



Healthcare ethics and the law- Why law pervades medicine

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Abstract

Law has always been the rulebook by which most healthcare professionals guide their medical practice. However and despite healthcare's founding fathers being esteemed philosophers and ethicists, we rarely use moral or ethical principals to guide the care we provide to patients. In this article, a review of Charity Scott's essay entitled *Why Law Pervades Medicine: An Essay on Ethics in Health Care* shows the continued divide between healthcare and legal practitioners and suggests a movement to a higher standard, namely ethics.

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Mini Review

I was asked to review an article written by Charity Scott, entitled *Why Law Pervades Medicine: An Essay on Ethics in Health Care* [1] given the relevance of both ethics and law on the practice of medicine in the USA. I initially expected the article to touch on what many if not most clinicians feel (and most state out loud very loudly), lawyers are the root to all of medicine's problems (and solutions). As an attorney turned physician, I am often looked at by many of my medical colleagues with suspicion and trepidation. Conversations suddenly become hushed, and silence dominates previously boisterous rooms full of conversation and the latest hospital gossip, until I reassure I am a physician and my legal work is only for physicians. Nonetheless,

I have spent the better part of the last 2 decades educating physicians and medical students on the importance of understanding the law as it relates to healthcare. This article reminded me, that I set the bar too low, and should have been teaching them ethics instead.

There is still a misconception as to the role of law and ethics in medicine, and this article touched on many of them. However, the one that resonated the most with me was the concept that Ethics represents an ideal concept of fair and just actions for humans, whereas law is the legislative "snapshot" of society's morals at any given time. As Scott stated, "ethics is what we ought to do, the law is what we must do." It is my belief and I believe the author's as well, that Ethics precedes laws, and

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laws capture the Ethics of a time/people/place, and hence why many laws differ from culture to culture, nation to nation. Ethics represents the sophisticated moral compass of a given society, and the law tags along slowly behind it, dragging on the ground like a sack of law books. As further stated in the article "law only sets a floor for ethical behavior."

I had previously expressed a viewpoint to a class on health-care law that physicians, especially those in highly litigious states like New York, responded best to legal mandates versus moral or ethical causes. We have seen this in the adoption of Physician Orders for Life Sustaining Treatment (POLST) Paradigms, throughout the country, as well as countless other examples (such as the author's provided example of Informed Consent). Ironically, there are still some states in the US whereby physicians can come together through governing bodies of physicians and agree to practice guidelines for the state. All without any legislative activity. This is a rarity and has only occurred in Oregon and a few other states [1,2]. Hence it seems law becomes the force or power to get clinicians to "obey orders", that no amount of moral and ethical convincing could achieve. Somewhat ironic for a profession that prides itself on Ethics and Hippocratic Oaths and other moral guiding founding principles. Were Aristotle and Socrates not physicians who spoke at length on the moral principles involved in caring for humans?

I do disagree with the author on a few minor points (mostly semantically and possibly generationally or culturally based), as exemplified in the following statements-*In effect, the widespread adoption of informed consent laws reflects a societal consensus that in medical ethics at the bedside, the principle of autonomy ought to prevail, in a case of conflict, over the principle of beneficence.*

Patients were arguing that it was ethically appropriate for doctors to talk in depth about the medical care they proposed, even though such conversations were largely foreign to the ethical perspective of the medical profession.

The implication here and in earlier statements made, is that beneficence is necessarily paternalistic (physician based) and prevents patient autonomy as an outright truth. I believe there to be two distinct issues here, namely one of paternalism and separately that of beneficence and non-maleficence. If we look at the Dictionary.com definition of beneficence, it is the doing of good; active goodness or kindness; charity. I am not

sure how this necessarily translates to a paternalistic act and one that somehow impedes or conflicts with a patient's right to autonomy. When a physician seeks to care for a patient and recommends certain treatments or procedures in a beneficent and non-maleficent manner (i.e. do good, and prevent harm) the patient's right to self-determination, Informed Consent, and every other human right is not automatically at a conflict. Perhaps in times past or in cultures where physicians treat humans as mute, unintelligent, and/or irrelevant to the decision process, the "my way or the highway" approach might have proved a problem to the patients who asked to be involved in the decision process. I think modern medicine practiced in the west has long respected patient autonomy yet still remained beneficent and non-maleficent. That being said, I think the author confuses cultures or societies that accept paternalistic medical practices as being the same as beneficence/non-maleficence. As the author pointed out, some members of society (including many a physician) believed and still believe that women, gays, coloreds, and any "foreigners" had no voice or role in any type of decision-making, and used their "paternalistic" viewpoints and power to subjugate them. That does not mean all of medicine follows such viewpoints, and in my opinion makes a generalized label of paternalism misleading and generally incorrect for the majority of compassionate and aware physicians.

Admittedly as a foreign born, dark skinned, philosophy major, attorney turned physician, I may not represent the average physician in America. Nonetheless, I have noted generational, cultural and personal prejudices that have played a role in many a physician's "orders" or behaviors that are often taken by the lay-public as representing "all doctors". Some of us did/do not need the law to make us do the right thing for our patients, however I acknowledge that unfortunately, many of us do.

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