Laws that Conflict with the Ethics of Medicine: *What Should Doctors Do?*

BY DENA S. DAVIS AND ERIC KODISH

This past July, five professional societies, whose members together provide the majority of clinical care in the United States, published a statement objecting to "inappropriate legislative interference" with the physician-patient relationship and reiterated the importance of "putting patients' best interests first."[1] Such a collective response is helpful, but given the apparently growing interest among legislators in legislating aspects of physician-patient communications, individual physicians, too, may have to face this problem. What should a physician do when confronted with a law that attempts to intervene in the doctor-patient relationship in a way that the physician believes undercuts good medical care?

Consider the issue of gun safety in the home. The American Academy of Pediatrics urges pediatricians to inquire routinely about gun ownership and to counsel parents about gun safety. The AAP believes that the absence of guns in homes and communities is the most reliable and effective measure to prevent firearm-related injuries in children and adolescents.[2] The AAP also recommends that members inquire about pool safety, automobile restraints, and other environmental issues, reflecting a belief that children's health is not just about "medicine." Among homes with children and firearms, more than 40 percent have at least one unlocked firearm.[3] A randomized controlled trial reported in *Pediatrics* in 2008 showed encouraging results when pediatricians counseled parents on strategies for safe gun storage and handed out cable locks, reporting a 21.4 percent increase in families who stored their firearms locked.[4] What pediatrician would not want to be part of an effort that could effectively reduce one of the leading causes of child mortality?

Dena S. Davis and Eric Kodish, "Laws that Conflict with the Ethics of Medicine: What Should Doctors Do?," *Hastings Center Report* 44, no. 6 (2014): 11-14. DOI: 10.1002/hast.382

A Florida statute, however, makes it illegal for pediatricians to ask families if they possess guns; violation of the law could lead to loss of one's medical license. In July 2014, the Court of Appeals for the 11th Circuit upheld the Florida law, claiming that it did not trammel physicians' right to free speech, but merely protected vulnerable patients' privacy: "The Act simply acknowledges that the practice of good medicine does not require interrogation about irrelevant, private matters."[5]

Similar bills were introduced in 2011 in five other states. In West Virginia, a bill was introduced that would have amended the state Medical Practice Act to define asking about gun ownership as "gross negligence" and "medical incompetence." All these bills failed, but passing similar laws is an important goal of the National Rifle Association, and with this decision from the 11th Circuit, we can expect more attempts.[6]

Family planning is another and older issue that can lead to laws intervening inappropriately in medical practice. In 1991, the United States Supreme Court ruled in *Rust v. Sullivan* that health providers in publicly funded family planning clinics can legally be prohibited from "advocating, counseling or referring" patients for abortions.[7] In other words, a physician who believes that abortion is a good medical option for her patient can be prevented from even mentioning that possibility so that the patient can seek care elsewhere. This is especially troubling because it has a disparate impact on the poor and underinsured, who have little choice but to use publicly funded clinics.

Yet other legislative interventions into the practice of gynecology and obstetrics have been attempted. In 2011, a coalition of antiabortion groups announced an initiative to try to pass bills in all fifty states that would require women to listen to their fetus's heartbeat before having an abortion.[8] Other bills would require patients to watch fetal ultrasounds. These are things that physicians might appropriately *offer* to patients but would never insist upon. Some state laws require doctors to "inform" patients of scientific untruths, such as the

purported connection between abortion and breast cancer or abortion and depression.[9] Such practices are never defensible.

Legislative intervention into medical practice can be prompted by other social issues as well. The Medical Society of the State of New York has vehemently opposed the requirement, in the state's 2011 Palliative Care Information Act, that physicians offer to provide terminally ill patients with information about palliative care and end-of-life options. The society objected that the law was insensitive to the nuances of individual doctor-patient relationships and could be harmful to some cancer patients.[10] Some ethicists believe that required request laws for organ donation, despite their admirable goals, create unacceptable conflicts of interests for physicians by "subtly increasing the pressure" on them to facilitate the organ donation process.[11] As Americans become increasingly frustrated with the broken U.S. immigration system, we may soon see state laws that forbid the provision of aid, including medical care, to undocumented immigrants. Such bills have been passed in Alabama and defeated in Arizona, and could well be introduced more broadly.[12]

These examples encompass several of the categories of legislative constraints described in the statement from five professional medical societies this July. The challenge they pose is not a matter of liberal versus conservative perspectives, nor do we claim that these laws are always ill intentioned. Different physicians will have different reasons for objecting to different laws at different times. The ethical question, however, remains the same: how should physicians respond to laws that interfere with their ability to do their best for their patients? What ought a physician to do when caught between her professional obligations to do her best for the patient and her legal obligation to obey the law?

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Everyone has certain prima facie moral obligations to others that may conflict with the law. Everyone, for example, has obligations to avoid harm and to tell the truth. Medical professionals, however, have special moral obligations that are tied to their roles as physicians, nurses, and others. These special obligations have been expressed through codes of professional ethics, principles of biomedical ethics, the concept of a fiduciary relationship, rich accounts of the virtues, and obligations inherent in the doctor-patient relationship. In what follows, we lay out some useful pathways for thinking about and responding to this problem.

The Principlist Approach. In *Principles of Biomedical Ethics*, Tom L. Beauchamp and James F. Childress elaborated four principles that are now often regarded as foundational for medical ethics.[13] Laws such as those described above force physicians to violate these four principles in numerous ways. First, the principle of respect for patient autonomy is violated when physicians are required to tell patients untruths, such as about links between abortion and breast cancer. Respect for autonomy is also violated when physicians must force a patient to listen to a fetal heartbeat or observe a fetal ultrasound before an abortion is provided. The principle of nonmaleficence ("do no harm") is violated whenever patients are given less than full and truthful information because decisions made on the basis of false information are often not in people's best interests. False information about a rise in risk of breast cancer can also result in women's increased anxiety for the rest of their lives and lead to an increase in unnecessary cancer screening procedures such as mammography. Beneficence is violated when physicians do less than they are capable of doing to promote patients' welfare, for example, by not asking parents about gun ownership. The moral obligation to prevent avoidable harm to children is central to the ethics of pediatric medicine. Finally, the principle of justice is violated if some patients, because of better education or better insurance, are able to navigate around legal restrictions on the doctor-patient relationship, while other patients are left severely limited.

The Covenantal Approach. Ethicists Edmund Pellegrino and William F. May represent a philosophical return to the roots of medical ethics. Inspired by Hippocrates, Maimonides, and others, they argued that a rights-based, autonomy-driven medical ethics had gone too far, and they reintroduced physicians and other students of medical ethics to a "covenantal" understanding of the doctor-patient relationship. For Pellegrino, medicine is based on an "internal morality" derived from the nature of medicine itself, and it is oriented toward the twin goals of "excellence in healing" and "the good of the patient."[14] These goals are the "internal" goods of medicine and should, in his view, always take precedence over "external" goods such as financial reward and social prestige. May begins with a biblical notion of covenant that obligates the more powerful "to accept some responsibility for the more vulnerable and powerless." He concludes that, even in a secular context, medicine is a "vocation" as well as a profession, so that the services of physicians should extend "beyond parochial boundaries" to the stranger and the person in need.

The covenantal model encompasses a virtue-based description of professional ethics. Telling the truth to the patient is based not only on respect for the patient's autonomy but also on "steadfastness, on being a true and trustworthy person. Physicians and nurses face the moral question not simply of telling the truth, but of being true to their word. . . . The doctor offers the patient not simply efficiency and diagnostic accuracy but also fidelity."[15]

Another available model for the doctor-patient relationship is that of the contract. This model assumes obligations on both sides, but the content of the contract may be as thick or thin as the parties decide. Pellegrino and May criticize a contractual model of the physician-patient relationship because it assumes two more or less equal parties, each acting primarily out of self-interest, which they believe is an inaccurate and ethically impoverished account. However, even the contractual model obligates physicians to give patients the benefit of their best medical knowledge and to recommend procedures optimal for patients' health.[16]

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The Fiduciary Approach. Society has always recognized that some relationships, even though they may superficially appear to be merely a species of business transaction or contract, require increased ethical vigilance. A fiduciary relationship describes a situation of heightened trust and confidence. Alex London recently articulated this view: "Clinicians have strong fiduciary duties to patients, meaning they have the duty to place the interest of the patient above almost all other competing concerns."[17] The vulnerability of patients and their relative inability to access and evaluate medical information makes it that much more important that they be able to rely on the physician's trustworthiness. Therefore, the physician must give accurate information and act with what Justice Benjamin Cardozo described as "the very punctilio of honesty."[18]

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Physicians are caught between three competing goals: doing the best they can for their patients, following the law, and protecting themselves from the consequences of breaking the law (losing their licenses, for example). They also need to be sensitive to the fact that the actions of even one or two individuals can have important consequences; one physician who is publicly disciplined for refusing to follow the law can be an effective agent for change. Finally, obeying these laws can lead to the corrosion of the profession's integrity. There are no studies of how obstetricians and gynecologists actually respond to laws requiring them to give misinformation, but one can imagine undignified scenes of exaggerated winks and nods or perhaps of the physician reading the required "information" while shaking her head in a violent negative, or holding her nose, or ostentatiously holding aloft her crossed fingers.

Medical ethics has always asked doctors to put their patients first, even at some risk to themselves. "Medicine is, at its center, a moral enterprise grounded in a covenant of trust," writes Christine Cassell. "This covenant obliges physicians to be competent and to use their competence in the patient's best interests. Physicians, therefore, are both intellectually and morally obliged to act as advocates for the sick wherever their welfare is threatened and for their health at all times."[19] Physicians are expected to care for patients with infectious diseases, even at risk of their own health. Physicians are expected to do some pro bono work, to take on some patients who are not financial assets, and so on. Physicians should be advocates for the health of all people, above and beyond even their own patients. The AAP is "dedicated to the health of all children."[20] The imperative to act on this ethical norm clearly suggests that physicians should challenge these types of laws. On rare occasions, individual doctors may be ethically justified in disobeying or breaking the law.

We recognize that some of these laws are more problematic than others. Forbidding physicians to ask about gun ownership may be less abhorrent than forcing them to lie to patients by giving medical "information" that they know to be false. Some laws allow for easier work-arounds than others, like offering gun safety information without first inquiring about guns in the home. In that case, complying with the law as narrowly as possible, while working publicly for its removal, may best satisfy all the conflicting obligations. However, in our view, a physician may never lie to a patient to satisfy an unjust law. As medicine becomes increasingly complex, patients rely more than ever on accurate information from their physicians. Access to the Internet and some excellent patient information sites do not obviate this point. A physician who deliberately gives a patient inaccurate information not only disrespects her autonomy but also risks her mistrust when and if she discovers the lie. The mistrust may well turn into mistrust of health professionals generally.

Physicians who lie to a patient or who call the police to report an illegal immigrant who is seeking medical care are betraying not only the patient but their own professional commitments as well. Such physicians are not, in May's terms, "steadfast" and trustworthy. In situations that pose a conflict between ethical conduct and abiding by an unjust law, an act of civil disobedience may be indicated.[21] A doctor should commit civil disobedience rather than lie to a patient. And if all the affected doctors did this, the law would disappear very soon.

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