Clinical Ethics

What's Law Got to Do With It?

"WILL I GET SUED if I stop treatment?" "What should I do next—from the legal point of view?" These 2 questions are seemingly embedded (off the record) in every case consultation our ethics committee performs. My unhesitating reply, of course, is that one should first decide what is the right thing to do and, only after that, consider legal counsel. Given that malpractice concerns are real in our litigious society, the questions are understandable. And given our country's history of some unethical laws (forced sterilization, racial and sexual discrimination, etc), it may seem that bioethical and legal concerns are frequently at odds. So what precisely is the role of law in resolving ethical dilemmas?

See also page 342

In this issue of the ARCHIVES, Tunzi[1] does a superb job of bringing together the most popular theories of clinical bioethics and illustrating how different clinical situations call for different methods of ethical analysis. Whereas one case of refusing life-sustaining treatment can be best resolved by analyzing the principles at stake, another may become clear only by getting the full narrative. In some cases, physicians are helped by reflecting on similar dilemmas; in others, by asking, "What would my role model physician do?" Of course, the importance of full, open, and caring communication cannot be overstated. Does one really need to think about the law?

The answer is yes, although the relationship of law to bioethics is a complex one.[2] The legal system of the United States is based on the Western European political philosophy of the Enlightenment and the common law tradition of Great Britain. Philosophers such as John Locke are recognized sources of the rights-based language of our Constitution, but acknowledgment must also be given to the Judeo-Christian tradition in Western Civilization, with its emphasis on the dignity and autonomy of each person and the sanctity of life.

What are the sources of secular bioethics? Modern secular bioethics, less than a half century old, was created, many would say,[3] to deal with the problems of research scandals and medical technologies gone awry. Although these were not uniquely American problems, most early bioethicists were Americans who recognized that our pluralistic society would not tolerate appeals to religious guidance for resolving our disputes. But bioethicists did not create their secular theories out of thin air. The principle of autonomy is clearly based on the notion of individual self-determination from the Enlightenment. The principles of beneficence and justice can be followed back through political and religious thought to the early Christian Church and before. The virtues came from Aristotle by way of Saint Thomas Aquinas (1225-1274). In short, American law and bioethics have sprung from the same philosophical roots. In addition, casuistry (the ethical analysis of a case by comparing it with similar cases) is the modus operandi of the legal world as judges look to past cases for precedent.

The laws of our country include court decisions (common law), statutes passed by state and federal legislatures, and the regulations promulgated by administrative bodies. Although subject to political pressure groups, the authors of our laws may be seen as articulating the collective wisdom of our society (or at least, its majority view). Tunzi asks physicians to look to collective wisdom when encountering difficult cases. When doing so, we must not forget to look to the law.

The law has spoken clearly and forcefully in many areas of bioethical concern. Physicians are expected to maintain confidentiality in general but are legally required to breach it in certain situations—eg, communicable disease, child abuse, or specific physical threat to another. Physicians are legally required to give patients as much information as a reasonable patient would need to make decisions. Physicians are legally required to honor the refusal of treatment by competent patients (although they may remove themselves from such cases if their personal moral code precludes discontinuing treatment). Physicians are legally required to refrain from referring patients to facilities and services from which they may profit. Although laws may differ from state to state, physicians have legal guidelines to follow in surrogate decision making, organ donation, the care of minors, and maternal-fetal conflicts.

In many areas of bioethical concern, however, no legal consensus exists. Sometimes this is because the issue involves a new technological procedure, such as cloning or frozen embryos. Other issues are not new but simply unresolved, such as physician-assisted suicide, appropriate care for those in persistent vegetative states, and whether physicians may refuse patient demands for "futile" treatments. These are issues with which family physicians wrestle. When wrestling with one of these difficult cases, a physician may use the various methods of ethical analysis described by Tunzi.[1] It is also appropriate for professional associations (eg, the American Association of Family Physicians and the American Medical Association) to set professional standards of care for

approaching these cases. Rather than waiting for the law to tell them what to do, physicians as a profession should articulate a well-reasoned standard of care so that, as these cases make their way to court (as some surely will), the medical profession can critically contribute to the developing legal standards. Physicians should not expect the law to provide a quick-fix solution when society is divided on an issue.[4] But they have a professional obligation to provide judges and legislators with their best opinion of how to approach these problems.

It can be seen from the above that sometimes the law speaks to physicians with a clear and ethical voice (eg, "Keep confidentiality except for these exceptions"). Sometimes, however, the medical profession must speak to judges and legislators to help guide their decision making.

Sometimes there may be near consensus that a current law is unethical (eg, the requirement in New York and Missouri of clear and convincing evidence before discontinuing life-sustaining medical treatment). Then, physicians, as a profession, should seek to change the law. And sometimes a physician may decide to break a law that "should" be broken in a particular case for the good of all involved. In summary, laws may be ethical or unethical; ethical actions may be legal or illegal.

Where does this leave physicians? An ethical analysis should always precede a legal one. But physicians need to know the state and federal laws that relate to the practice of medicine. At times, the law not only clearly tells physicians what to do (eg, report a homicidal patient who is headed with a gun to his estranged wife's house) but justifies the decision and helps them communicate it ("I'm required by law to break this confidence, Joe"). At other times, the law can be a source of collective wisdom and guidance, especially if there is strong legal consensus (eg, that a competent patient has the right to refuse a life-saving treatment). Tunzi[1] states that it is important to let students know that there are some clinical situations in which multiple approaches are acceptable. Although this may be true for some ethical dilemmas, it is equally important to teach students about those clinical and ethical situations in which there is consensus in the approach. For these cases, the law can be an ally and a guidepost.

Susan M. Bauman, MD
Hunterdon Medical Center
Department of Family Medicine
Flemington, NJ

REFERENCES

1. Tunzi M. Ethical theories and clinical practice: one family physician's approach. *Arch Fam Med.* 1999;8:342-344.
2. De Ville K. "What does the law say?" law, ethics, and medical decision-making. *West J Med.* 1994;160:478-480.
3. Jecker NS, ed. *Bioethics: An Introduction to the History, Methods, and Practice.* Sudbury, Mass: Jones & Bartlett Publishers Inc; 1997.
4. Dworkin RB. *Limits: The Role of the Law in Bioethical Decision-making.* Bloomington: Indiana University Press; 1996.