

Ethics Dispatch

“The object of philosophy is the logical clarification of thoughts. Philosophy is not a theory but an activity.”

– Ludwig Wittgenstein

Hot Topic

Vaccination Status: Is It Okay to Ask?

The United States of America, as well as many other countries around the world, are currently in the process of “reopening.” Businesses are reopening. Public events are happening. People are associating with others. This has been the goal for many and has been done only with considerable effort. The reopening of the country is also made safely possible by effective Covid-19 vaccines and their widespread use. As more people are vaccinated, the likelihood of a successful and safe reopening is increased. This places a high importance on individuals being vaccinated, and with widespread vaccine hesitancy, particularly in the United States of America, it raises the question: Are businesses, employers and other people ethically and legally permitted to ask if someone is vaccinated?

What about HIPAA?

In the United States, one perceived major barrier to asking someone if they are vaccinated is HIPAA (Health Insurance Portability and Accountability Act of 1996). HIPAA is often misunderstood to mean that any information regarding a person’s health or history of medical care is protected and cannot be known without direct permission of the person. Even asking about another person’s health history is a violation of HIPAA. This is a misunderstanding of the intention and practical use of HIPAA, and not what HIPAA is, means or intends.

As specifically stated by the CDC, HIPAA is a federal law “that required the creation of national standards to protect sensitive patient health information from being disclosed without the patient’s consent or knowledge” ([CDC](#)). Based on a direct reading of the law, HIPAA only applies to insurance providers, healthcare providers, and healthcare business associates. HIPAA does not mean that all of a person’s health information is protected, although additional state and local laws may apply.

A Right to Ask and a Right to Refuse

The difficulty and confusion likely arises from society’s equivalence of HIPAA with privacy. It is common for people to think that the right to keep all health information, including vaccine status, private is protected by HIPAA. So, what information does HIPAA protect? What HIPAA certainly does not cover is individuals asking about a person’s health status. It is completely within a person’s right, and potentially a business’s right (although again, particular state and local laws may be in play depending on circumstances) to ask about a person’s health status, including vaccination status. It is then also within the person’s right to refuse to answer or disclose such information.

The main point is that HIPAA does not protect some from being asked, but rather protects that person’s information from being shared. A thought experiment example being, say your friend heard you were not feeling well, and asked you if you were recovering from surgery. It is not a violation of HIPAA for your friend you ask you if you recently had surgery. However, if your friend called your physician and asked if you had surgery, it would be illegal for your physician to share that information without your consent.

Information and Safety

This idea of combining health information protection and personal privacy has implications in other clinical aspects. An important example is prenatal drug screening. The impacts of prenatal use of alcohol, drugs and tobacco are well documented as “serious and life-threatening complications such as maternal cardiac dysrhythmias, placental abruption, and uterine rupture can occur with cocaine and other stimulant abuse, whereas withdrawal from alcohol or sedatives can lead to maternal hypertension and seizures. The potential outcomes for offspring are also a concern and range from intrauterine growth restriction and preterm birth to spontaneous abortion and fetal death” ([Yonkers et al., 2011](#)). This is why the American College of Obstetricians and Gynecologists recommends screening pregnant women for alcohol and illicit substances. ([ACOG Committee Opinion](#)).

The difficulty comes from accessing this information as “Recent evidence supports that the use of questionnaires as the only measure to investigate prenatal alcohol and drugs of abuse exposure underestimate the real prevalence. From the 15 studies comparing questionnaires versus biomarkers (8 in alcohol and 7 in other drugs of abuse) when questionnaires were compared with biomarkers, 13 of them showed an underestimated exposure by the questionnaire” ([Chiandetti et al., 2017](#)). This is why many studies recommend using biomarkers in addition to questionnaires due to the impact on the infant’s health.

Is prenatal drug screening a violation of a patient’s privacy? And would restricting access and care due to biomarkers or questionnaire responses be ethically permissible? It is often important and necessary for health providers and others to have information in order to best treat all patients in a safe way. The value of the information is of too high importance to depend only on questionnaires. This argument can be applied, although not fully, to vaccination status.

Bioethics in the News

[Can teens get vaccinated if their parents object?](#)

[Moral distress, physician wellness and bioethics training: What the COVID-19 pandemic tells us about the future](#)

[Expert says Nova Scotia needs a plan now on expiring AstraZeneca doses](#)

[Vaccine mandates and Catholic colleges](#)

[Vaccine passes: protecting human rights and personal data](#)

[Ethicists prioritize poorer nations for COVID-19 vaccine](#)

Case Study

The patient is a 33 year old female, who is 38.5 weeks pregnant and came to the hospital in labor. When she presented to the hospital, she was given the standard admission paperwork, and signed without any questions or issues (although was in considerable distress due to active labor and did not have anyone else at the hospital with her). The patient is relatively well known to the hospital, having presented several times due in fact to her history of drug and substance abuse. Now, due to standard procedure, visual assessment, and the patient’s history, the medical team requested the patient give a urine sample for a drug screen. The patient is actively refusing to participate, stating the hospital has no right to know one way or another. The patient cites HIPAA as a reason. It was then explained that another drug screen will be performed on the infant after birth, the patient is now choosing to leave against medical advice (AMA). Due to the clinical and emotional distress the patient is in and risk to the infant if her drug screen was positive, the medical team are not sure if it is ethically permissible to allow her to leave. The medical team request an ethics consult.

Ethical Musings

Morality, Ethics and the Law: What's the Difference?

Ethical issues arise in some of the most difficult and challenging situations in medicine and healthcare. And it is easy to understand why. Ethics consults are typically not requested if the path forward is known. People are much more likely to seek ethical guidance when there are unknowns, which also usually means that other departments are involved in the case, including palliative medicine, risk management and legal. This raises the question: What is the relationship between medical ethics and the hospital legal department? What is the difference between ethics and law?

There are many different approaches to understanding this distinction between ethics and the law. Fundamentally, it is similar to the distinction between ethics and morals. While morals are what you personally believe is right (what you want to do), ethics is a structured rationalization to determine what you should do (what you ought to do). Compare that to the law, which is an understanding of what you are to do under the laws (what you are permitted to do). So if law is not directly tied to morality, where does the law come from? And can there be an immoral law?

Legal Positivism

One view that seeks to answer these questions is known as legal positivism, which asserts that laws and morality are two completely separate things. One of the most renowned legal positivists was the Oxford legal philosopher H. L. A. Hart (1907-1992), who argued that laws are completely manmade concepts, with no grounding in morality. He also proposed that a legal system is a complete/closed logical system, which means that there is an answer to any question. By comparison, ethical and moral statements do not have an objective right or wrong. This distinction makes law entirely unique relative to ethics and other systems of logic. This is to say, unlike ethics, there are no metaethical analyses in law, but only a proper understanding of the application of the laws that are written (Positivism and the Separation of Law and Morals).

An example of this distinction can be made via the question: *Is it right to needlessly kill another person?* Ethics has always debated these types of questions, either with metaethics seeking to understand whether there is an objective right or wrong answer, meaning it is objectively wrong to kill someone or whether we create the meaning through society. With a law question, there is an answer to the question: It is wrong/illegal to meaninglessly kill someone. A typical follow-up to this is: Why is it illegal to kill someone? But Hart is not concerned with this question, arguing that laws are completely developed by man, not nature, stating:

"It is possible to endorse the separation between law and morals and to value analytical inquiries into the meaning of legal concepts and yet think it wrong to conceive of law as essentially a command. One source of great confusion in the criticism of the separation of law and morals was the belief that the falsity of any one of these three doctrines in the utilitarian tradition showed the other two to be false; what was worse was the failure to see that there were three quite separate doctrines in this tradition. The indiscriminate use of the label "positivism" to designate ambiguously each one of these three separate doctrines (together with some others which the Utilitarians never professed) has perhaps confused the issue more than any other single factor."
(Positivism and the Separation of Law and Morals, 601).

Meaning there does not have to be a natural, ethical or moral reason for the creation of a law. The fact that a law exists is enough.

No Unjust Law

This follows up on the work of another legal philosopher, John Austin (1790 – 1859), who worked on establishing the distinction between law and morality. Austin viewed the law as a true and real thing, meaning the answers to legal questions had true and complete answers. And most importantly, if a law exists then that law needs to be understood and followed, stating:

*“The existence of law is one thing; its merit or demerit is another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry. A law, which actually exists, is a law, though we happen to dislike it, or though it vary from the text, by which we regulate our approbation and disapprobation. This truth, when formally announced as an abstract proposition, is so simple and glaring that it seems idle to insist upon it. But simple and glaring as it is, when enunciated in abstract expressions the enumeration of the instances in which it has been forgotten would fill a volume.” (Austin, *The Province of Jurisprudence Determined*, 184-85).*

According to Austin, there is no such thing as an immoral law or an unethical law. There is only the law. While we may disagree with a law, we still are obligated to follow the law. Because laws exist on their own and are not founded on objectively established morality, there is no such thing as an unjust law. And therefore, all laws, which build together the complete system, need to be followed.

Both/And: Apply Ethics and Law Properly Together

The idea that there is no unjust law goes against many people’s ideas of what ethics and laws are and what they are for. Some believe that laws are a society’s attempt to enforce morality, and if a law is found to be immoral, then that law needs to be eliminated. There is no obligation for laws to reflect morality and ethics because they exist as their own system, not the enforcement of a deeper moral system. A law can exist without any ethical or moral justification. This is often interpreted as following the “letter of the law” versus “intent of the law.” Nevertheless, for Austin and Hart, there is only the letter of the law.

These continued debates and discussion highlight the fundamental fact that law and ethics are different, have different goals and different foundations. At the same time, while they are distinct from one another, they are both important to understand and apply properly together.