

Law and bioethics

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There is probably no other field in which law and ethics are so strongly intertwined as in biomedicine. Legal and ethical doctrines on topics like informed consent have been developed through close cooperation between lawyers and ethicists. The work of ethicists is in many ways both oriented towards the law and influenced by the law. Ethicists act as expert witnesses in courts or as advisers on legislative issues, for example, on the regulation of embryo research. In countries where ethics committees or review boards are legally recognized, they seem to have a semi-judicial status. Conversely, legal concepts, like the right to privacy, dominate moral discussions.

Because bioethics and health law are so strongly connected, every bioethicist must have a basic understanding of law. For instance, when an ethicist is asked for advice on legislation, he or she should take account of the institutional character of law, which has its own dynamics, restraints and societal functions. Take, for example, a discussion of prostitution in the context of AIDS policies. Here the practical problems of enforcement and the possible side-effects of legal prohibition alone might produce such bad consequences that the more principled arguments against legal moralism become superfluous.

Law

A general and neutral definition of law seems to be impossible because in various respects law is a highly variable and diverse phenomenon. Of course, a number of defining characteristics have been suggested, especially some criteria that would distinguish law from morality. Among those criteria are the connection of law with political authority or with sanctions, the existence of certain kinds of procedures and the emphasis on external acts rather than on motives. However, as Judith Shklar (1964) has argued, none of the differential features suggested is found in all legal systems or practices, nor are they always absent in morality.

Nevertheless, these and other less than general characteristics are important for a full

understanding of the phenomenon of law. When they are present in concrete legal systems – and only in so far as they are present – they influence the internal dynamics and societal functioning of law. Most of these features have to do with the institutionalized character of law, which takes different forms in different historical contexts.

One example may suffice to show the importance of taking these institutional characteristics into account. Law emphasizes, partly for reasons of proof, external acts rather than internal intentions, whereas many ethical theories do the reverse. This difference explains why the distinction between ‘active’ and ‘passive’ euthanasia is usually deemed more important in law than in moral theory. A Dutch criminal case against a gynaecologist in Alkmaar, who was accused of the swift, active euthanasia of a severely handicapped and suffering neonate, illustrates this difference in approach. In my view, the crucial moral issue in cases like this is whether or not to start medical treatment when non-treatment will result in the baby’s death within months. This is the real decision about life or death. However, the lower court considered this issue to be within the realm of professional autonomy and therefore of no legal relevance. (I should add that the appeal court took a more sophisticated stance.) The legal discussion focused on a different point in the decision process, namely swift, active euthanasia. If the doctor had chosen to let the baby die a ‘natural’ but slow and painful death, or even if he had intentionally hastened death by administering increasing doses of painkillers, he would not have been prosecuted. Because he actively administered swift euthanasia, however, he was prosecuted for murder. (In the end he was not convicted.) Most ethicists agreed that, once the non-treatment decision had been taken, this was the most humane way of acting to avoid further suffering for the baby. Thus the ethical and legal discussions focus on different points in the decision process: the non-treatment decision and the swift, active euthanasia respectively. This relative emphasis on external acts rather than intentions is only one of the characteristics of law with a more general, though not universal, nature. There are many others that are connected only to specific legal cultures or to fields of law in specific phases of their development. This wide variety of characteristics possessed by law in different cultures and fields makes it almost impossible to make general statements about law and bioethics. Positive law takes a

different shape in every country and, even if statutory rules seem identical, the differences in legal cultures often result in different interpretations.

A major difference among Western legal cultures is that between the 'Common Law' countries (the Anglophone world), where judicial precedent constitutes the main body of law, and 'Civil Law' countries (roughly the countries of the European continent and their former colonies) where codification and statutory law form the core of the law. In the Common Law tradition, the basic attitudes towards statutes and legal rules, and hence the interpretative strategies, are generally more restrictive than those in Civil Law countries. A statute on patient rights will therefore be more restrictively interpreted in England and Wales than in the Netherlands; hence an identical statute (or an international treaty) may have different effects in the two different traditions. The existence of major non-Western legal traditions, like those of Chinese Law and Middle Eastern Law, leads to an additional variation.

There is even variation within a legal culture. For example, the possibilities and limitations of legal change through adjudication are different from those of change through legislation. Case law can offer flexible, incremental change but is sometimes unable to deal systematically with comprehensive social concerns; legislation can produce clear and prospective rules, but its mistakes may also have more comprehensive consequences (Dworkin, 1996). Or, to take another source of variation, legal thought and attitudes in the field of contract law differ from those in criminal law. Reference to morality in criminal law is, for instance, generally considered more acceptable if it results in the acquittal of the defendant than if its purpose is to broaden the scope of a legal prohibition. The fact that health law is an amalgam of various fields of law therefore creates many internal tensions and inconsistencies.

There is also a more fundamental plurality in the concept of law. There are two perspectives on law that cannot be consistently grasped in one theory, just as an electron can be seen as a particle and as a wave, but not as both at the same time.

The first approach regards law as a product, as law in the books. Law is, for instance, structured as a collection of statutes, judicial decisions and customary rules, or as a system of rules and principles. This approach to law is, in a sense, the most natural one. Legislators produce law in the form of statutes; judges decide cases on the basis of their

understanding of the legal rules and principles. The second approach regards law as a process, as an activity (or, rather, a cluster of processes). Law is seen as an interpretative and argumentative practice (Dworkin, 1978) and legislation as a purposive enterprise (Fuller, 1969).

Both views on law are connected and presuppose each other. Law as a process is in many ways oriented to and structured by law as a product. Law as a product only makes sense because it is continuously interpreted, reconstructed, changed and applied in a great many processes. Interdependent as they may be, it is nevertheless impossible to combine both perspectives at the same time. A unifying theory cannot be found by bringing both dimensions of law under one heading; it can be found only by acknowledging the dialectic interplay between them. This unavoidable, but rarely explicitly recognized, multitude of perspectives inherent in the phenomenon of law itself is, in my view, a major cause of the misunderstandings and quarrels between the various schools of jurisprudence, like natural law and legal positivism.

The distinction between the two perspectives has important practical consequences. In a product view (which is dominant in many legal textbooks) many standard distinctions can be defended, like that between existing law (law as it is) and ideal law (law as it ought to be from a critical point of view) or between law and morality – the product is usually easily identifiable by some test of pedigree. But in a process view, the legal and moral arguments cannot be so neatly separated, as Ronald Dworkin (1978) has argued. When discussing the legality of euthanasia in court, we have no simple criteria to say this argument is a moral one and that one is strictly legal. The two categories fuse, because law is an open system which means that in principle every moral argument can be legally relevant. And as soon as we regard law as a dynamic, ongoing process of competing interpretations, we realize that our views on, what ‘the law on euthanasia’ is are always partly determined by, and open to our normative views on, what the law on euthanasia ought to be. We should therefore lay aside the simple, static image of existing or positive law in favour of a more dynamic concept in which views on law as it is, and views on law as it should be, are continually merging into views on law as it is becoming.

Morality

In ethics, a largely analogous distinction can be made between a product view of morality and a practice view. (Process and practice are not fully equivalent, which is largely due to the institutional character of law.) A product approach in ethics focuses on normative theories, principles and guidelines – for instance, on protocols and guidelines regarding medical experiments. We can also regard morality as a practice, as an activity in which we are continually interpreting, reconstructing and realizing our central moral values – for instance, our ideal of being a good doctor or nurse.

Here again, my suggestion would be that we need both perspectives of product and practice, but cannot take both at the same time. The choice of perspective has important consequences. In a product view, Hart's distinction between positive and critical morality is a clear-cut one (Hart, 1963). However, if we reflect from within ethics on ethics as an interpretative practice, this distinction becomes a dialectical interplay, simply because we have no Archimedean point for our critical morality. Our view of ideal morality is always partly determined by our positive morality; and at the same time our positive morality includes the possibility of self-criticism and justification in the light of ideal or critical morality.

From Morality to Law

After this preparatory work, we can now turn to the central theme of this article: the relationships between morality and law in the field of biomedicine. Morality influences law in many ways. Moral opinions on issues like abortion are often expressed in legislation or reflected in judicial decisions. This raises the question: when is it justified to transform morality into law, or at least to give legal effect to it? It should be noted that if we phrase the question in this standard way, we implicitly take a product view of both law and morality. We are asking when a moral rule or principle should be incorporated into the law. In a process or practice view, the distinction between law and morality is less strict and therefore the question would acquire a vaguer and less tangible character.

I will cluster the major issues under three headings.

The integrity of the law (and of its constitutive fields and processes), with its special function and character, should be taken into account. For instance, when discussing euthanasia, we should recognize that law has special problems of enforcement and proof,

and that legal rules should be general. It seems impossible to make general rules that fully cover the morally acceptable cases of euthanasia, and to set corresponding standards of proof which only acceptable cases can meet. This implies, in my view, that even though we should legalize some forms of euthanasia, we will be forced to prosecute certain morally acceptable cases in order to avoid tolerating unacceptable cases. Embryo experimentation presents another example: even if, from a moral point of view, individuation at fourteen days after conception were only an arbitrary line, it might be a defensible one in legislation, just because legal rules have to be simple and clear.

Both the intended effects and the unwanted side-effects should be estimated (Skolnick, 1968; Cotterrell 1992, especially chapter 2). Moreover, we should be realistic about the intended effects: legislation is not always effective in influencing people's behaviour. The unpredicted and undesirable side-effects of legislation sometimes outweigh the beneficial effects. The US prohibition of alcohol is a classic example: it made the Mafia flourish, and it led to corruption, blackmail and selective law enforcement. The modern 'war on drugs' has similar effects; if we take these into account we should doubt whether criminalization is a good strategy. A strict prohibition of abortion usually has undesirable consequences, like women dying after undergoing illegal abortions.

The side-effects of a law can yield arguments both for and against legalization of specific practices. Laws against euthanasia may result in a completely uncontrolled, secret medical practice of euthanasia; legalization of euthanasia may make some older people feel that they are under social pressure to request it.

The third cluster of topics is straightforwardly *normative*. According to most normative political theories, some forms of behaviour that are considered morally wrong should nevertheless not be the subject of legal prohibition; but just when and why this is so is an issue of controversy. Some theories construe the sphere of morality in which the law has no business broadly, on the basis of classic ideas like safeguarding private spheres or fundamental rights. Apart from their controversial character, these normative theories seem to be only partly relevant to the reality of modern societies, where states play an active role and where law is a crucial instrument for policy purposes. Moreover, a serious limitation of most of these theories, even of Feinberg's celebrated four-volume analysis and defence of such an approach (Feinberg, 1984–90) is that they deal only with criminal

law. In modern states, however, other forms of law may be more important. Medical malpractice rarely leads to criminal cases; the threat of private lawsuits is more substantial. Consider the practice of surrogate pregnancy, for example. (See also chapter 17.) Law can deal with surrogacy in many ways other than blanket prohibition: it may establish family relationships and inheritance rights between the child and either the surrogate mother or the commissioning couple; it may give or withhold legal effect to specific surrogacy contracts; and internal hospital regulations can make assisted insemination for such purposes impossible. In modern societies, many morally sensitive issues concern contract or administrative law rather than criminal law. This variety makes it impossible to suggest simple criteria for deciding which part of morality is to be legally regulated, or the way in which this should be done. Even an outline of a normative theory on this broader theme is still lacking.

From Law to Morality

Conversely, law also influences morality in various respects. Legal styles of argument can influence the style of moral reasoning. If a legal system focuses on cases, morality will probably be *case-oriented* as well. Civil Law legal cultures naturally focus on statutory rules; we may therefore expect moral reasoning in these countries to be more rule-oriented than in the more casuistic Common Law countries. (See also chapter 12.)

Furthermore, legal concepts sometimes influence the structure of moral debates. When the theme of abortion is legally structured in terms of conflicting rights, it will be more difficult to encourage an open moral debate in terms other than rights, for example, on whether abortion based on gender of the fetus is acceptable. If there is a threat of a conservative backlash against legalized abortion, citizens may be unwilling to give up the liberal rights framework, even if it is not adequate for more subtle moral questions.

Finally, law may directly influence the contents of popular morality. For example, legal rules on informed consent may, directly or in the long run, mould medical practice and moral opinion.

A different normative issue is whether law gives rise to moral obligations. Especially in rapidly developing fields such as those of bioethics, the law often cannot keep up with the pace of change. Is a health-care professional morally obliged to obey a law that is

inadequate or unjust, like an illiberal abortion law? This theme of political obligation and civil disobedience has elicited a rich literature (Greenawalt, 1989). A word of caution might be in place. Law is more than a set of statutory rules: most legal systems have means (like the defence of necessity) for allowing acts that, though against the letter of the law, are morally justified. It may therefore be unclear whether an act like euthanasia or abortion is really illegal, precisely because moral argument is relevant in interpreting the law (Dworkin, 1978).

Converging Law and Morality

The relations between morality and law usually have the character of mutual interaction rather than that of a one-way influence. We can distinguish three typical developmental phases or models in the interaction between health law and bioethics in most Western countries (Van der Burg, 1997). In the first phase, the emphasis is on ethical practice; only a small number of legal rules exist as a codification of this practice. In the second, law and ethics converge in a product approach and cooperate closely in changing the traditional practice; in the third, they diverge again.

Until the 1960s, neither bioethics nor health law were independent disciplines; guidelines and rules (the 'product') were almost non-existent. The medical profession was largely autonomous and free from external legal regulation; medical ethics was primarily an ethics of good medical practice. The few legal rules that existed usually reflected positive morality, like rules prohibiting abortion, euthanasia and certain sexual activities. In this setting, the relationships between law and morality were primarily discussed under the headings of legal moralism and paternalism. We may therefore call this the moralistic-paternalistic model. The best critical analysis of problems with this model can be found in Feinberg's work, to which reference has already been made (see also Dworkin, 1994).

This moralistic-paternalistic model has, in most countries, gradually been replaced by a different one, which I shall call the liberal model. Health law and bioethics have developed into flourishing disciplines that are closely connected. They have a common mission: the search for adequate answers to the many new problems that arise and the struggle to make biomedical practice comply with norms shared by ethics and health law.

In interdisciplinary cooperation, ethicists and lawyers are developing doctrines of euthanasia and abortion. Legal case materials are used for illustration in bioethics textbooks; ethical literature is quoted in legal texts and court decisions.

This convergence has been facilitated by a number of closely connected factors that characterize the new liberal model. First, both health law and bioethics take a product view (exemplified in the principlism of Beauchamp and Childress (1994); see also chapter 7), trying to develop new theories for the new problems that arise (or for old problems that are seen in a new light) such as the plight of psychiatric patients and the possibilities and risks of new technologies. Second, both use the same conceptual categories: rules, principles, rights, procedures. As a result, translation from legal to moral analysis, and vice versa, seems (at least superficially) simple, which is a precondition for successful cooperation. Third, both focus on what is minimally necessary for decent medical practice rather than on the ideal situation; formulating and realizing minimum standards seems to be a major achievement itself. The fourth factor is closely connected to the other three: both use the same liberal substantive theory, in which autonomy and patient rights are central.

These four factors not only facilitate cooperation between the two disciplines, but also contribute to their effectiveness. In modern pluralist societies, an overlapping consensus can more easily be reached on procedures, minimum rules and rights than on the good life. The liberal model offers simple legal solutions to intricate problems like abortion and euthanasia by entrusting individuals with the responsibility for moral dilemmas. The problems that were most urgent in the early years of bioethics and health law – patient rights, abortion, medical experiments – can thus all be fruitfully addressed in the context of a product-oriented liberalism (at least, with respect to abortion, if one starts from the assumption that the fetus does not count as a full person). Moreover, scarce intellectual resources and weak societal powers are thus combined.

Of course, this liberal model has not been equally effective everywhere; in fact, no country has yet fully implemented it. In strongly pluralist societies, like the United States and the Netherlands, it has been much more influential than in, for example, Ireland. There are even differences within one country. The United States has adopted an extremely liberal stance on patient rights, whereas, so far, it has taken a more moralistic

position on various issues in the field of human sexuality.

Diverging Law and Morality: Beyond the Liberal Model

The liberal model has now gained broad support in many countries. Central elements have been legally recognized and sometimes codified in constitutional rights, statutes and international treaties. (Although, of course, this process of legal recognition is in many countries still far from completion.) Bioethics and health law have become established fields in many universities. The very success of the liberal model, however, now leads to its decline: the advantages become less important and the disadvantages become more visible. Although the criticisms are quite diverse, they have a common implication: developments in health law and bioethics should no longer be parallel and connected. To put it simply: health law is criticized as being too dominant, too rigid and not sensitive enough to the complex problems of health-care practice; bioethics is criticized as being reduced to a minimum rights-oriented morality that neglects broader ethical dimensions. Precisely because, and in so far as, the liberal model has been realized, we are now in a position to go beyond it.

Trying to predict future developments would be too speculative. Therefore I can only make some tentative suggestions for the way in which a new, post-liberal model of the relations between health law and bioethics should be construed. First, the liberal model has undeniably brought progress; its achievements, especially in health law, should not be discarded lightly. Patient rights, legal abortion, informed consent and so on should be preserved. It should, however, be supplemented, and in some respects corrected, on the basis of a proper understanding of the specific roles and characteristics of law and ethics, and of the differences between them.

With regard to bioethics, we should acknowledge that the four factors responsible for the liberal success have resulted in a certain one-sidedness. These characteristics have been challenged by a host of critics in modern ethics, ranging from MacIntyre (1981) to the advocates of an ethics of care (Gilligan, 1982) (see chapters 10 and 11). To compensate for this one-sidedness, we should supplement them with a richer view of ethics rather than do away with them. Many current topics simply cannot be discussed adequately in terms of the liberal model: we should discuss both product and practice,

both the minimally decent and the excellent doctor. When we discuss experiments with human embryos or sex selection, references to autonomy and rights are not sufficient. A full ethical analysis of prenatal diagnosis requires a discussion of topics like society's attitude towards persons with a handicap, and this inevitably leads us to issues that are connected to more personal and even religious conceptions of the good life. These are examples of the ways in which, in ethics, we must go beyond the liberal model.

For health law, the situation is different, and here we should largely stick to the liberal model. Legislating virtues, let alone legislating the full richness of the good life, is not possible and not desirable. Therefore health law can only partly follow bioethics in its reorientation towards practice and towards ideals of good health care. But it should, at least, not hinder this ethical reorientation and therefore it should show more self-restraint. Legal rules are sometimes too rigid and general to do justice to the intricate details of health-care practice. As the rise of 'legally defensive medicine' – for example, ordering additional tests primarily in order to minimize the risk of being sued – illustrates, legal rules can adversely influence health care. After a period of rapid expansion of health law, it may therefore now be time for a more modest attitude of legal self-restraint and for the reduction of legal interventions.

As a result, law and ethics will diverge. Precisely because the close cooperation between law and ethics has been so fruitful in the past, it is now time to loosen the bonds in the interests of law and of morality, but especially in the interest of good health-care practice.

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