

Confidentiality and the law

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Author's abstract

Codes of medical ethics issued by professional organizations typically contain statements affirming the importance of confidentiality between patients and health-care practitioners. Seldom, however, is the confidentiality obligation depicted as absolute. Instead, exceptions are noted, the most common of which is that health-care professionals are justified in breaching the confidence of a patient if required by law to do so. Reasons that might be given to support this exception are critically discussed in this paper. The conclusion argued for is that this is not a legitimate exception to the confidentiality rule.

On June 26, 1990, the American Medical Association (AMA) House of Delegates adopted a report of the Council on Ethical and Judicial Affairs concerning the *Fundamental Elements of the Patient-Physician Relationship*.

Item four of the 'Fundamental Elements' deals with confidentiality and says: 'The patient has the right to confidentiality. The physician should not reveal confidential communications or information without the consent of the patient, unless provided for by law or by the need to protect the welfare of the individual or the public interest' (1). According to this statement, then, one of the three types of cases in which physicians are justified in breaching patient confidentiality is when they are required by law to do so.

Such a claim echoes earlier pronouncements by the AMA. For example, in the *AMA Principles of Medical Ethics* (1957, 1971) it is stated: 'A physician may not reveal confidences entrusted to him in the course of medical attendance ... unless he is required to do so by law or unless it becomes necessary in order to protect the welfare of the individual or of the society' (2). In the 1980 revision of these principles, the confidentiality statement was altered. But it still said that physicians 'shall safeguard patient confidences within the constraints of the law' (3).

Key words

Confidentiality; codes of ethics; law.

The AMA is not alone in allowing this as an exception to the confidentiality rule. The British Medical Association's principles (1959, 1971), for example, say: 'It is a practitioner's obligation to observe the rule of professional secrecy by refraining from disclosing voluntarily without the consent of the patient (save with statutory sanction) to any third party information which he has learnt in his professional relationship with the patient' (4).

And in 1992, the General Medical Council of Great Britain issued its *Professional Conduct and Discipline: Fitness to Practise*. Sections 76-91 deal with confidentiality, and item 85 says: 'Information may be disclosed in order to satisfy a specific statutory requirement...'

Pertinent examples here include a legal requirement to report gunshot wounds, infectious diseases, and *prima facie* evidence of child abuse. Though these statutes may be reasonable and though such a consensus regarding this exception is impressive, I shall argue that health care practitioners are not justified in breaching patient confidence *simply because* they are required by law to do so.

My argument begins with a rather mundane observation. Laws are made by legislators, and they can and sometimes do enact legislation that is morally unjustified. Consider an extreme *hypothetical* example. Suppose that a law were passed requiring physicians to report to a federal agency any patient testing positive for the human immunodeficiency virus (HIV). The purpose of the legislation is to develop a registry of persons with HIV and to make it available to insurance companies and prospective employers. I hope that anyone reading this will agree that putting this information to such use is morally unacceptable. And if the law is unjustified, it seems that physicians should refuse to comply with it. In the face of this point, why might anyone think that physicians are warranted in breaching patient confidence simply because they are required by law to do so? At least two reasons can be cited.

Some point to the serious effects on society of disobeying the law as a reason in support of the AMA's exception to the confidentiality rule. Robert M Veatch articulates this reasoning eloquently. He writes:

'The physician, after all, is a citizen of the land and subject to the laws of the land. To decide to break the law, even when it appears justified by a professional code of ethics with a principle as well established as that of confidentiality, is no trivial decision; it is civil disobedience.

'... But to reject legal authority routinely and without due thought is anarchistic. No society could survive the indiscriminate personal acceptance or rejection of law. If the physician is to avoid considering himself different from other citizens, he must treat civil disobedience with appropriate seriousness' (5).

The argument, then, is that to break the law is to engage in an act of civil disobedience. But no society can survive if its citizens disobey the law indiscriminately.

An argument based on exaggeration

This is a familiar contention and is often advanced in contexts much broader than the one of concern here. The argument is unconvincing, however; it is based on an exaggeration. Isolated acts of civil disobedience by physicians will not constitute rejecting legal authority 'routinely' and will not destroy society's fabric; if societies were that delicate, most would long ago have ceased to exist. After all, illegal acts occur frequently. Moreover, those who deny that physicians are warranted in breaching confidence merely because the law requires that they do so are hardly advocating *indiscriminate* disobedience. The occasions for questioning the law will presumably be rare.

There is an additional problem with the argument. Even if it were not based on an exaggeration, it would not show that physicians are justified in breaching confidence when the law requires them to do so. Instead, it would only show that society is justified, on the basis of self-defence, in punishing physicians who refuse to breach confidence when demanded by law (6). But this should not shock us, since there is no guarantee that the demands of the law and those of morality will always be in harmony. This leads naturally to the next point.

The second reason in support of this exception to the confidentiality rule begins with the observation that anyone who openly disobeys the law will be punished, either by fine or incarceration. Thus, to disobey the law is to incur a great sacrifice. But no one is required to make a great sacrifice. Such acts are called by philosophers 'supererogatory' – or in more ordinary English, above and beyond the call of duty. Since agents are permitted to refrain from performing supererogatory acts, physicians are justified in breaching confidence when required by law; to deny this is to confuse acts that are required with those that are beyond the call of duty.

This argument in defence of the exception is also flawed, however. It is based on the false assumption that morality never requires one to make great sacrifices. But counter-examples abound. Journalists plausibly regard themselves as required to endure incarceration rather than to reveal confidential sources. And parents are often obliged to undergo severe hardships for the welfare of their children. It is simply incorrect to assume that all self-sacrificial acts are supererogatory; some are morally required. And it is reasonable to expect that members of a helping profession, such as medicine, will be among those who are sometimes obligated to make such sacrifices.

There may, of course, be other reasons to support the exception under discussion here. But even if there are no such reasons, it does not follow that physicians ought to disregard the law when it demands that they breach confidence. Instead, the conclusion to draw is that they should examine each law on its own merits. If the law is morally sound, they are justified in breaching confidence; if it is not morally sound, they must consider disobedience (7). Indeed, one might reasonably think that all citizens have a comparable responsibility.

Those who endorse breaching confidence because it is required by law are probably impressed with the particular statutes with which they are acquainted, such as requirements to report gunshot wounds, infectious diseases, and evidence of child abuse. But if we ask what justifies each of these laws, a similar answer comes forth, one that appeals to a different clause in item four of the 'Fundamental Elements': each is arguably necessary to protect the public interest. A gunshot wound suggests likelihood of foul play and is evidence that the welfare of others may be endangered; thus, investigation is warranted. Similarly, steps must be taken to arrest infectious diseases in order to minimize harm and prevent epidemics. And when there is evidence of child abuse, there is reason to believe that the well-being of vulnerable minors is threatened and an immediate investigation is called for. These considerations are utilitarian and they are impressive, especially in the case of reporting infectious diseases.

An historical case

Protecting the public interest is obviously a legitimate function of the law, and what I am suggesting here is that our reason for approving of certain statutes requiring breach of confidence is that they promote this end, and not merely that they are duly enacted. To lend some credence to this hypothesis, consider these points. First, the hypothetical statute mentioned earlier requiring physicians to report all patients who test HIV-positive so that this information can be disseminated to businesses is one of which most will likely disapprove, and surely it would do little to protect the public welfare.

Second, consider an historical case. In 1966 Richard Speck brutally murdered eight student nurses in Chicago, Illinois. Unbeknownst to Speck, one resident of the nurses' townhouse hid under a bed, thus saving her life. She provided the police with a description of the murderer, including the presence of a distinctive tattoo on his arm. Two days after the murders, Speck attempted suicide. He was taken to Cook County Hospital. A physician who treated him noticed the tattoo and called the police. Speck was arrested and later convicted of the murders. The physician revealed information about a patient that he had acquired in his role as a physician and he was not legally required to do so. Yet not only was this physician not criticized, he was widely praised. His action protected the welfare of the public.

Third, when people debate the wisdom of legislation requiring breaches of confidence, often the debate is about whether the public interest is best served by such laws. Consider again the requirement to report evidence of child abuse. Some who oppose this argue that it will deter abusive parents from bringing their children for needed medical treatment (8). If the deterrence is great enough, innocent children will actually suffer more if we require that such evidence be reported than if there is no such requirement. Thus, the critics argue, the legislation is self-defeating. The point here, of course, is not to resolve this particular debate about reporting suspected child abusers. Rather, it is to call attention to the value that the disputants agree is at stake: the public interest.

In response to the position that I have sketched here, some will object that it wrongly denies that each citizen has an obligation to obey duly enacted laws. But my argument need not deny this. The point instead is that physicians also have an obligation to keep information about their patients confidential. The obligations of confidentiality and obedience to the law can, in certain circumstances, conflict. Those who claim that physicians may breach patient confidentiality whenever required to do so by law are saying that the obligation to obey the law is *always* more important than, and takes precedence over, the obligation of confidentiality. But such a position is too simplistic. The strength of the general obligation to obey the law is context-dependent and cannot be divorced from a particular statute's content. The obligation to obey a morally justifiable law is stronger than the obligation to obey a law that is unjustifiable, and the former are more likely to prevail in cases of conflict than are the latter.

Some may also object that it is improper for physicians to attempt to judge what is or is not in the

public interest. But there is a response to this too. Surely when a statute directly affects the practice of medicine, health care practitioners are at least as competent to determine what is in the public interest as are legislators. A related objection is that physicians have been commissioned to care for the health of patients, not to safeguard the public interest (9). But this assumes either that physicians have no duty at all to protect the public interest, or that such a duty is always superseded by the duty owed to patients. Neither assumption is obviously true, however, and proponents of this objection owe us additional argumentation.

We can agree with Veatch (in the previously quoted passage) that physicians 'must treat civil disobedience with appropriate seriousness'. Unfortunately the first exception to the confidentiality rule endorsed in item four of the 'Fundamental Elements' goes much further than this. For a class of cases, it in effect counsels physicians to surrender to legislators their responsibility to make moral decisions. This is a mistake and this exception should be dropped.

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References

- (1) Report of the Council on Ethical and Judicial Affairs. Fundamental elements of the patient-physician relationship. *Journal of the American Medical Association* 1990; 264: 3133.
- (2) McConnell T. *Moral issues in health care*. Monterey, CA: Wadsworth Publishing, 1982: 269. The two arguments in support of this exception addressed below are discussed briefly in this book, 34–36.
- (3) Mappes T, Zembaty J. *Biomedical ethics* [3rd ed]. New York: McGraw-Hill, 1991: 54.
- (4) Veatch R. *Case studies in medical ethics*. Cambridge MA: Harvard University Press, 1977: 117.
- (5) See reference (4): 126–127.
- (6) See reference (4): Veatch may concur with this since he concludes that physicians must treat civil disobedience 'with appropriate seriousness'.
- (7) This assumes that the confidentiality obligation is not absolute. For an opposing view, see Kottow M H. Medical confidentiality: an intransigent and absolute obligation. *Journal of medical ethics* 1986; 12: 117–122.
- (8) Berlin F S, Malin H M, Dean S. Effects of statutes requiring psychiatrists to report suspected sexual abuse of children. *American journal of psychiatry* 1991; 148: 449–453.
- (9) See reference (7): 120.