim to the universal right to healthcare.

In summary, Habermas abstract categories of rights lay the foundation for the enumeration of a schedule of rights including rights to equal individual liberties and social-economic and political rights. Habermas notes, "The proceduralist paradigm directs the legislature's attention to the *conditions for mobilizing* law."[69]Successfully integrating the formal institutionalized and informal public avenues of legitimate discourse it is the source of the democratic genesis of law and may provide the key to any successful legalized right to healthcare.

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[64] Habermas, *Between Facts and Norms,* p. 401.
[65] The "Principle of Legal Freedom" requires "that the individual is due the highest possible degree of freedom to do as he or she pleases, relative to the legal and factual possibilities." Habermas notes" this principle coincides with Kant's universal human right, the right to the greatest possible degree of equal individual liberty." See Habermas, *Between Facts and Norms,* p. 399.
[66] Habermas, *Between Facts and Norms,* p. 401.
[67] Arneson, R., "Democracy is not intrinsically Just," in *Justice & Democracy,* Cambridge University Press, 2004, p.47 note, 12.
[68] Arneson, R., "Democracy is not intrinsically Just," in *Justice & Democracy,* p. 47 note,12
[69] Habermas, *Between Facts and Norms,* p .441.

MY EXPERIENCE OF DEVELOPMENT AND IMPLEMENTATION OF A DENTAL HUMANITIES ELECTIVE IN UNDERGRADUATE (UG) DENTAL CURRICULUM

JYOTI AJAY KHADE, B.D.S., M.D.S., P.G.D.D.E.[1]

I distinctly remember the day I received my Post Graduate Diploma in Dental Education (PGDDE). It was then that I made a decision of pursuing PhD in Health Professions Education (HPE), instead of my subject of postgraduation- Periodontology. As I had already cleared the entrance exam for getting enrolled in PhD, I opted for the subject of Health Profession Education, under the faculty of Interdisciplinary Sciences of the university. After approval of my request, I was allotted with a PhD Supervisor and thus my journey of PhD began.

I consulted my supervisor on probable areas of HPE, in which I could go ahead with the PhD thesis. Madam, has been very supportive and understanding since the beginning of my endeavor. She initially suggested of finding the research gaps in either Humanities and Social sciences or in Self-directed learning (SDL) as a teaching-learning method. As I have always been a very intuitive person with feelings of compassion and empathy for people around me, and am religiously working on my spiritual growth through Yoga and Meditation, I chose Humanities and social sciences.

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In-spite of huge advances in diagnosis and management of oral and dental diseases, I was always drawn to the patient's perspective of their disease and how it impacts their lives. I have been a patient listener to many of my chronic periodontitis patients and developed a relationship of mutual trust and respect. Thus, venturing into humanities as a PhD thesis work has been a blessing and a deeply enriching experience. This way, I could be instrumental in bringing back or rather re-instilling the values of being human, amongst future dental health care providers.

I began searching for educational interventions in the form of original articles, systematic reviews and meta-analysis on humanities and social sciences in dental education curriculum. I found ample material on individual aspects of medical humanities and social sciences as interventions. Very few studies involved multiple aspects of humanities including literature, ethics, professionalism, communication skills, research methodology, history, law, management, policy and insurance. The learners in these educational interventions perceived gain in knowledge, skills and attitude about humanistic and social components of medicine/ dentistry. However, skill training of empathy, tolerance of ambiguity, interpersonal conflict management, emotional intelligence and regulation, using visual / performing arts, role plays and literature, are few areas of humanities and social sciences which have received little attention as a part of formal curriculum for undergraduate students.[2]

The process of reviewing the existing literature, pushed me towards development and implementation of a new curriculum on Dental humanities as either a compulsory competency-based course or a credit- based elective. My husband guided and supported me in this journey at each stage. He, being a head of the department and elective coordinator at his institution, had adequate knowledge about electives and module development. Also, his experience as a FAIMER (Foundation for Advancement of International Medical

[2] Marti, K.C. et al. "Humanities in predoctoral dental education: A scoping review." Journal of Dental Education, 2019 October; 83 (10): 1174-1198.

Education and Research) fellow, was very useful during the curriculum implementation and evaluation stages.

We followed the principles laid down by David Kern on curriculum development.[3] Thus, an elective module of 15 days (Two Weeks) on Dental Humanities was developed and later on validated by a team of experts in this field. The Institutional Ethical Committee (IEC) approval was sought before beginning with the implementation of the elective.

The elective program was executed as a pilot project enrolling 35 UG dental students, after getting their informed consent. Participation was voluntary. An initial orientation and sensitization of students, was conducted. The module was implemented in a hybrid mode. Pretest, posttest, Offline classroom lectures, role play, discussions, online presentation of projects by students in groups, online assignment submissions, use of images, artwork, videos, biography, autobiography, movie clips as a trigger for self-directed learning of skills like empathy, vocation, communication skills, professionalism, understanding patient's illness perception, their quality of life, observation skills, listening skills and ethical practice, were a part of this module.

Assignments included project presentation & submission, story writing, poem writing, drawings, essay writing on selected topics pertaining to application of humanities in dental education and practice. Formative as well as summative assessment of students was done to gauge the learning gain. At the end, the participants had to submit their feedback and reflection on their experience of the elective. All Students performed remarkably well. Only one student could not complete the entire course as she met with an accident and had to be hospitalized for one week.

[3] Patricia, A.T., M.D. Thomas, D.E. Kern, et al. "Curriculum development for medical education: A six-step approach." 4th ed. Baltimore: Johns Hopkins University Press, 2022.

The overall satisfaction of the learners with the elective was excellent. Many learners felt that there is a need for incorporating dental humanities as a mandatory minor subject, taught in every year/semester of the UG curriculum, with thorough training on communication and interpersonal skills, emotional intelligence, conflict resolution training, stress management, professionalism, ethics, utilization of arts and literature in dental education and dental practice, use of reflection, narrative writing, poetry & story-telling in holistic development of future dental professionals, as well as integration of concepts of economics, management, law, insurance, history and sociodemographic factors in the understanding of dentistry. Two weeks, is rather a short span to train students on so many skills of humanities.

Nevertheless, it has been a very exciting and fulfilling experience to conduct the pilot project of Dental Humanities. Success of such projects cannot be measured solely in numbers and statistical significance. Feelings of involvement, active engagement and contentment, are usually subjective as well as subtle, which requires individual experience, to be believed.

Proposal for implementation of Dental Humanities as a mandatory competency-based subject, taught throughout the UG dental curriculum, is sent to the higher administrative authorities for approval. The enthusiastic and overwhelming response of the students is quite humbling. This restores our faith in values of humanities among future health professionals in dentistry.[4]

[4] Acknowledgements: I am deeply indebted to Dr Adarshlata Singh- PhD Supervisor and Professor of Dermatology, JNMC Wardha, and to Dr Ajay Khade, Professor and Head, Pharmacology, and Electives Coordinator, DMMC, Nagpur, for their support and guidance throughout this project. Similarly, critical appraisal, suggestions and approvals of the Doctoral Research, Doctoral Synopsis certification and Institutional Ethical Committees of the deemed to be university, DMIHER, Wardha, Maharashtra, India, have provided useful insights and greatly enhanced the quality and methodology of this research endeavour. Lastly, but not the least, I am truly grateful to the students enrolled in this educational research intervention, for their sincerity, enthusiasm, involvement and active participation.

ORAL HYGIENE AND HEALTH

JYOTI AJAY KHADE, B.D.S., M.D.S., P.G.D.D.E.

A message on oral Hygiene day
Teeth and our gums
Have their own melody to hum
If we pay good attention,
They'll not give any tension,
Need to brush daily twice
So that gums and teeth feel very nice
Say no to tobacco and such vice
Always follow your dentist's advice
Eat bread, sweet or rice
Make sure to floss in the crevice
With the first sign of tooth-gum pain,
Run to the dentist, to get oral health gain
Stay sincere and dedicated ,
Towards oral hygiene and care
That's sure to assure,
A healthy oral and systemic affair.

Dr Jyoti Ajay Khade

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